A Proposed Framework for Kansas District Courts' Discretion on a Motion to Reconsider a Suppression Ruling

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> "A motion to [the court's] discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles."
>
> —Chief Justice John Marshall[1]

I. INTRODUCTION

On October 6, 2008, Phillip Martin was found shot to death in his kitchen.[2] The police suspected a drug-related robbery and focused their investigation on seventeen-year-old Kelvin H. Gibson, Jr.[3] The police located Gibson and escorted him to the police station, where he was interviewed.[4] Gibson confessed to killing Martin, claiming that others had threatened him with death if he did not shoot.[5] The police stopped the interview at that point and administered the *Miranda* warnings to Gibson, which he acknowledged and waived in writing.[6] The interview resumed and continued for several hours.[7] Gibson gave a second interview two days later, again after being read his *Miranda* rights and

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1. United States v. Burr, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692D).
2. State v. Gibson, 322 P.3d 389, 392 (Kan. 2014).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 392–93.
7. *Id.* at 393.

signing a waiver.[8]

The district court held a pre-trial hearing to determine whether Gibson's interviews had been given voluntarily.[9] Gibson's attorney cross-examined the interviewing detective but did not put on any direct evidence.[10] Gibson himself did not testify.[11] The prosecution then asked for a ruling that Gibson's interviews had been voluntarily given.[12] Gibson's attorney admitted voluntariness, appending weak caveats: "[F]rom the testimony, he gave it voluntarily. I would note that he was 17 . . . and . . . that he was very afraid."[13] The district court ruled in favor of the prosecution and allowed both interviews to be admitted.[14]

Several months later but still before trial, Gibson's attorney moved for the court to reconsider its ruling.[15] The motion alleged that Gibson had been unable to understand his *Miranda* rights during the initial interview because of marijuana intoxication.[16] The district court did not respond.[17] Several more months later, Gibson filed a pro se motion to reconsider.[18] His motion alleged coercion because of his age at the time, because he was greatly intimidated, and because he was intoxicated.[19] The district court allowed argument on the motion the morning of trial.[20] Gibson's attorney presented no new evidence, and the court denied Gibson's pro se motion "for the same reasons mentioned at the first prior hearing."[21] In a final effort, Gibson's attorney asked the court to put Gibson under oath and allow testimony on the record.[22] The court refused, stating that Gibson already had "every opportunity to raise anything" bearing on the voluntariness of his statements.[23]

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8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 393–394 (alteration in original).
14. *Id.* at 394.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* Gibson's pro se motion was titled "First Amended Motion to Suppress Statement." *Id.* In this Comment, any motion requesting that the district court overturn its final suppression ruling is a motion to reconsider. *See* Ten Eyck v. Harp, 419 P.2d 922, 925 (Kan. 1966) (holding that the nature of a pleading is found in the relief sought, not the form or name given to the paper).
19. *Gibson*, 322 P.3d at 394.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*

The court's suppression ruling remained undisturbed. The statements were admitted for use at trial. Gibson was found guilty of first-degree murder and aggravated robbery and was sentenced to life imprisonment.[24]

The Kansas Supreme Court affirmed Gibson's convictions in April 2014.[25] In doing so, the court asked "whether the district court properly refused to reconsider its prior determination that the statements were voluntary."[26] To answer this question, the court stated affirmatively for the first time that the district court's refusal to reconsider its judgment on a suppression hearing would be reviewed for an abuse of discretion.[27] The court then described the three categories within which an abuse of discretion, generally, can occur:

> An abuse of discretion occurs when judicial action was (1) arbitrary, fanciful, or unreasonable, *i.e.*, if no reasonable person would have taken the view adopted by the trial court; (2) based on an error of law, *i.e.*, if the discretion was guided by an erroneous legal conclusion; or (3) based on an error of fact, *i.e.*, if substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion was based.[28]

After examining Gibson's motion and the evidence available to the district court, the court held that "a reasonable person could agree with the district court's decision" to refuse Gibson's proffer of testimony.[29] Therefore, the trial court had not abused its discretion.

Gibson settled a previously unsettled question in Kansas: what standard of review does the reviewing court use when examining a district court's grant or denial of a motion for reconsideration of judgment on the suppression of evidence? The reviewing court will use an abuse-of-discretion standard. But how should the *district court* act when presented with a motion to reconsider its previous ruling on evidence suppression?

The *Gibson* court admonished district courts to refrain from making

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24. *Id.*

25. *Id.* at 392.

26. *Id.* at 398.

27. *Id.* The Kansas Supreme Court had previously held that reconsideration of a suppression ruling was within the trial court's discretion. State v. Holmes, 102 P.3d 406, 420 (Kan. 2004).

28. *Gibson*, 322 P.3d at 398 (citing State v. McCullough, 270 P.3d 1142, 1154 (Kan. 2012)).

29. *Id.* at 400. The Kansas Supreme Court appears to have implicitly dismissed the error-of-law and error-of-fact prongs of the abuse-of-discretion standard and gone straight to arbitrary or unreasonable.

decisions based on legal or factual errors and to decide reasonably. But are there interests to be balanced? What factors should the district court examine? Should some motions be granted or denied outright without a hearing? In other words, when does a district court make a reasonable decision (or at least avoid making an unreasonable ruling)? This Comment presents answers to help district courts exercise discretion without abusing their discretion. Prescribing standards more specific than those stated in *Gibson* may save judicial resources by streamlining procedures and reducing the chance of a reversal. Furthermore, consistency across districts enhances at least the appearance, and probably the actuality, of the impartial application of justice.

To be clear on procedure and terminology, this Comment encompasses all motions requesting a district court to reverse its own pre-trial suppression ruling. Although such a motion can arise at trial, the contemporaneous objection is not discussed because its role is largely to preserve an issue for later appeal.[30] A district court should always consider a motion, at least to the extent of accepting and reading the filing. The discretionary choices available are to summarily dismiss the motion, to grant the motion without a hearing but allowing for opposing briefs, or to reopen the suppression hearing for additional argument and evidence. The process of selecting from these choices is called *reconsideration* in this Comment. Thus, a "motion to reconsider" includes motions that request reconsideration, supplementation, or reopening.

Part II of this Comment discusses judicial discretion and appellate review, the purposes and processes of evidence suppression, and relevant Kansas statutory authority. In Part III, a framework for district-court analysis is assembled by defining the interests and stakeholders involved, by searching for circumstances that may prevent a district court from having discretion at all, and by suggesting specific factors for consideration when the court does exercise its discretion. Finally, Part IV recommends a four-step procedure that district courts can use to determine whether to grant a motion to reconsider based on the facts and circumstances presented: (1) does the motion argue a new legal theory? If so, deny. This argument has been waived. Otherwise, (2) does the motion correctly reveal an error of fact or an error of law? If so, grant. A court should correct its own error when possible. Otherwise, (3) does

30. FED. R. EVID. 103; KAN. STAT. ANN. § 60-404 (2005); *see generally*, DENNIS D. PRATER ET AL., EVIDENCE: THE OBJECTION METHOD ch. 2 (4th ed. 2011).

the motion proffer sufficient relevant and material additional evidence? If not, deny. The motion is repetitive or irrelevant. Otherwise, (4) consider the new evidence in light of a balance of several interests, taking into account a nonexclusive list of specific factors. This stepwise procedure ensures a district court uses appropriate process in arriving at its substantive discretionary decision.

II. BACKGROUND

A. Judicial Discretion

The basic concept underlying discretion is choice: a decision maker selecting an outcome.[31] In judicial discretion, the decision maker is a judge. The goal of this Comment is to aid a district court judge's choice by recommending standards and procedures. To do so, the *what* of judicial discretion will be examined in some detail. But first, the *why* of judicial discretion merits a brief discussion. Professor Maurice Rosenberg's foundational articles on judicial discretion illuminate both concepts.

1. The *Why* of Judicial Discretion

Professor Rosenberg describes two types of discretion. The first he calls "decision-liberating."[32] Decision-liberating discretion allows a court free rein to choose a legal outcome.[33] "Precise norms are not laid down, decision is intended to pivot on the circumstances of the particular case, and each court along the route is free to reach an independent conclusion as to the result called for by its own sound exercise of discretion."[34] The second category of discretion is "review-limiting."[35] This category of discretion becomes apparent only when viewing the hierarchical relationship between courts.[36] Review-limiting discretion grants the district court "a limited right to be wrong . . . without being reversed."[37] The majority of this Comment takes the point of view of the

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31. Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 636 (1971) [hereinafter *Judicial Discretion*].

32. *Id.* at 638.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 649 (quoting Bringhurst v. Harkins, 122 A. 783, 787 (Del. 1923)).

district court and is therefore concerned with decision-liberating discretion. It does, however, bear considering why our judicial system allows the "wrong" judgment of a lower court to be undisturbed.

The most compelling reason for a reviewing court to leave the district court's choice undisturbed is "the superiority of [the court's] nether position."[38] The district court judge has the benefit of watching the demeanor of litigants and witnesses, seeing and hearing proffered evidence and testimony, and observing confusion or hesitation of jurors. Just as the rules of evidence favor testimony from witnesses with personal knowledge of events,[39] the reviewing court may rightly prefer conclusions drawn from the district court's full-sense experience to its own conclusions drawn from a paper record. Deference, then, is proper for any ruling "based on facts or circumstances that are critical to decision and that the record imperfectly conveys."[40]

A secondary reason for leaving a district court's decision undisturbed is precisely decision-liberating discretion: the issue is not appropriate for a judicially created rule because it resists generalization.[41] This could be because the matter is highly variable—the allowable scope of cross-examination, for instance—or because the matter arises in a new and untested context.[42] In either case, the reviewing court may not want to pass down a rule of law that will poorly fit the next occurrence of the same issue.

Professor Rosenberg contrasts these "good" reasons for allowing discretion with three "lesser" reasons: the practical necessities of judicial economy and finality and the maintenance of a trial-judge's morale.[43] These reasons are lesser because they apply equally to all district court decisions that can be reviewed; they do not discriminate.[44] The good reasons, on the other hand, distinguish those rulings that deserve deferential review.[45] A district court should be granted discretion to rule on matters that are best perceived in person or matters that are not presently amenable to broad rules of law. In those cases, the reviewing court will not reverse a ruling without a showing of unreasonableness, an

38. *Id.* at 663.
39. FED. R. EVID. 701; KAN. STAT. ANN. § 60-419 (2005).
40. *Judicial Discretion*, *supra* note 31, at 664.
41. *Id.* at 662.
42. *Id.*
43. *Id.* at 660–62.
44. *Id.* at 662.
45. *Id.* at 663, 665.

error of law, or an error of fact.

The Kansas Supreme Court deployed this analysis in *State v. Reid* when refining its test for the admissibility of prior crimes and civil wrongs under Kansas Statutes Annotated (K.S.A.) section 60-455.[46] Section 60-455 bars evidence that would show only a criminal disposition;[47] the statute, however, allows evidence that would "prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident."[48] The statute also grants the defendant a chance to object to the evidence before trial.[49] If the defendant does object, the district court must use a multi-step test to determine admissibility, the first two steps of which are to determine that the evidence is material and probative of that material fact.[50]

These two closely linked determinations are reviewed under different standards because of the nature of the issues. To find materiality, the district court has only to determine whether the fact to be proved was significant to the statutory elements of the underlying charge.[51] A piece of evidence is immaterial only when it cannot legally affect the outcome.[52] A reviewing court can determine this from the appellate record and the statutory charge, and so "materiality is largely a question of law."[53] The issue of probativeness, that is, whether the evidence offered has a tendency to prove or disprove the material fact, is not so straightforward. "[Probativeness] is more a matter of logic and experience than of law."[54] The *Reid* court therefore determined that materiality would be reviewed de novo and probativeness would be reviewed for abuse of discretion.[55]

Examined within Professor Rosenberg's "good reasons" framework, it is hardly surprising the *Gibson* court held that a district court's ruling on a motion to reconsider would be reviewed for an abuse of discretion.

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46. *See* State v. Reid, 186 P.3d 713, 718 (Kan. 2008); KAN. STAT. ANN. § 60-455 (Supp. 2014); *see also* State v. Gunby, 144 P.3d 647 (Kan. 2006).

47. KAN. STAT. ANN. § 60-455(a).

48. *Id.* § 60-455(b).

49. *Id.* § 60-455(e).

50. *Reid*, 186 P.3d at 721 (describing the *Gunby* test for admissibility of K.S.A. section 60-455 evidence); *see* KAN. STAT. ANN. § 60-455(b).

51. *Reid*, 186 P.3d at 723.

52. *See id.* at 723 (citing Arlio v. Lively, 474 F.3d 46, 52 (2d Cir. 2007)).

53. *Id.* at 722.

54. *Id.* at 724 (quoting State v. Faulkner, 551 P.2d 1247, 1251 (Kan. 1976)).

55. *Id.* at 722, 724.

The district court, having already ruled on suppression, is familiar with the evidence and the parties. The determination is particular to the facts and circumstances of each case. From the perspective of a higher court, it would not make sense to substitute its judgment for that of the district court. This is the essence of review-limiting discretion. The district court's perspective is discussed next.

2. The *What* of Judicial Discretion

After *Gibson*, district courts in Kansas have broad decision-liberating discretion. No rules yet determine whether a district court has abused its discretion except general admonitions that the district court (1) cannot decide in an arbitrary, fanciful, or unreasonable manner; (2) cannot decide based on an error of law; and (3) cannot decide based on an error of fact.[56] The latter two abuses of discretion, errors of law and fact, define themselves. A court's ruling must be reversed because the court simply misunderstood the factual foundation or legal landscape.[57] The "arbitrary, fanciful, or unreasonable" abuse of discretion—equivalent to the "no reasonable person would agree" articulation—deserves further discussion. As it turns out, the idea of an "unreasonable" abuse of discretion is bound to the idea of decision-liberating discretion.

Because decision-liberating discretion allows a district court to freely select from available outcomes, it is in tension with a basic tenet of our judicial system: "It is the essence of all law that when the facts are the same, the result is the same."[58] Legal rules and precedent conflict with decision-liberating discretion.[59] A prior ruling stating the proposition "if X, then Y" necessarily limits a decision maker's future choice. Free choice gives way to consistency and predictability.

Thus decision-liberating discretion is not boundless or, at least, does not remain boundless for long. When an appellate court first reviews a legal question, it is apt to be deferential to the district court's decision.[60] But over time as the same legal question arises in different contexts, the appellate court may narrow the scope of discretion negatively by finding

56. *See* State v. Gibson, 322 P.3d 389, 398 (Kan. 2014) (citing State v. McCullough, 270 P.3d 1142, 1154 (Kan. 2012)).

57. *See infra* Parts III.B.1 & 2 for more on errors of fact and law.

58. *Judicial Discretion*, *supra* note 31, at 643 (quoting Hubbard v. Hubbard, 58 A. 969, 970 (Vt. 1904)).

59. *Id.* at 639.

60. Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 50 (2000).

instances when district courts have abused their discretion.[61] Factors to consider and interests to balance gradually emerge that limit a district court's choice. Judicial discretion, as to specific factual situations, may eventually be replaced altogether by a rule of law.[62]

Professor Rosenberg analogizes the gradual limitation of decision-liberating choice to a pastoral context:

> The area of discretion is a pasture in which the trial judge is free to graze. The appellate courts will not disturb the trial court's rulings—depending on the gradation of discretion that applies to the particular instance—but will defer to them. Every now and again, however, a case . . . comes along, and even though it involves an area normally entrusted to trial court discretion, the appellate court calls a halt and cuts away a corner of the pasture. From that point on, it has become a rule of law . . . . The result is that a corner of the pasture has been fenced off and placed outside the trial judge's discretion. In other areas of the pasture, the trial judge remains free to exercise discretion.[63]

Within the remaining pasture, the district court retains free choice and the limited right to be wrong; when the district court strays from the pasture, however, it has acted in an "arbitrary, fanciful, or unreasonable" manner and will be reversed on appeal.

A fenced off portion of the pasture may be defined by "particular required factors" that a district court must consider when making its decision.[64] The particular required factors may be set by statute[65] or by judicial decision.[66] In *State v. Murdock*, for example, the Kansas Supreme Court recognized a need to fence off part of the discretionary pasture regarding a ruling on motion to reopen a party's case after the party has rested:

> Yet while examination of our previously decided cases confirms that we review a court's decision on a motion to reopen for an abuse of discretion, our past decisions have not sufficiently identified those factors which should guide the district court in its determination of

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61. *Id.*

62. *Id.*

63. Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 180 (1978).

64. Kan. Dep't of Revenue v. Powell, 232 P.3d 856, 860 (Kan. 2010).

65. *E.g.*, State v. Edgar, 127 P.3d 986, 992–93 (Kan. 2006) (holding that a trial court considering a plea withdrawal must evaluate the standards articulated in the relevant statute).

66. *E.g.*, State v. Murdock, 187 P.3d 1267, 1275–76 (Kan. 2008).

> whether to permit either party to reopen its case.[67]

The court did so by prescribing the required factors that go into a reasonable discretionary decision: "In exercising its discretion, the court must consider the timeliness of the motion, the character of the testimony, and the effect of the granting of the motion. The party moving to reopen should provide a reasonable explanation for failure to present the evidence in its case-in-chief."[68]

Required factors are not elements to be checked off; nor are they to be matched one against another, with opposing factors cancelling each other out. Instead, the district court should weigh each factor individually and make a reasoned decision in light of the facts and circumstances presented by the case.[69] The district court need not consider each factor explicitly, but the court's record must be sufficiently developed by evidence and testimony for an appellate court to make an independent judgment.[70]

One might question the goal of this Comment: if the process of narrowing decision-liberating choice occurs naturally over time, why not let the process occur? First, although *Gibson* is a recent decision, the question of whether to reconsider is recurrent and longstanding. Suppression hearings are common pre-trial hearings. The Kansas Supreme Court has examined the issue of reconsideration in cases going back at least to 1973.[71] Second, courts in other jurisdictions have analyzed the issue extensively.[72] The reasoning and holdings from other courts can be looked to as a sound foundation to build upon. Third, a consistent jurisdiction-wide set of factors will increase judicial efficiency because fewer decisions will be reversed. And finally, a standard, repeatable procedure may make the substantive outcome on a motion to reconsider more palatable to defendants and the public. Whether a piece of evidence is suppressed, after all, may determine whether the defendant is convicted or acquitted.

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67. *Murdock*, 187 P.3d at 1275.

68. *Id.* (quoting United States v. Blankenship, 775 F.2d 735, 741 (6th Cir. 1985)).

69. *See id.* at 1277.

70. *Id.* (identifying each of the Kansas Supreme Court's newly announced required factors in the district court record).

71. State v. Jackson, 515 P.2d 1108 (Kan. 1973).

72. *See infra* Part III.

B. Suppression of Evidence and Statements

Evidence—in this Comment, meaning both physical evidence and a defendant's statements—gathered in violation of the defendant's rights may be suppressed, that is, ruled inadmissible for trial. Typically alleged violations are illegal searches and seizures[73] and involuntary confessions or admissions.[74] Common to all the types of alleged violations is the actual court procedure of suppression.[75] A pre-trial hearing is held at which the prosecution and defendant may produce evidence, put on witnesses, and cross-examine opposing witnesses.[76] The district court then rules on whether the evidence will be admissible. This is a critical part of a criminal trial. The evidence in question may be the only direct proof of a crime.[77]

A district court suppresses evidence for very different reasons than those by which evidence is generally determined inadmissible at trial. For instance, a district court may deem character or propensity evidence inadmissible because it is immaterial or only marginally relevant to the crime charged.[78] The rules on admissibility of hearsay evidence largely address concerns of the reliability of such evidence.[79] And all evidence may be ruled inadmissible, in the discretion of the district court, when its probative value is outweighed substantially by a risk of unfair prejudice to the opposing party.[80] In contrast, evidence gathered in violation of a defendant's rights is likely to be highly relevant, reliable, and probative of guilt: "It is true that . . . the effect of the rule is to deprive the courts of extremely relevant, often direct evidence of the guilt of the defendant."[81]

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73. *See* U.S. CONST. amend. IV ("The right of the people to be secure . . . against unreasonable searches and seizures shall not be violated . . . .").

74. Miranda v. Arizona, 384 U.S. 436 (1966); *see* U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

75. WILLIAM E. RINGEL, SEARCHES & SEIZURES, ARRESTS & CONFESSIONS § 30:1 (2d ed. 1980).

76. WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.2(d) (5th ed. 2012); RINGEL, *supra* note 75, § 20:15.

77. *See, e.g.*, State v. Riedel, 752 P.2d 115, 117 (Kan. 1988) ("[T]he State candidly conceded its case against defendant, without evidence of the prior conviction, was too weak to justify going to trial.").

78. *See* FED. R. EVID. 405; KAN. STAT. ANN. § 60-455 (Supp. 2014); *see also supra* notes 46–55 and accompanying text; *see generally* PRATER, *supra* note 30, at ch. 6.

79. *See generally* PRATER, *supra* note 30, chs. 10–13; KAN. STAT. ANN. §§ 60-459–460 (2005 & Supp. 2014).

80. FED. R. EVID. 403; KAN. STAT. ANN. § 60-445 (2005).

81. Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1392

The suppression of evidence is the result of a balance between societal costs and benefits—a balance the district court is charged with assessing. The cost of suppressing relevant, reliable, and probative evidence is clear: "[S]ome guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains."[82] The benefit is more difficult to articulate, partly because the United States Supreme Court has not always been clear on what exactly society gets out of suppression.[83] In modern decisions, however the Court has been clear that deterrence of future police misconduct is the primary—possibly the only—benefit society derives from the suppression of evidence.[84] The idea is that excluding relevant, probative evidence in one case will set an example, discouraging police from gathering evidence outside of constitutional bounds in later investigations.[85] Courts therefore must weigh the benefit of probable, expected deterrence against the cost to public safety in different factual scenarios.[86] As might be inferred from the adjectives modifying *deterrence*, the U.S. Supreme Court has often held that the societal cost outweighed the benefit.[87] Thus, suppression rules have become subject to complex, situation-specific exceptions.[88] Some broad strokes, however, may be stated about what sorts of evidence are relatively more often suppressed, which correlates with what constitutional rights are relatively more often protected.

Physical evidence is generally more admissible than incriminating statements by the defendant, even when a constitutional violation can be shown. Evidence gathered by an illegal search or seizure may still be

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(1983). Although retired Justice Stewart wrote directly about the Fourth Amendment exclusionary rule, his words are applicable to evidence suppressed on the basis of other constitutional violations.

82. United States v. Leon, 468 U.S. 897, 907 (1984).

83. Sharon L. Davies, *The Penalty of Exclusion—a Price or Sanction?*, 73 S. CAL. L. REV. 1275, 1298–1302 (2000) (describing the evolution of the U.S. Supreme Court's rationale for deterrence).

84. *E.g.*, *Leon*, 468 U.S. at 900 ("[W]e must consider once again the tension between the sometimes competing goals of . . . deterring official misconduct and removing inducements to unreasonable invasions of privacy and . . . establishing procedures under which criminal defendants are 'acquitted or convicted on the basis of all the evidence which exposes the truth.'" (quoting Alderman v. United States, 394 U.S. 165, 175 (1969))); LAFAVE, *supra* note 76, § 1.1(f); Davies, *supra* note 83, at 1299 ("For the past two decades, the Supreme Court has justified the exclusion of probative but tainted evidence almost exclusively on the ground of deterrence.").

85. LAFAVE, *supra* note 76, § 1.1(f).

86. *Id.*; *e.g.*, Davis v. United States, 131 S. Ct. 2419 (2011).

87. *E.g.*, *Leon*, 468 U.S. at 917 (holding that evidence gathered illegally, but in good-faith reliance on a search warrant later discovered to be defective, should not be suppressed because it does not further deterrence).

88. LAFAVE, *supra* note 76, § 1.1(f).

used at trial under two well-established exceptions.[89] Furthermore, such evidence can be used at many adjudicatory proceedings other than the actual criminal trial.[90] Statements or confessions found to be involuntary because of a Fifth Amendment due-process violation, on the other hand, will be suppressed.[91] There are no allowable exceptions.[92] The *Miranda* warnings, recommended to preserve the Fifth Amendment protection against self incrimination,[93] sit in a middle ground: statements given without the warnings will be suppressed, but the fruits, that is, evidence derived from involuntary statements, are admissible.[94] Admissible fruits may include incriminating statements made by parties other than the defendant because that would not be self-incrimination.[95] In contrast to the *Miranda* framework, the fruits of evidence gathered in violation of both Fourth Amendment and due-process violations is generally inadmissible.[96]

Why the U.S. Supreme Court does not treat all illegally gathered evidence the same is not clear. It may be that the Court distinguishes between accomplished wrongs and threatened wrongs.[97] An illegal search or seizure, in the Court's view, is "'fully accomplished' by the unlawful search or seizure itself."[98] If the use of that evidence "work[s] no new Fourth Amendment wrong," then suppression serves *only* as a deterrent for future cases.[99] The use at trial of an involuntary statement, however, is an impending wrong.[100] By suppressing the defendant's incriminating statement, compelled self-incrimination is avoided. It may also be that the Court distinguishes between a violation of property rights

89. *Id.* at §§ 1.3, 11.4(a) (describing the good-faith and inevitable-discovery exceptions).

90. Davies, *supra* note 83, at 1303 (listing "grand jury proceedings, civil tax proceedings, civil deportation proceedings, child protection proceedings, military discharge proceedings, parole and probation revocation proceedings, supervised release proceedings, habeas corpus proceedings, and sentencing proceedings").

91. Jackson v. Denno, 378 U.S. 368, 385–86 (1964); RINGEL, *supra* note 75, § 30:2.

92. *But see* Arizona v. Fulminante, 499 U.S. 279, 303 (1991) (holding that mistaken admission of an involuntary confession may be harmless error).

93. RINGEL, *supra* note 75, § 24:3.

94. *Id.*, at § 30:8.

95. *Id.*

96. There are two significant exceptions that fruits may be admitted under. LAFAVE, *supra* note 76, at §11.4(a) (describing the independent-source and attenuation exceptions).

97. William C. Heffernan, *On Justifying Fourth Amendment Exclusion*, 1989 WIS. L. REV. 1193, 1196–1206 (1989).

98. United States v. Leon, 468 U.S. 897, 906 (1984) (quoting United States v. Calandra, 414 U.S. 338, 354 (1974)).

99. *Id.* (alteration in original) (quoting *Calandra*, 414 U.S. at 354).

100. Heffernan, *supra* note 97, at 1198–1200.

and a violation of bodily integrity. Although the Court has clearly stated that a constitutional violation does not give a defendant a personal right of redress,[101] the Court has also recognized that involuntary statements may be the result of physical or mental coercion.[102] Violence against a person is perhaps more worthy of deterrence than violation of a property or privacy right. Finally, the *Miranda* warnings are mere procedural guarantees of voluntary statements and are not in themselves mandated by the Constitution.[103]

In summary, although each suppression ruling will be specific to the facts and circumstances of its case, the Court's decisions are generally less permissive to the admissibility of a defendant's own statements compared with the admissibility of physical evidence and other witnesses' statements. Although a district court should suppress evidence only when a constitutional violation has actually occurred, a baseline distinction may be made depending on what type of violation is alleged. Furthermore, a baseline distinction may be found in the positions of the defendant and prosecution.

C. How Kansas Statutes Position the Prosecution and Defendant

Kansas has codified a defendant's right to object before trial to illegally gathered evidence.[104] The Kansas statutory procedures stand in for the judicially created processes applied to the states by the U.S. Supreme Court.[105] The statutory hearings allow a defendant to raise objections to evidence on constitutional grounds. The two statutes are materially similar to one another except for the issue raised: suppression of involuntary statements or suppression of illegally seized evidence. The defendant has an initial burden to allege a prima facie rights violation.[106] When defendant's motion suffices, the district court shall hold a hearing at which the burden of proof rests on the prosecution to show that a violation did not occur.[107] Both statutes also recognize that the prosecution and defendant are not similarly situated.

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101. *See, e.g.*, *Leon*, 468 U.S. at 906 ("The rule thus operates as 'a judicially created remedy . . . rather than a personal constitutional right of the party aggrieved.'" (quoting *Calandra*, 414 U.S. at 348)).

102. RINGEL, *supra* note 75, § 24:2.

103. *Id.* at § 24:3.

104. KAN. STAT. ANN. §§ 22-3215, 3216 (2007).

105. State v. Miles, 662 P.2d 1227, 1230 (Kan. 1983).

106. KAN. STAT. ANN. §§ 22-3215(2), 3216(2).

107. *Id.* §§ 22-3215(3), (4), 3216(2).

First, the statutes recognize a disparity in information between defendant and prosecution. The motion must be made before trial "unless opportunity therefor did not exist or the defendant was not aware of the ground for the motion."[108] Furthermore, the district court always retains discretion to hear a motion at trial regardless of circumstances.[109] These provisions implicitly acknowledge that the defendant is disadvantaged compared to the prosecution. The basis for a suppression motion is police action, and a defendant may simply not know all the details until they come out at trial. The prosecution, however, is assumed to have full knowledge, and the statutes do not generally allow the prosecution to raise the issue at trial.[110]

The prosecution, on the other hand, has a procedural option not available to the defendant. The prosecution may, within fourteen days of entry of judgment, make an interlocutory appeal to the appellate court.[111] This stays trial proceedings until the issue is determined on appeal.[112] The interlocutory appeal seems to recognize the critical importance to the prosecution's case of suppressed evidence. The interlocutory appeal, however, will submit only evidence contained within the suppression-hearing record to the appellate court. Because the prosecution will not be able to supplement the record, this option will not always be attractive. When the prosecution needs to put on additional evidence, its only option is a motion for reconsideration. Because the defendant may not make an interlocutory appeal, the defendant's only immediate "appeal" of an adverse ruling is also a motion for reconsideration.

Once a district court has ruled on a motion to suppress evidence, a party is able to move the court for reconsideration, although on what statutory authority is not entirely clear. The Kansas Supreme Court has interpreted K.S.A. section 22-3216(3)[113] to allow a district court to re-entertain an illegal-seizure suppression motion at trial.[114] The Kansas Supreme Court reasoned that "[t]o interpret otherwise would be to

108. KAN. STAT. ANN. §§ 22-3215(6), 3216(3).

109. *Id.*

110. For tactical reasons the prosecution may ask the court to rule on admissibility of evidence before trial. *See, e.g.*, State v. Gibson, 322 P.3d 389, 392 (Kan. 2014).

111. KAN. STAT. ANN. § 22-3603 (Supp. 2014).

112. *Id.*

113. *Id.* § 22-3216(3) ("The motion shall be made before trial, in the court having jurisdiction to try the case, unless opportunity therefor did not exist or the defendant was not aware of the ground for the motion, *but the court in its discretion may entertain the motion at the trial*." (emphasis added)).

114. State v. Jackson, 515 P.2d 1108, 1114 (Kan. 1973).

proscribe correction of its own error by the trial court at trial."[115] Because K.S.A. section 22-3215(6), regarding motions to suppress involuntary statements, contains nearly identical language,[116] it may be presumed that this statute identically allows a district court to re-entertain an involuntary-statement suppression motion at trial. Case law has not specifically addressed under what authority a district court may hear a motion to reconsider evidence suppression after the entry of judgment but *before* the trial. However, the Kansas Supreme Court's broad statements about a district court's discretion to reconsider its own decisions on evidentiary matters strongly indicate that entertaining such a motion is permitted.[117]

Kansas codification of suppression procedures recognize that the defendant and prosecution are not similarly situated. U.S. Supreme Court opinions indicate that not all constitutional violations are equal. And a district court's freedom to interpret these opinions will likely be channeled over time. This Comment now attempts to detect the contours of that channel.

III. ANALYSIS

In this Part, a framework for a district court's discretionary decision-making is erected. First, the three broad interests are identified that a district court may balance when making its decision on a motion to reconsider a prior judgment on the suppression of evidence. Second, this Part probes the boundaries of discretion, looking for fenced-off portions of the pasture. Finally, this Part suggests specific factors a district court should consider in making its decision. Each specific factor is discussed in the context of the broad interests identified.

A. Interests at Stake

Three broad interests are at stake in a district court's discretionary decision to reconsider an evidence-suppression ruling. The first is

115. *Id.*

116. KAN. STAT. ANN. § 22-3215(6) (2007) ("The motion shall be made before preliminary examination or trial, unless opportunity therefor did not exist or the defendant was not aware of the ground for the motion, but the court in its discretion may entertain the motion at the preliminary examination or the trial.").

117. State v. Riedel, 752 P.2d 115, 118 (Kan. 1988) ("[R]econsideration of [an evidentiary] issue lies within the sound discretion of the trial judge.").

society's interest in an accurate ruling on all the evidence.[118] Second is the district court's own interest in judicial economy: "controlling its docket and avoiding piecemeal litigation."[119] Third is the threat of unfair prejudice to the nonmoving party, that is, the party in whose favor the district court has already ruled.[120] These interests are not presented in hierarchical order. In fact, the Federal Circuit Courts disagree over the relative weight that should be allocated to each interest.

1. Society's Interest in an Accurate Determination

When a defendant's rights have been violated, the evidence should be suppressed;[121] when a defendant's rights have not been violated, the evidence should be admitted. These straightforward propositions are the basis for the Seventh Circuit Court of Appeal's statement in *United States v. Ozuna* that "society has a strong interest in admitting all relevant evidence."[122] In *Ozuna*, the district court granted defendant's suppression motion because of perceived discrepancies in defendant's signature on a consent-to-search form.[123] The prosecution later submitted the form to a handwriting expert and moved to reopen the hearing to admit the expert testimony.[124] The court granted the motion and, after hearing from handwriting experts for both prosecution and defense, reversed its ruling and admitted the evidence.[125]

In affirming the district court's discretionary decision, the *Ozuna* court weighed all three of the interests this Comment will discuss. The district court had not abused its discretion because (a) the additional evidence allowed the court to make a more accurate ruling on the suppression motion; (b) there was no evidence of negligence or deliberate delay by the prosecution; and (c) the decision to reopen did not unfairly prejudice the defendant, who was given adequate time to prepare and to hire his own expert.[126] The *Ozuna* court's analysis, however,

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118. United States v. Ozuna, 561 F.3d 728, 734, 736 (7th Cir. 2009); *accord* United States v. Dickerson, 166 F.3d 667, 679 (4th Cir. 1999), *rev'd on other grounds*, 530 U.S. 428 (2000).

119. *Dickerson*, 166 F.3d at 679; *accord Ozuna*, 561 F.3d at 735.

120. United States v. Kithcart, 218 F.3d 213, 219–20 (3d Cir. 2000).

121. This statement is far from straightforward. *See supra* notes 81–102 and accompanying text.

122. *Ozuna*, 561 F.3d at 734.

123. *Id.* at 731–32.

124. *Id.* at 732.

125. *Id.*

126. *Id.* at 735–36.

appears to gloss over a difference between two possible meanings of "society's interest." Does society's interest lie in the admission of all relevant evidence to make an accurate determination *on suppression* or in the judgment *at trial*?

The *Ozuna* court first stated that, "society has a strong interest in admitting all relevant evidence. Thus, a defendant is entitled to suppression only in cases of constitutional violations, and the district court remains free throughout the trial to reconsider its previous orders suppressing evidence."[127] This statement seems to mean that society's interest lies in making an accurate determination of whether a constitutional violation occurred. But later, the court stated that "a more flexible approach protects society's interest in ensuring a complete proceeding where the court considers all relevant, constitutionally obtained evidence."[128] This statement echoes the U.S. Supreme Court's balancing of society's interest against deterrence for whether evidence in particular situations should be suppressed at all.[129]

Distinguishing precisely where society's interest lies on a motion to reconsider is important. For, if society's interest lies in the most accurate determination *at trial*, then society's interest will always align with the prosecution and against the defendant. Society's interest is in favor of admitting "extremely relevant, often direct evidence of the guilt of the defendant."[130] If the district court has ruled against the prosecution, society's interest will weigh in favor of allowing the prosecution to supplement because society wants that evidence at trial. If the district court has ruled against the defendant, society's interest likely weighs against reconsideration for the same reason. Society's interest on the outcome *at trial* has nothing to do with determining whether a defendant's rights were violated.

This interpretation of society's interest puts the cart before the horse. It conflicts with its premises: that evidence should be suppressed when a constitutional violation has occurred and should not be suppressed otherwise. At this stage of the proceedings, the district court needs to accurately determine whether a constitutional violation occurred. A better interpretation, one more consistent with the premises, is that society's interest on a motion to reconsider favors an accurate

127. *Id.* at 734 (citations omitted).

128. *Id.* at 735.

129. *See, e.g.*, United States v. Leon, 468 U.S. 897, 907 (1984).

130. Stewart, *supra* note 81, at 1392.

determination on *suppression*. Therefore, society's interest weighs in favor of the district court reconsidering its decision when the movant submits additional relevant information, regardless of whether the movant is prosecution or defendant.

The relative weight accorded to society's interest, however, may increase or decrease depending on which party is the movant and the nature of the claim. Suppression of physical evidence is relatively disfavored when compared with suppression of involuntary statements.[131] Although society's interest in an accurate suppression ruling will often weigh in favor of reconsideration, that weight will be relatively greater in two cases: (1) when the underlying issue is the legality of a search or seizure and the movant is the prosecution; and (2) when the underlying issue is the voluntariness of a statement and the movant is the defendant. Society's interest carries relatively less weight in the opposite circumstances.

2. The Court's Interest in Judicial Economy

While society's interest in an accurate determination usually weighs in favor of reconsideration, the court's interest in judicial economy will frequently weigh against reconsideration. Judicial economy is the avoidance of waste or delay. "[T]ime consumed and wasted prevents the timely dispatch of business in the courts."[132] A court requires "[s]ome degree of finality" to move a case towards its conclusion and "prevent endless piecemeal litigation."[133] Thus, the court's interest in judicial economy is typically served by preserving its judgment.

The Fourth Circuit Court of Appeals gave substantial weight to the interest of judicial economy in *United States v. Dickerson.* There, the district court found defendant's testimony more credible than the testifying officer and suppressed the defendant's confession because it was obtained in violation of the *Miranda* rule.[134] The prosecution then moved for the court to reconsider its ruling, appending affidavits from other law enforcement personnel who were present at the time of defendant's statement.[135] The prosecution explained that it had not

131. *See supra* notes 88–102 and accompanying text.

132. Hacker v. State, 483 P.2d 484, 485 (Kan. 1971).

133. *Id.*

134. United States v. Dickerson, 166 F.3d 667, 674 (4th Cir. 1999), *rev'd on other grounds*, 530 U.S. 428 (2000).

135. *Id.* at 676.

introduced these affidavits at the initial hearing because it did not expect the court to disbelieve its witness and because it did not want to present cumulative evidence.[136] The district court refused the additional evidence and denied this motion for reconsideration.[137] In holding that the district court had not abused its discretion, the *Dickerson* court stated that "the district court has a strong interest in controlling its docket and avoiding piecemeal litigation."[138]

The district court properly denied the motion to reconsider when the prosecution had already been given multiple opportunities to present its evidence.[139] Not only had the proffered affidavits been available at the time of the initial hearing, but the prosecution had also been allowed to supplement its initial memorandum twice before the court ruled.[140] Because of the "ample opportunities" afforded to the prosecution to present its evidence, "its articulated reasons for failing to do so ring hollow."[141]

Echoes of *Dickerson*'s reasoning are found in the Kansas Supreme Court's *Gibson* opinion, although here applied to the defendant rather than prosecution:

> We have held that a defendant may testify at a [suppression] hearing . . . . But we have not held that a defendant has a right to testify regarding suppression whenever he or she sees fit after twice giving up that opportunity at a prior hearing. . . .
>
> . . . .
>
> . . . This is not a case in which refusal to reopen the suppression hearing actually denied Gibson the opportunity to testify. Gibson declined the opportunity in the regular course of the . . . hearing and then about 4 months later simply changed his mind.[142]

When a party fails to present all available evidence at an initial suppression hearing, proffering it in a motion for reconsideration may simply be too late.

It is within a district court's discretion to refuse reconsideration on

136. *Id.* at 678.
137. *Id.* at 677.
138. *Id.* at 679.
139. *Id.*
140. *Id.*
141. *Id.*
142. State v. Gibson, 322 P.3d 389, 399 (Kan. 2014) (citations omitted).

grounds of judicial economy. This ability stems from the court's inherent power over its own docket.[143] A district court may, for instance, set reasonable restrictions on motion filing to prevent strain on the court's resources.[144] Or a court may summarily dismiss motions that are repetitious or make unsupported allegations.[145] The *Gibson* court held, in part, that summarily dismissing the motion to reconsider when defendant presented "[n]o new issue or newly discovered evidence" was not an abuse of discretion.[146]

Thus, the court's interest in judicial economy will weigh most strongly against reconsideration when a motion is duplicative or proffers evidence the party had failed to present at an initial hearing. To best serve the court's interest in avoiding piecemeal legislation, a party should present all relevant evidence in its possession at the first opportunity.

In one narrow instance, the court's interest in economy may weigh in favor of reconsideration. The prosecution has the right to file an interlocutory appeal on an adverse ruling, which will stay proceedings until a higher court reviews the issue.[147] This will likely cause a greater delay than if the district court itself reconsidered its motion. Therefore, when the prosecution files for reconsideration alleging an error of law or error of fact—that is, proffers no additional evidence—the court's interest in judicial economy may weigh in favor of reconsidering the motion to prevent the greater delay of an interlocutory appeal.

3. Threat of Unfair Prejudice to the Nonmovant

The third broad interest a district court should consider when exercising its discretion is the nonmovant's interest in unfair prejudice. Because prejudice will not occur until a district court acts, the district court should assess the threat of prejudice upon receiving a motion for reconsideration. This threat may not always be present, but when it is, it will strongly weigh against reconsideration.

The district court should look for more than mere prejudice. After all, *prejudice* legally speaking is synonymous with *harm*.[148] A party

143. Holt v. State, 232 P.3d 848, 853 (Kan. 2010).
144. *Id.* at 855.
145. Hacker v. State, 483 P.2d 484, 485 (Kan. 1971).
146. *Gibson*, 322 P.3d at 399.
147. *See supra* notes 111–12 and accompanying text.
148. BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 699 (3d ed. 2011).

required to defend a successful motion for a second time is certainly harmed, if only because resources are consumed and the favorable ruling may be overturned. There must be a measure of unfairness to give weight to this interest.[149] Unfair prejudice will be found in two situations: when the moving party has manipulated the judicial process to gain an advantage or when the motion to reopen surprises the nonmoving party.

The Third Circuit Court of Appeals in *United States v. Kithcart* found prejudice to be the weightiest interest at stake: "[T]he district court's primary focus should be on whether the party opposing reopening would be prejudiced if reopening is permitted."[150] *Kithcart* presents a different procedural stance from the cases so far examined in this Comment, with a suppression ruling being reviewed for the second time. At an initial suppression hearing, the district court had admitted a gun found after a traffic stop.[151] The defendant pleaded guilty but appealed the suppression ruling.[152] On appeal, the Third Circuit reversed the district court's ruling, holding that the evidence had been gathered without probable cause because of a too-general description of the suspects and their car.[153] The appellate court, however, remanded for a determination of whether the evidence should be admitted under a reasonable-suspicion standard.[154] On remand, the district court reopened the hearing and allowed the prosecution to supplement its testimony.[155] The district court again ruled in favor of the prosecution, and a second appeal of the ruling followed.[156] At issue on appeal was whether the district court had abused its discretion in allowing the prosecution to present additional evidence.

Allowing additional evidence was an abuse of the district court's discretion.[157] The prosecution had tailored its evidence to meet the prior written opinion.[158] The additional evidence "neatly spackled over each

149. *Cf.* FED. R. EVID. 403 (stating that any evidence may be inadmissible when the probative value is substantially outweighed by the danger of unfair prejudice).

150. United States v. Kithcart, 218 F.3d 213, 220 (3d Cir. 2000) (quoting United States v. Blankenship, 775 F.2d 735, 740 (6th Cir. 1985)).

151. *Id.* at 217.

152. *Id.* at 215.

153. *Id.* at 216–17.

154. *Id.* at 217.

155. *Id.*

156. *Id.* at 219.

157. *Id.* at 222.

158. *Id.* at 218 ("Not surprisingly, the government's new testimony nicely filled the lacunae of

of the cracks in the foundation of proof that we pointed out" on the first appeal.[159] When the prosecution should have known what it needed to prove at the first hearing, this was, in the Third Circuit's opinion, an unfair "second . . . bite of the . . . apple."[160]

Likewise, in *State v. Parry*, the Kansas Court of Appeals found that the prosecution had manipulated the legal process to take "an impermissible second bite at the apple."[161] There the prosecution, after adverse rulings at the suppression hearing and its interlocutory appeal, dismissed its case before trial but immediately refiled the charges.[162] At the suppression hearing in the refiled case, the prosecution argued a different underlying theory for the legality of its search.[163] The court held that the prosecution was barred from relitigating the issue when the prosecution had a prior opportunity to make all its arguments.[164]

Although the ruling in *Parry* did not involve a district court's reconsideration, it foregrounds concerns about a losing party taking a "do-over" to "assert arguments it failed to raise during the first hearing."[165] Courts view this as simply unfair to the opposing party and a misuse of the legal process. In these decisions, courts considered whether the party requesting the "do-over" had always possessed the evidence and knew, or should have known, what evidence needed to be proved to win on the suppression hearing. When that is so, allowing reconsideration on the same issue is unfairly prejudicial to the nonmovant.

The second type of unfair prejudice is found when the motion for reconsideration surprises the nonmovant. Generally, the nonmoving party should be given adequate notice and opportunity to respond to any newly produced evidence or arguments. In *Ozuna*, for example, the district court did not abuse its discretion when, after ruling against the prosecution, it allowed the prosecution to present expert handwriting analysis of a disputed consent form because the defendant was able to call his own handwriting expert and to cross-examine the prosecution's

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the first hearing.")

159. *Id.*

160. *Id.* at 220–21 (quoting United States v. Kithcart, 134 F.3d 529, 536 (3d Cir. 1998) (McKee, J., concurring in part and dissenting in part)).

161. State v. Parry, 358 P.3d 101, 102 (Kan. Ct. App. 2015).

162. *Id.* at 103.

163. *Id.*

164. *Id.* at 104.

165. *Id.*

expert.[166] Although the defendant was prejudiced by having an unfavorable ruling overturned, the defendant had adequate opportunity to respond to the new evidence.

The nonmoving party is also not unfairly prejudiced when the movant supplements with evidence that the nonmoving party was already aware of. In *State v. Murdock*, the Kansas Supreme Court addressed whether a district court abused its discretion when it allowed the prosecution to reopen its case in chief.[167] The court held that the district court had not abused its discretion.[168] "It cannot be said that the defendant was surprised" when the additional testimony had been presented at a preliminary hearing and defendant had prepared his case accordingly.[169] Thus, prejudice through surprise is not unfair when the nonmovant has adequate time to prepare to meet supplemental evidence or when the nonmovant has prior knowledge of the supplemental evidence.

A defendant will more often be threatened with unfair prejudice than the prosecution. First, a district court decides whether or not to suppress evidence based on the conduct of police officers and investigators. The defendant may not have full knowledge of police action before the suppression hearing; the defendant may not have full knowledge before witnesses have been presented at trial.[170] The prosecution, on the other hand, has access to all the witnesses necessary to justify its evidence gathering.[171] Kansas statutes implicitly acknowledge this by allowing the defendant—but not the prosecution—to move for suppression during trial when "the defendant was not aware of the ground for the motion" before trial.[172] Second, with an indigent defendant and appointed attorney, "it would blink reality to ignore the disparate position of the state and the accused before trial."[173] The prosecution will frequently have more resources and more experienced attorneys. Because of the disparity in information and resources, the defendant is more likely to be unfairly prejudiced by a motion for reconsideration. A district court may therefore weigh the threat of unfair prejudice more strongly against

166. United States v. Ozuna, 561 F.3d 728, 736 (7th Cir. 2009).
167. State v. Murdock, 187 P.3d 1267 (Kan. 2008).
168. *Id.* at 1277.
169. *Id.*
170. McRae v. United States, 420 F.2d 1283, 1287 (D.C. Cir. 1969).
171. *Id.*
172. KAN. STAT. ANN. §§ 22-3215(6), 3216(3) (2007).
173. *McRae*, 420 F.2d at 1287.

motions for reconsideration submitted by the prosecution.

When there is a grave threat of unfair prejudice, the district court should ensure that the threat is not realized. This may mean per se dismissal of such a motion without consideration of its merits. The district court has arrived at one of Professor Rosenberg's fenced-off areas of the discretionary pasture. A district court's grazing can be further informed by looking for other areas that are out of bounds.

B. The Boundaries of Discretion

This Comment now searches for the outer bounds of a district court's discretion. As Professor Rosenberg's pastoral analogy suggests, this is easiest to do negatively by finding areas that have been "fenced off" and are now out of discretionary bounds. In such territory, the district court has no decision-liberating discretion. To avoid an abuse, the motion must be granted or denied. The first and second inquiries investigate whether a motion may be granted that does not implicate society's interest in an accurate determination. The third inquiry asks whether the combined interests of judicial economy and avoiding unfair prejudice are so weighty that the court will not accept supplementary evidence without a reasonable justification from the movant.

1. May the Movant Argue a New Legal Basis for Suppression?

Generally, a party moving for reconsideration may not argue a new legal theory for suppression. A district court may summarily dismiss such a motion. Dismissal serves the interests of both judicial economy (avoiding piecemeal legislation) and threat of unfairness to the nonmoving party (the "do-over" rule). These two interests combine to outweigh society's interest in an accurate determination. As an exception to this general rule, however, a party may move for reconsideration on the basis that the court's ruling misinterpreted the law or facts. This too serves the interest of judicial economy by allowing the district court to correct its own error.

The Eleventh Circuit Court of Appeal's opinion in *United States v. Thompson* illustrates the general rule nicely. At the suppression hearing, the prosecution argued that their search of a small sailboat was performed legally pursuant to an authorized document and safety

inspection.[174] The district court, however, granted defendants' motion and suppressed the marijuana that had been seized.[175] The prosecution then filed a motion for reconsideration, arguing that the marijuana had been seized legally pursuant to a search on reasonable suspicion of illegal activity.[176] The district court declined to consider this new legal basis for the search.[177]

The Eleventh Circuit affirmed the district court's denial: "[B]y failing to raise the issue at the suppression hearing without offering any justification therefor, the government waived its right to assert it in subsequent proceedings."[178] Thus, a party who omits arguments at a suppression hearing will not be allowed to submit them in a motion for reconsideration. The threat of unfair prejudice and drain on judicial resources outweigh any benefit of an accurate determination. The district court has no discretion; the scales balance in only one direction—against reconsideration.

A distinction must be made, however, between arguing a new legal basis and arguing that the district court erred in interpreting the legal basis presented. If the district court's ruling is based on an error of law, then the court has categorically abused its discretion. In that event, because the ruling is bound to be overturned on appeal, the interest of judicial economy would weigh in favor of reconsideration, as discussed in the following section.

2. Must the Movant Proffer Additional Evidence?

In *State v. Jackson*, the Kansas Supreme Court stated that "if at trial new or additional evidence is produced bearing on the issue or substantially affecting the credibility of the evidence adduced at the pretrial hearing . . . we believe the statute authorizes reentertainment of the [suppression] motion in the court's discretion."[179] This suggests that new or additional relevant evidence is a per se requirement before a district court has discretion to reconsider its prior suppression ruling. But this would be an incorrect conclusion. A district court may reconsider its own prior ruling even when the movant proffers no new or

174. United States v. Thompson, 710 F.2d 1500, 1503 (11th Cir. 1983).
175. *Id.*
176. *Id.* at 1504.
177. *Id.*
178. *Id.*
179. State v. Jackson, 515 P.2d 1108, 1114 (Kan. 1973).

additional evidence. A district court has abused its discretion when "judicial action was . . . based on an error of law . . . or . . . based on an error of fact."[180] If either type of error is brought to the district court's attention, the court should overturn its own decision.

Jackson illustrates a possible error of fact. Before trial an administrative judge had denied defendant's motion to suppress various car keys taken from defendant's pocket.[181] Twice during trial the defense renewed its motion to suppress.[182] The court questioned the arresting officer outside the presence of the jury but denied the renewed motion.[183] Then, during jury deliberations, the district court reversed the administrative judge's rulings, suppressed the keys, and acquitted the defendant.[184]

The Kansas Supreme Court held that this last minute reversal was not an abuse of the court's discretion. "Normally . . . the motion, when made before trial, will be heard once and disposed of; however, if at trial new or additional evidence is produced . . . we believe . . . reentertainment of the motion [is] in the court's discretion."[185] Even though the *Jackson* opinion does not reveal what, if any, new or additional evidence was produced, the court approved the district court's reconsideration on the grounds that a district court must be able to correct its own error.[186]

The Kansas Supreme Court reiterated its *Jackson* opinion fifteen years later in *State v. Riedel*, which concerns an error of law. Although *Riedel* does not concern reconsideration of a suppression ruling, the issue was closely analogous—reconsideration of a pre-trial ruling on prior conviction evidence. In *Riedel*, the district court granted prosecution's motion to admit defendant's expunged conviction on the grounds that the prior conviction would go to prove knowledge, intent, or absence of mistake, which the judge considered to be an element of the case.[187] This was a mistake of law; the judge had misunderstood the elements of the charged offense and misapplied a statutory exception for character

180. State v. Gibson, 322 P.3d 389, 398 (citing State v. McCullough, 270 P.3d 1142, 1154–55 (Kan. 2012)).

181. *Jackson*, 515 P.2d at 1110.

182. *Id.* at 1111.

183. *Id.*

184. *Id.* at 1110.

185. *Id.* at 1114.

186. *Id.*

187. State v. Riedel, 752 P.2d 115, 117 (Kan. 1988).

evidence.[188] When the case was reassigned to a new judge, defendant moved for reconsideration pointing out the error of law.[189] The new judge granted the defendant's motion, after which the prosecution dropped the case.[190]

The Kansas Supreme Court held that reconsideration was not an abuse of discretion even though the defendant had proffered no new evidence. "[The new judge] was placed in the position of either accepting [the first judge's] ruling, and perhaps allowing inadmissible evidence to be presented to the jury, or making an independent decision . . . ."[191] That additional evidence is not a prerequisite to reconsideration follows clearly from the proposition that a district court should correct an error brought to its attention. "[T]o interpret otherwise would be to proscribe correction of its own error . . . ."[192]

Encouraging—perhaps requiring—a district court to correct its own error serves the interest of judicial economy. If a district court comes to believe its prior ruling was incorrect, it need not complete the trial, only to have the trial outcome overturned on appeal. Society's interest in an accurate determination will eventually be fulfilled, and there is little threat of unfair prejudice to the nonmovant when no new evidence is proffered. The district court should correct itself when a party moving for reconsideration convinces the court that its prior ruling was faulty, based on the arguments already presented at a suppression hearing. In such a case, it is not an abuse of discretion for the court to overrule itself summarily.

Although a motion that does not proffer new or additional evidence is therefore not necessarily outside the discretionary pasture, the motion should make a substantial argument that the ruling was in error. Certainly, if a party moves for reconsideration *without* proffering additional evidence "material to the issues or substantially affect[ing] the credibility of the evidence"[193] or arguing legal or factual error, the district court should dismiss the motion summarily.

188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.* at 118.
192. *Id.* (quoting State v. Jackson, 515 P.2d 1108, 1114 (Kan. 1973)).
193. State v. Holmes, 102 P.3d 406, 422 (Kan. 2004).

3. Must the Movant Provide a Reasonable Justification?

When the movant does offer supplemental evidence or testimony in its motion for reconsideration, some courts hold that it is an abuse of discretion for the district court to consider that motion without first finding a reasonable and adequate justification to do so. The First, Third, Fourth, Eleventh, and D.C. Circuit Courts of Appeals require this threshold justification before a district court may consider the merits of the motion.[194] "In order to properly exercise its discretion the district court must evaluate [the movant's] explanation and determine if it is both reasonable, and adequate to explain why the [movant] initially failed to introduce evidence that may have been essential to meeting its burden of proof."[195] Because an error of fact or law is per se an abuse of discretion and will usually not require additional evidence, the justification requirement is an interpretation of the unreasonable prong of abuse of discretion. That is, no reasonable district court would allow the movant to produce additional evidence without first providing a reasonable justification.

In their decisions, these circuit courts have focused on different interests to arrive at the justification requirement. The D.C. Circuit emphasized the court's interest: disallowing reconsideration "promote[s] judicial efficiency by insuring that trials will not be interrupted or delayed by tangential inquiries into the propriety of police conduct."[196] The Third Circuit, however, held that the threat of unfair prejudice to the nonmovant should be the "district court's primary focus."[197] Among these circuit courts, society's interest in an accurate determination is a subsidiary consideration.

The Second, Fifth, Eighth, Ninth, Seventh, and Tenth Circuits reason that evidence should be excluded only when a constitutional violation has occurred.[198] Society's interest in an accurate determination generally

194. United States v. Allen, 573 F.3d 42 (1st Cir. 2009); United States v. Kithcart, 218 F.3d 213 (3d Cir. 2000); United States v. Dickerson, 166 F.3d 667 (4th Cir. 1999), *rev'd on other grounds*, 530 U.S. 428 (2000); United States v. Villabona-Garnica, 63 F.3d 1051 (11th Cir. 1995); McRae v. United States, 420 F.2d 1283 (D.C. Cir. 1965).

195. *Kithcart*, 218 F.3d at 220.

196. *McRae*, 420 F.2d at 1288.

197. *Kithcart*, 218 F.3d at 220 (quoting United States v. Blankenship, 775 F.2d 735, 740 (6th Cir. 1985)).

198. United States v. Huff, 782 F.3d 1221 (10th Cir. 2015), *cert. denied*, 136 S. Ct. 537; United States v. Ozuna, 561 F.3d 728 (7th Cir. 2009); *In re* Terrorist Bombings of U.S. Embassies in E. Africa, 552 F.3d 177 (2d Cir. 2008); United States v. Gill, 513 F.3d 836 (8th Cir. 2008); United States v. Rabb, 752 F.2d 1320 (9th Cir. 1984); United States v. Scott, 524 F.2d 465 (5th Cir. 1975).

outweighs other interests. These circuits hold that justification for failure to produce adequate evidence, if offered, is only a factor for the district court to consider in its discretionary decision making.[199]

The Kansas Supreme Court has not required a reasonable and adequate justification before a district court may consider the merits of a motion to reconsider. In *State v. Murdock*, however, the court instituted a threshold justification requirement in an analogous circumstance.[200] A party who moves to reopen its case-in-chief after resting at trial must offer a reasonable justification; until the justification has been offered and accepted, the court has no discretion to grant the motion.[201] The court based its decision on the threat of unfair prejudice to the nonmovant, and in particular the threat of surprise at trial:

> One of the critical factors in evaluating prejudice is the timing of the motion . . . . If . . . the opposing party will have an opportunity to respond and attempt to rebut the evidence introduced after reopening, it is not nearly as likely to be prejudicial . . . .[202]

The court held in the instant case that the defendant was not significantly prejudiced because the prosecution had moved to reopen before the defendant had offered any evidence and the omitted testimony was expected by the defendant.[203] Under these circumstances, the district court did not abuse its discretion to reopen the trial when the prosecution offered the justification of simple oversight.[204]

The sufficiency of a *Murdock* requirement has been assessed in only one other case, *State v. Brown*.[205] There, the district court was similarly satisfied with a justification of "oversight" when the omitted evidence was already evident from circumstantial evidence and the defendant had the opportunity to respond and rebut.[206] The *Murdock* and *Brown* opinions show that the Kansas Supreme Court relates the stringency of the justification requirement to the merits of the motion to reopen. This is a much more flexible and lenient justification requirement than that used by several of the Federal Circuit Courts. The First Circuit Court of

199. *E.g.*, *Ozuna*, 561 F.3d at 734.
200. State v. Murdock, 187 P.3d 1267, 1275 (Kan. 2008).
201. *Id.*
202. *Id.* at 1276 (quoting *Blankenship*, 775 F.2d at 741).
203. *Id.* at 1277.
204. *Id.*
205. State v. Brown, 284 P.3d 977, 994 (Kan. 2012).
206. *Brown*, 284 P.3d at 997.

Appeals, for instance, allows reconsideration of a suppression motion in only three circumstances: newly discovered evidence, an intervening change in the law, or demonstration of an error of law.[207]

Even a flexible or lenient justification requirement, such as the *Murdock* requirement, should not be mandatory before a district court can consider the merits of a motion to reconsider. Reopening a case-in-chief is not identical to the reopening of a pre-trial hearing. First, the threat of unfair prejudice can be mitigated more easily before trial. If the nonmovant is confronted with new evidence, the district court can grant a continuance. Second, rehearing a motion before trial may disrupt a court's docket. But the interruption of trial to reopen a case-in-chief is likely to affect additional parties, such as an empaneled jury, and consume far greater judicial resources. Finally, a flexible and lenient justification requirement is likely to be overcome by a pro forma statement of "oversight." Such a requirement will not assist the court in balancing the interests of an accurate determination, judicial economy, and unfair prejudice.

C. Factors to Consider When Exercising Discretion

The district court's discretionary decision to reconsider a suppression ruling should be based on the totality of the facts and circumstances.[208] "[T]he superiority of [the] nether position," that is, direct knowledge of the facts and parties before it, is the most compelling reason district courts are allowed discretion.[209] "It is not that he knows more than his loftier brothers; rather, he sees more and senses more."[210] The district court should come to its reasoned decision based upon all the data available to it, both argued in the motion for reconsideration and all that has come before. This broad "facts and circumstances" recommendation can, however, be refined by describing the more common and relevant factors a district court may expect to consider when exercising its discretion. The court should always keep in mind the relation among the following factors and the interests of an accurate determination, judicial economy, and avoiding unfair prejudice.

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207. United States v. Allen, 573 F.3d 42, 53 (1st Cir. 2009).

208. United States v. Ozuna, 561 F.3d 728, 735 (7th Cir. 2009); State v. Bozung, 245 P.3d 739, 743 (Utah 2011); *see Murdock*, 187 P.3d at 1276 (recommending specific factors for a district court to consider on motion to reopen a case-in-chief but recognizing that "unique circumstances" may control another case).

209. *Judicial Discretion*, *supra* note 31, at 663; *see supra* notes 32–45 and accompanying text.

210. *Judicial Discretion*, *supra* note 31, at 663.

1. Additional Evidence

Society's interest in an accurate determination of whether a constitutional violation occurred is advanced directly by consideration of all relevant evidence. Although additional evidence need not be proffered in a motion for reconsideration,[211] a motion to reconsider that does not supplement the evidentiary record will not succeed without a convincing argument that the district court made an error of fact or error of law. The proffer of additional evidence—and the adequacy of that evidence—is likely to be the key factor in a district court's decision on reconsideration.

Immaterial, irrelevant, and already presented evidence does not further society's interest because it does not help the district court make a more accurate determination. The court's interest in efficiency justifies summarily dismissing a motion that fails to present evidence "bearing on the issue or substantially affecting the credibility of the evidence adduced at the pretrial hearing."[212] Simply recharacterizing evidence or rephrasing testimony already presented is an inadequate proffer.[213] Unsupported speculation or legal conclusions are also unhelpful to the district court. A motion for reconsideration must do more than address an already settled issue in greater detail.[214] Although evidence presented at a suppression hearing need not be admissible at trial,[215] the district court may consider whether any proffered evidence itself was obtained legally or is otherwise admissible. Finally, a movant who proffers evidence already in its possession at the suppression hearing may find its proffer refused.[216] Although such evidence does implicate society's interest, the district court may still dismiss on grounds of judicial economy, that the movant has created an unnecessary delay by not presenting all its evidence in the first instance.[217]

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211. *See supra* Part III.B.2.

212. State v. Jackson, 515 P.2d 1108, 1114 (Kan. 1973).

213. McRae v. United States, 420 F.2d 1283, 1289 (D.C. Cir. 1965) ("[T]he Government should not be permitted . . . to present the same witness to a second judge in the hopes that a differently phrased narration of the relevant circumstances will lead to a different ruling.").

214. State v. Holmes, 102 P.3d 406, 422 (Kan. 2004).

215. RINGEL, *supra* note 75, § 20:15.

216. United States v. Dickerson, 166 F.3d 667, 679 (4th Cir. 1999), *rev'd on other grounds*, 530 U.S. 428 (2000); State v. Gibson, 322 P.3d 389, 399 (Kan. 2014).

217. *See supra* Part III.A.2 discussing judicial economy regarding evidence in possession but withheld.

2. Timeliness of the Motion

The timeliness of a motion bears on the court's interest in judicial economy and the threat of unfair prejudice to the nonmovant. This can be measured from either of two points: the time after the court's initial suppression ruling or the time before trial begins. As the ruling recedes or trial approaches, both interests weigh more greatly against reconsideration, whereas the relative weight of society's interest in an accurate determination remains constant.

The length of time after entry of the order granting or denying suppression is related to unfair prejudice. A significant delay may indicate improper motive for filing, such as an attempt to burden or surprise the nonmovant. In any case, the nonmovant must be allowed time to respond to the motion at least on paper. As trial approaches, both the court's interest and the threat of unfair prejudice increase. They increase dramatically after trial has begun because of the involvement of other parties, such as jurors, court staff, and members of the public.

When considering timeliness, the district court should recognize that the prosecution and defendant are not equally situated. First, the defendant has a statutory right to move for suppression at trial if "opportunity therefor did not exist or the defendant was not aware of the ground for the motion."[218] Second, the defendant is more likely to find new grounds for suppression as proceedings progress.[219] When evidence has been ruled admissible, the investigating officers will likely testify and be cross-examined at trial. The defendant then has a chance to verify the facts and probe for inconsistencies. When evidence has been suppressed, however, it will not appear at trial and no new evidence will arise.

The district court does retain discretion to entertain all motions for reconsideration at trial.[220] This allows the court to protect society's interest. However, a motion presented at trial should present a compelling case for why society's interest counterbalances the interests of judicial economy and unfair prejudice.

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218. KAN. STAT. ANN. §§ 22-3215(6), 3216(3) (2007).

219. McRae v. United States, 420 F.2d 1283, 1287 (D.C. Cir. 1965); *see supra* notes 107–09, 169–72 and accompanying text.

220. KAN. STAT. ANN. §§ 22-3215(6), 3216(3) (2007).

3. Reasonable Justification

An adequate and reasonable justification should not be a threshold requirement for a district court to entertain a motion for reconsideration. A strict requirement gives too little weight to society's interest, but a lenient requirement tends towards irrelevance.[221] The court may, however, look at any justification offered as part of the complete facts and circumstances to be considered. Here, the district court should watch out in particular for threats of unfair prejudice to the nonmovant. Simple oversight, especially when the nonmovant was aware of the omitted evidence, is not a cause of unfair prejudice.[222] And when the court has ruled against a party in a close decision, the movant may reasonably submit supplementary evidence it already had in its possession.[223] On the other hand, a motion for reconsideration indicating gross negligence, deliberate delay, or abuse of the legal process deserves little indulgence.

4. Nature of the Constitutional Violation Alleged

The district court may consider the constitutional basis alleged for suppression. The weight accorded society's interest in an accurate determination changes depending on the constitutional grounds and whether the movant is the prosecution or defendant.[224] When a defendant's statements have been ruled voluntary, society's interest weighs relatively more in favor of defendant's motion for reconsideration than the prosecution's. When physical evidence has been suppressed, society's interest weighs relatively more in favor of the prosecution's motion than defendant's.

IV. RECOMMENDATION

This Comment now describes a recommended process that a Kansas district court should use when a motion for reconsideration is filed. As a preliminary matter, a court may wish to know whether the initial balance

221. *See supra* Part III.B.3.

222. *See* State v. Murdock, 187 P.3d 1267, 1277 (Kan. 2008).

223. United States v. Ozuna, 561 F.3d 728, 736 (7th Cir. 2009); *but see* United States v. Dickerson, 166 F.3d 667, 678–79 (4th Cir. 1999) (holding that prosecution's withholding of evidence because it did not expect to need it was not a reasonable justification), *rev'd on other grounds*, 530 U.S. 428 (2000).

224. *See supra* note 130 and accompanying paragraph.

of the three interests tilts toward or against reconsideration. The Kansas Supreme Court has stated that "[n]ormally . . . the [suppression] motion, when made before trial, will be heard once and disposed of."[225] This appears to show a general disinclination to reconsideration. However, that statement can also be read as a simpler observation—that most suppression rulings are not challenged by a motion to reconsider. The best approach is that district courts accept a motion to reconsider with the scales level: society's interest precisely balanced by the combined weight of judicial economy and threat of unfair prejudice. From that starting point, the district court follows the steps laid out below.

First, does the motion argue for suppression on a new legal theory not advanced at the suppression hearing? If so, the motion should be summarily dismissed. Because legal bases not argued are waived, the district court has no discretion to hear this motion. If not, proceed.

Second, does the motion argue persuasively that the court's ruling is an abuse of discretion because of an error of law or an error of fact? If so, the motion should be granted. A district court must correct its own error when it can. Before ruling, the district court may allow the nonmovant to respond in person or through supplemental briefs. It is unlikely, however, that the court will need to reopen the hearing to take additional testimony or evidence.

Third, does the motion proffer additional evidence "bearing on the issue or substantially affecting the credibility of the evidence adduced at the pretrial hearing" so that there is a substantial possibility of changing the outcome?[226] If not, the motion is repetitive, immaterial, irrelevant, or insufficient and should be dismissed.

If the motion does proffer adequate additional evidence, then the district court should consider the totality of the facts and circumstances presented with specific reference to the balance among society's interest, the court's interest, and the nonmovant's interest. As nonexclusive factors, the court should consider the additional evidence proffered, the timeliness of the motion, any justification offered by the movant, and the nature of the alleged constitutional violation. The hearing may be reopened for the presentation of evidence, testimony, and argument. When the court has made its decision, the court must state on the record or in a written order the reasons for its ruling in order to provide an adequate record for later review. If this procedure has been followed,

225. State v. Jackson, 515 P.2d 1108, 1114 (Kan. 1973).

226. *Id.*

however, the district court has not only protected society's and the parties' interests, but it also should have protected itself from reversal.

V. CONCLUSION

In *State v. Gibson*, the Kansas Supreme Court announced that district-court action on a motion for reconsideration of a suppression hearing would be reviewed for abuse of discretion. *Gibson* was directed to appellate courts. It gave those courts a review standard. However, *Gibson* did not tell district courts how they should exercise discretion. This Comment has proposed a method for doing so.

To exercise discretion on a motion for reconsideration, district courts should balance three broad interests: society's interest in an accurate determination of whether a constitutional violation occurred; the court's interest in judicial economy; and the threat of unfair prejudice to the nonmovant. The court should generally look to all the facts and circumstances in relation to these interests. Among the more common and significant circumstances presented will be the additional evidence proffered, the timeliness of the motion, the reason given for the motion, and the nature of the issue presented. A district court whose ruling is based on these factors and a balance of the interests will not abuse its discretion.