Kansas Law Review Criminal Procedure Survey

I. INTRODUCTION

The Criminal Procedure Survey was compiled by staff members of the 2014-2015 Vol. 63 Kansas Law Review and is intended to provide a snapshot of changes in criminal law over the past year. This Survey examines the evolution of Kansas criminal law and criminal procedure using cases from the Kansas Supreme Court and Kansas Court of Appeals, along with decisions from the Tenth Circuit Court of Appeals and the Supreme Court. Changes in the Kansas Statutes are also provided. We intend this Survey to serve as a resource to inform practitioners and judges on the development of the law and its current status.

II. SEARCHES AND THE FOURTH AMENDMENT

A. Scope of the Fourth Amendment

The Fourth Amendment of the United States Constitution—through its Reasonableness Clause and Warrant Clause—governs searches of persons and property by government officials.\(^1\) With respect to search, the applicable language of the Fourth Amendment reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches . . . shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.\(^2\)

Section 15 of the Kansas Bill of Rights contains similar language to the Fourth Amendment.\(^3\) It reads: “The right of people to be secure in their persons and property against unreasonable searches and seizures, shall be inviolate. . . .”\(^4\) The Kansas Supreme Court has held that section

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1. U.S. CONST. amend. IV.
2. Id.
4. KAN. CONST. Bill of Rights § 15.
15 of the Kansas Bill of Rights provides the same protection from unlawful government searches as the Fourth Amendment. However, the court has consistently held that while “the protection afforded by the Kansas Constitution is co-extensive with the Fourth Amendment,” the state maintains authority to “adopt measures more protective of an individual’s rights than the Fourth Amendment requires.” Presently, Kansas does not provide any more protection to its residents than those afforded by the Fourth Amendment.

1. Government Action Requirement

The Fourth Amendment protects only against governmental action. Thus, the Amendment is “wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official.” Nevertheless, “in some cases a search by a private citizen may be transformed into a governmental search implicating the Fourth Amendment if the government coerces, dominates or directs the actions of [the] private person conducting the search.” The Kansas Supreme Court has held that the Fourth Amendment also applies to any private actor who is acting as an agent of the government, i.e. “under the authority or direction” of the government.

To determine whether a search by a private actor amounts to governmental action, Kansas courts use a two-step inquiry: (1) “whether the government knew of and acquiesced in the [individual’s] intrusive conduct,” and (2) whether the party performing the search “intended to assist law enforcement efforts” or merely intended to further his or her

6. Id.
10. United States v. Benoit, 713 F.3d 1, 9 (10th Cir. 2013) (quoting United States v. Poe, 556 F.3d 1113, 1123 (10th Cir. 2009)).
own ends.\textsuperscript{12} Under this analysis, both prongs “must be satisfied considering the totality of the circumstances before [a] seemingly private search may be deemed a government search.”\textsuperscript{13}

Apart from private actors, not all government employees are “government actors” for purposes of the Fourth Amendment and the Kansas Bill of Rights, particularly when the employee is “not acting within the scope of his or her employment.”\textsuperscript{14} Kansas courts have not adopted a “bright-line rule” to distinguish between a government employee and a constitutionally constrained government actor.\textsuperscript{15} However, the court has held that “the applicability of constitutional restraint is not driven solely by a government employee’s job description. Rather, to be a constitutionally constrained government actor, the government employee must be performing an investigatory-type activity for the benefit of his or her employer.”\textsuperscript{16}

2. Reasonableness Requirement

“The ultimate touchstone of the Fourth Amendment is reasonableness.”\textsuperscript{17} Reasonableness is the “measure of the constitutionality of a governmental search.”\textsuperscript{18} Whether a search is reasonable, as examined on a case-by-case basis, is “assessed by balancing the degree of intrusion into an individual’s privacy with the need for the search to promote governmental interests.”\textsuperscript{19} Furthermore, an “action is reasonable under the Fourth Amendment, regardless of the individual officer’s state of mind, as long as the circumstances, viewed objectively, justify the action.”\textsuperscript{20} This analysis requires the court to examine the totality of the circumstances based on the perspective “of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”\textsuperscript{21}

\begin{itemize}
\item \textsuperscript{12} Brokers’ Choice of America, Inc. v. NBC Universal, Inc., 757 F.3d 1125, 1145 (10th Cir. 2014).
\item \textsuperscript{13} Id.
\item \textsuperscript{14} Brittingham, 294 P.3d at 268.
\item \textsuperscript{15} Id. at 269.
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Heien v. North Carolina, 135 S. Ct. 530, 536 (2014).
\item \textsuperscript{19} Leatherwood v. Welker, 757 F.3d 1115, 1120 (10th Cir. 2014).
\item \textsuperscript{20} United States v. Madrid, 713 F.3d 1251, 1257 (10th Cir. 2013) (citing Brigham City v. Stuart, 547 U.S. 398, 404 (2006)).
\end{itemize}
3. “Search” Defined

In determining whether a search has occurred, the United States Supreme Court has adopted two tests that focus on reasonableness.\(^{22}\) The first test asks whether there was physical “intrusion of a constitutionally protected area.”\(^{23}\) For example, when the “Government obtains information by physically intruding on persons, houses, papers, or effects, a ‘search’ within the original meaning of the Fourth Amendment has undoubtedly occurred.”\(^{24}\) Under the second test, a search occurs when the Government intrudes on an individual’s “actual (subjective) expectation of privacy [that] society is prepared to recognize as ‘reasonable.’”\(^{25}\) Because of frequent technological advances in modern-day society, the second test, first formulated by Justice Harlan’s concurring opinion in *Katz v. United States*,\(^{26}\) dominates modern constitutional jurisprudence in deciding when a search has occurred under the Fourth Amendment. However, the “reasonable expectation” test continues to be *in addition to—not in substitution for*—the older trespass test.\(^{27}\)

**B. Search Warrant Requirement**

Under the Fourth Amendment and under section 15 of the Kansas Bill of Rights, warrantless searches are per se unreasonable.\(^{28}\) The Fourth Amendment articulates three textual requirements for a valid warrant. A warrant must: (1) rest upon probable cause, (2) arise after an oath or affirmation, and (3) describe with particularity the place to be searched.\(^{29}\) This warrant requirement furthers the right of individuals to


\(^{24}\) *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (citing *Jones*, 132 S. Ct. at 950 (attaching a Global-Positioning-System (GPS) tracking device to a suspect’s vehicle constituted a “search” within the meaning of the Fourth Amendment)).

\(^{25}\) *Id.* at 361 (Harlan, J., concurring).

\(^{26}\) *Katz*, 389 U.S. at 347.

\(^{27}\) *Jones*, 132 S. Ct. at 951–52.


\(^{29}\) U.S. CONST. amend. IV.
be free from unreasonable searches by “interpos[ing] an independent reviewing authority—a judge—to assess the sufficiency of the grounds government agents offer for interfering with citizens or their property.”

A warrantless search conducted by a government actor is “per se unreasonable under the Fourth Amendment unless the State can fit the search within one of the recognized exceptions to the warrant requirement...” The Kansas-recognized exceptions to the warrant requirement are discussed below in section I.C. However, even if the state can fit the search within a recognized exception, “[t]he state bears the burden to prove a warrantless search was lawful.”

1. Probable Cause

As expressly required by the Fourth Amendment, a search warrant will be issued only when probable cause has been shown through a supporting oath or affirmation, and “particularly describing the place to be searched...” Kansas law provides similar protections:

[a] search warrant shall be issued only upon the oral or written statement, including those conveyed or received by electronic communication, of any person under oath or affirmation which states facts sufficient to show probable cause that a crime has been, is being or is about to be committed and which particularly describes a person, place or means of conveyance to be searched...

To satisfy this statute, any oral statement must be either recorded by a certified shorthand reporter or recorded before the magistrate.

When reviewing whether probable cause exists to justify the issuance of a search warrant, a judge will consider the totality of the circumstances and make a “practical, common-sense decision whether a crime has been committed or is being committed and whether there is a fair probability that contraband or evidence of a crime will be found in a particular place.” A government actor is said to have probable cause to

33. U.S. CONST. amend. IV.
34. KAN. STAT. ANN. § 22-2502(a) (2013).
35. Id.
36. Id.
conduct a search when “the facts available to [him or her] would ‘warrant a [person] of reasonable caution in the belief’ that contraband or evidence of the crime is present.”38 Furthermore, the Supreme Court has rejected “rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach.”39

Simply put, probable cause is established when a government actor demonstrates a fair probability that contraband or evidence of a crime will be found at the particular place to be searched.40 Sufficient information must be provided to show a “nexus between [the] suspected criminal activity and the place to be searched . . . .”41 Mere conclusive assertions, “unmoored from specific factual representations,” are not sufficient to establish probable cause.42 Finally, the information provided in the supporting oath or affirmation cannot be stale. “Stale information,” as the Kansas Supreme Court explained, “is information that no longer informs whether there is a fair probability that evidence of a crime will be found at a particular place because sufficient time has elapsed between when [the information was acquired] and when officers [have decided to] act on the information.”43

2. Anticipatory Warrants

An anticipatory warrant is a particular type of warrant that is “based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of crime will be located at a specified place. Most anticipatory warrants subject their execution to some condition precedent other than the mere passage of time—a so called ‘triggering condition.’”44 For example, such a warrant may provide that its execution is dependent upon the suspect individual taking criminal

40. United States v. Hendrix, 664 F.3d 1334, 1338 (10th Cir. 2011).
41. United States v. Barajas, 710 F.3d 1102, 1108 (10th Cir. 2013) (quoting United States v. Roach, 582 F.3d 1192, 1200 (10th Cir. 2010)).
42. Althaus, 305 P.3d at 725.
evidence into his or her home. The United States Supreme Court has provided that, to satisfy the probable cause requirement of the Fourth Amendment, anticipatory warrants must comply with two conditions: “[1] if the triggering condition occurs ‘there is a fair probability that contraband or evidence of a crime will be found in a particular place,’ [and] [2] there is probable cause to believe the triggering condition will occur.”

Thus, so long as the above conditions are met, anticipatory warrants are constitutionally permissible even though there is not yet probable cause.

3. Particularity Requirement

As explicitly noted in the text of the Fourth Amendment, the oath or affirmation must particularly describe the place to be searched. Particularity ensures that searches do not exceed their permitted scope. Furthermore, such a requirement “remains a vital guard against ‘wide-ranging exploratory searches,’ [and is] a promise that governmental searches will be ‘carefully tailored to [their] justifications.’”

Regarding the location to be searched, the description of the particular location in the search warrant must be “sufficient to enable the executing officer to locate and identify the premises with reasonable effort,” and there cannot be a “reasonable probability that another premise might be mistakenly searched.”

Regarding the thing to be seized, “there must be language in the warrant that creates a nexus between the suspected crime and the thing to be seized.”

4. Execution Requirements

A search warrant must be executed within 96 hours from the time it was issued. Within this time frame, the search warrant may be

45.  Id. at 96–97 (internal citations omitted).
46.  United States v. Rowland, 145 F.3d 1194, 1201 (10th Cir. 1998).
47.  U.S. CONST. amend. IV (stating that search warrants must “particularly describe the place to be searched, and the persons or things to be seized.”)
51.  Id.
52.  KAN. STAT. ANN. § 22-2506 (2014).
executed at “any time of any day or night,” though the timing of the execution must still be reasonable. Also, a search can only be executed within the judicial district where the issuing judge resides or has been assigned. When executing a search warrant, while officers may use “all necessary and reasonable force” to effect entry into a premise to be searched, as a general rule, officers must first “knock and announce” their identity and purpose before forcibly executing a search. There are, however, circumstances in which officers can forego this requirement:

In order to justify a ‘no-knock’ [forcible] entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.

C. Exceptions to the Search Warrant Requirement

Though searches conducted without a search warrant are per se unreasonable, Kansas courts have provided specific and “well-delineated” exceptions. Exceptions to the search warrant requirement include: consent, search incident to a lawful arrest, stop and frisk, probable cause to search with exigent circumstances, the emergency doctrine, inventory searches, plain view, and administrative searches of a closely regulated business.

53. Id. at § 22-2510.
54. See State v. Shively, 987 P.2d 1119, 1126 (Kan. Ct. App. 1999) (noting that K.S.A. 22-2510 does not provide a “blanket exception” to the requirement of reasonableness in executing a search warrant; the execution of a search warrant must still be within the confines of the Constitution).
56. Id. at § 22-2508.
57. United States v. Esser, 451 F.3d 1109, 1112 (10th Cir. 2006).
58. Id. (quoting Richards v. Wisconsin, 520 U.S. 385, 394 (1997)); see also Hudson v. Michigan, 547 U.S. 586, 590 (2006) (ruling that the police are required to have a reasonable suspicion that one of the above grounds for failing to knock and announce exists, but that the showing of reasonable suspicion is not high).
1. Consent

An exception to the search warrant requirement exists when an individual provides voluntary, knowing, and intelligent consent.\(^{61}\) Consent to search may be obtained by either the owner of the property or a third party who “possesses common authority” over the property.\(^{62}\) (An individual has common authority if they have joint access or control of the property such that it is reasonable to recognize that he or she has the right to permit a search and any co-inhabitants have “assumed the risk that [he or she] might permit [a] common area to be searched.”\(^{63}\)) Here, “[t]he State has the burden of establishing the . . . voluntariness of the [individual’s provided] consent to search.”\(^{64}\)

In Kansas, a court will determine the voluntariness of an individual’s consent (that is whether the consent was freely given) by looking at the totality of the circumstances.\(^{65}\) Particularly, the Kansas Supreme Court has held that, for consent to be valid there must be: “(1) ‘clear and positive testimony that [the] consent was unequivocal, specific, and freely given; and (2) the consent must have been given without duress or coercion, express or implied.’”\(^{66}\) The Tenth Circuit has similarly held that “voluntary consent” consists of two parts: “(1) the law enforcement officers must receive either express or implied consent, and (2) that consent must be freely and voluntarily given.”\(^{67}\) Again, courts look to the totality of the circumstances to determine whether the above conditions are met. The following considerations are relevant in determining whether purported consent was the product of coercion:

[any] 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 [or her] Miranda rights, obtains consent pursuant to a claim of lawful authority, or informs a defendant of his or her right to refuse

\(^{63}\) Id. at 310 (quoting United States v. Matlock, 415 U.S. 164, 171 (1974)).
\(^{64}\) Id. at 309 (quoting State v. Thompson, 166 P.3d 1015 (Kan. 2007)).
\(^{67}\) United States v. Jones, 701 F.3d 1300, 1317 (10th Cir. 2012).
consent also are factors to consider.68

The individual must first be informed of his or her rights for consent to be considered valid, as “simply submitting to lawful authority does not equate to consent.”69

Consent may be either express or implied for it to be voluntary.70 Implied consent is “no less valid than explicit consent.”71 Implied consent may be granted by an individual through “gestures or other indications of acquiescence, so long as they are sufficiently comprehensible to a reasonable officer.”72 The court should not focus on subjective consent, but rather whether a reasonable officer would believe there was consent.73 For example, in United States v. Lopez-Carillo, the Tenth Circuit held that a woman who spoke little English gave implied consent when she gestured to the officers to enter her home, conversed with an officer who spoke Spanish, did not object when the officers began conducting a search, and opened a door for the officers during the search.74

The scope of a search is limited by the scope of consent.75 Here too, “[t]he State has the burden of establishing the scope . . . of the consent to search.”76 However, the evidence is viewed in the “light most favorable to the government.”77 The scope of consent to search is determined by considering “what a reasonable person would have understood by the exchange between the defendant and police officer.”78 Importantly, “[a]
suspect may . . . delimit as he chooses the scope of the search to which he consents.”

“[T]he consenting party may limit the scope of [the] search, and hence at any moment may withdraw his consent.”

However, conversely, “failure to object to the continuation of the search . . . may be considered an indication that the search was within the scope of consent.”

2. Probable Cause Plus Exigent Circumstances

The probable cause plus exigent circumstances exception to the search warrant requirement “applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.”

The state bears the burden of proving that the search falls under this exception.

The exception requires that an officer have probable cause and that the situation present exigent circumstances.

To have probable cause, there must exist “a fair probability that the police will find evidence of a crime.” However, “no amount of probable cause can justify a warrantless search or seizure absent ‘exigent circumstances.’”

Whether a law enforcement officer was justified in acting in the absence of a warrant depends on the “totality of circumstances.” The United States Supreme Court uses a “careful case-by-case” approach to determine whether circumstances rose to the required level of exigency. Recognized exigent circumstances that justify warrantless entry may include, but are not limited to: entering to provide emergency aid to

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80. Manzanares v. Higdon, 575 F.3d 1135, 1143 (10th Cir. 2009) (quoting Painter v. Robertson, 185 F.3d 557, 567 (6th Cir. 1999)).
84. Id. (citing State v. Jefferson, 310 P.3d 331, 338 (Kan. 2013)).
86. McNeely, 133 S. Ct at 1559.
87. Id. at 1561.
someone inside, 89 pursuant to an immediate threat to officer safety, 90 in "hot pursuit" of a fleeing suspect, 91 "to put out a fire and investigate its cause," 92 and to prevent the imminent destruction of evidence of a serious crime. 93 While circumstances that present the requisite exigency to justify a warrantless search differ, "in each [situation] a warrantless search is potentially reasonable because 'there is a compelling need for official action and no time to secure a warrant.'" 94 Every case’s “alleged exigency” is evaluated “based ‘on its own facts and circumstances.’” 95

Kansas courts consider the Platten factors in determining whether the circumstances were sufficiently exigent:

(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. It is also recognized that the possible loss or destruction of evidence is a factor to be considered. 96

a. Emergency Aid

The Tenth Circuit has held that, under the “emergency aid” exigency exception, officers may enter a home without a warrant if “(1) the officers have an objectively reasonable basis to believe there is an

89. Id. at 1558.
92. McNeely, 133 S. Ct at 1559 (citing Tyler, 436 U.S. at 509–10).
93. Mongold, 528 F. App’x at 948; Rogers, 2014 WL 6977405, at *6.
94. McNeely, 133 S. Ct at 1559 (quoting Tyler, 436 U.S. at 509).
95. McNeely, 133 S. Ct. at 1559 (quoting Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931)).
immediate need to protect lives or safety of themselves or others, and (2) the manner and scope of the search is reasonable.” However, the Kansas Supreme Court views that first prong differently, stating, “the emergency aid exception must be seen as a limited exception permitting a warrantless search when: (1) law enforcement officers enter the premises with an objectively reasonable basis to believe someone inside is seriously injured or imminently threatened with serious injury...”

Recently, courts have upheld warrantless entry under the emergency aid doctrine when a man was seen lying on a couch unconscious, and when a 911 dispatcher informed officers that a woman inside was afraid she was in danger of serious harm. There is also a stand-alone officer safety exception. To meet the officer safety exigency exception, the state must establish that:

the law enforcement officers must have reasonable grounds to believe that there is immediate need to protect their lives or other or their property or that of others, (2) the search must not be motivated by an intent to arrest and seize evidence, and (3) there must be some reasonable basis, approaching probable cause, to associate an emergency with the area or place to be searched.

b. Hot Pursuit

The hot pursuit exigent circumstance exception requires an officer to have “probable cause to arrest a person in a public place and then to give chase to that person when the person attempts to evade the arrest by fleeing into a house or other place normally requiring a warrant.” The exception is triggered when a suspect moves from “a location unprotected by the Fourth Amendment to a protected location in a deliberate effort to evade arrest.” However, “hot pursuit does not hand

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97. United States v. Gordon, 741 F.3d 64, 70 (10th Cir. 2014) (citing United States v. Najar, 451 F.3d 710, 718 (10th Cir. 2006)); State v. Neighbors, 328 P.3d 1081, 1091 (Kan. 2014); see also United States v. Stewart, 528 F. App’x 879, 882 (10th Cir. 2013), cert. denied, 134 S. Ct. 497 (2013) (woman yelling “it hurts” inside along with man answering door in “agitated” state “created an objectively reasonable basis” for officers to enter).

98. Neighbors, 328 P.3d at 1091.

99. Id. at 1091–92.

100. Gordon, 741 F.3d at 70.

101. Mongold, 528 F. App’x at 951.

102. Id.


104. Dugan, 276 P.3d at 829.
law enforcement officers an automatic or per se exemption from the
constraints of the Fourth Amendment," and so ordinarily a misdemeanor
offense alone is not sufficient to support the exigency required for a
warrantless search. Recently, the Kansas Court of Appeals upheld the
hot pursuit exception when officers followed a suspected drunk driver
from his driveway into his home, noting that the "brevity of the chase did
not render it less of a 'hot pursuit.'"

c. Destruction of Evidence

The destruction of evidence exigency exception is triggered by an
officer’s reasonable belief that “there is a threat of imminent loss,
destruction, removal, or concealment of evidence.” A four-part test is
employed to determine whether the exception applies, requiring an
officer’s warrantless entry to 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 of exigency that are not subject to police
manipulation or abuse.

The Tenth Circuit recently noted that while “‘serious crime’ is not
well-defined . . . the Supreme Court explained that penalties are the best
indication of whether a crime is ‘serious.’” Despite the fact that the
Supreme Court has yet to set a bar for which penalties constitute a
serious crime, the Tenth Circuit held that “marijuana possession is not a
serious crime.” Thus, the destruction of evidence exigency exception

105. Id. at 830.
Santana, 427 U.S. 38, 96 (1976)).
(Kan. 2008)).
108. Mongold, 528 F. App’x at 949 (citing United States v. Aquino, 836 F.2d 1268, 1272 (10th
Cir. 1988)).
109. Id. at 949 (citing Illinois v. McArthur, 531 U.S. 326, 336 (2001); Welsh v. Wisconsin, 466
U.S. 740, 753 (1984)).
110. Id. at 949 (citing OKLA. STAT. tit. 63, § 2-402 (2012)) (noting that “Oklahoma considers
did not apply when an officer entered a home without a warrant after smelling marijuana during a “knock-and-talk” and becoming concerned “that the ‘scurrying and shuffling’ sounds he heard might indicate the destruction of evidence.”

**d. Intoxication**

In regards to other situational contexts that might satisfy the exigency requirement, the United States Supreme Court recently held “that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.”

The state of Missouri argued for a categorical rule permitting an officer with probable cause to believe a driver to be intoxicated to conduct a blood test, on the ground that blood alcohol content begins to dissipate upon absorption and continues to do so until elimination is complete. In declining to do so, the Court acknowledged that the exception will likely apply in many drunk-driving investigations, but refused to “depart from [its] careful case-by-case assessment of exigency.”

The Kansas Court of Appeals recently held that a traffic violation coupled with an injury alone “does not constitute probable cause that drugs or alcohol were involved in the accident.” Thus, the court went on to hold K.S.A. 8-1001(b)(2) “unconstitutional to the extent it requires a search and seizure absent probable cause” that the driver was “under the influence.”

**e. Police-Created Exigency**

Although the existence of probable cause along with exigent circumstances may justify a warrantless search, in Kansas the police-created exigency doctrine precludes application of the exception when “police conduct ‘created’ or ‘manufactured’ that exigency.” In *State v. Declerck*, 317 P.3d 794, 801–02 (Kan. Ct. App. 2014).

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111. *Id.* at 949, 947.
113. *Id.* at 1560.
114. *Id.* at 1561.
116. *Id.*
Campbell, an officer’s warrantless search could not be cured by the probable cause plus exigent circumstances exception because he “exceed[ed] the scope of a knock and talk” by “covering the peephole” to prevent the occupants from discovering that he was on officer.118 The Kansas Supreme Court instructed that an officer “is not entitled to take advantage of his unreasonable behavior in creating the exigency by using that entry to gain evidence he otherwise would not have gathered.”119

3. Automobiles and Vehicles

The vehicle exception to the search warrant requirement permits an officer with probable cause to believe a vehicle “contains contraband or evidence of a crime” to search the vehicle without a warrant.120 A vehicle’s mobility alone satisfies the exigency requirement, and thus an officer needs only probable cause, and not any additional exigent circumstances.121 The vehicle exception may apply to vehicles that are parked122 or even temporarily immobile by reason of repair needs.123

The smell of alcohol from a vehicle does not, by itself, provide probable cause to search the vehicle.124 The Kansas Supreme Court in State v. Stevenson held that because there are situations where an open container in a vehicle does not violate the Kansas open container statute (and therefore is not contraband or evidence of a crime), more is needed to provide the requisite probable cause for a warrantless search of a vehicle.125

118. Id. at 78–79.
119. Id. at 79.
121. Jefferson, 310 P.3d at 338.
122. State v. Lundquist, 286 P.3d 232, 236 (Kan. Ct. App. 2012) (citing California v. Carney, 471 U.S. 386, 393–94 (1985)) (“For purposes of the motor vehicle exception, a car is considered ‘readily mobile’ if it is operable, even though it may be parked at the time of the search.”).
123. United States v. Mercado, 307 F.3d 1226, 1229 (citing Pennsylvania v. Labron, 518 U.S. 938, 940 (1996)) (“[M]ere temporary immobility due to a readily repairable problem while at an open public repair shop does not remove the vehicle from the category of ‘readily mobile.’”).
124. Stevenson, 299 P.3d at 763 (noting that the odor of alcohol, presumed spilled in the car, only raised a reasonable suspicion and not probable cause).
125. Id. at 761–63.
A drug dog alert may supply the requisite probable cause to search a vehicle.126 For a drug dog alert to provide probable cause to search, the state must lay a foundation of the dog’s certification and training.127 In State v. Brewer, the defendant challenged the sufficiency of a drug dog alert as probable cause on the ground that the dog had a false positive rate of approximately 37%.128 The Kansas Court of Appeals joined a majority of courts that find “that it is immaterial to use a real world false positive rate to challenge a K–9’s reliability because a K–9 can detect residual odor even after drugs have been removed from a vehicle.”129 Because the state established that the dog was trained and certified, the court found the alert sufficed as probable cause.130

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

a. Terry Stops

A Terry131 stop permits an officer without probable cause to “detain a person to investigate suspected criminal behavior.”132 In Terry v. Ohio, the U.S. Supreme Court held that pursuant to a Terry stop, or investigatory stop, “police may stop and frisk a person if they have reasonable suspicion that the person is engaged in criminal activity and when officers have a reasonable belief the person poses a safety concern.”133 Terry’s holding is codified in K.S.A. 22-2402.134

127. Brewer, 305 P.3d at 683; see also Carleton, 2014 WL 2871344, at *1 (noting that the police dog must be properly certified).
134. KAN. STAT. ANN. § 22-2402 (2009). Section 22-2402 provides:
(1) Without making an arrest, a law enforcement officer may stop any person in a public place whom such officer reasonably suspects is committing, has committed or is about to commit a crime and may demand of the name, address of such suspect and an explanation of such suspect’s actions.
(2) When a law enforcement officer has stopped a person for questioning pursuant to this section and reasonably suspects that such officer’s personal safety requires it, such officer may frisk such person for firearms or other dangerous weapons. If the law enforcement officer finds a firearm or weapon, or other thing, the possession of which may be a crime or evidence of crime, such officer may take
“Reasonable suspicion” is satisfied more easily than the standard of probable cause, and may also be “established with less reliable information.”135 The totality of the circumstances analysis of whether reasonable suspicion is satisfied considers both the amount and the reliability of the information police possess.136 An anonymous tip can provide reasonable suspicion for a Terry stop,137 as can a suspect’s flight.138 However, while reasonable suspicion is a less demanding standard, the Kansas Supreme Court recently reaffirmed that an officer’s “hunch” that proves accurate cannot rise to reasonable suspicion.139

A Terry stop must be “(1) ‘justified at its inception,’ and (2) ‘reasonably related in scope to the circumstances which justified the interference in the first place.’”140 Because “[t]he stop and search are independent actions,” each must be justified independently.141 If the stop does not satisfy both elements, the seizure is an arrest and requires the support of probable cause.142 Officers may handcuff a suspect during a Terry stop without it becoming an arrest requiring probable cause so long as the use of handcuffs is reasonable under the circumstances.143 To frisk the stopped person, an officer must “reasonably believe [that the person] might be armed and dangerous.”144

and keep it until the completion of the questioning, at which time such officer shall either return it, if lawfully possessed, or arrest such person. Id.


136. Id.

137. United States v. Madrid, 713 F.3d 1251, 1258 (10th Cir. 2013) (citing United States v. Leos-Quijada, 107 F.3d 786, 792 (10th Cir. 1997)).


139. State v. Jones, 333 P.3d 886, 895 (citing Wardlow, 528 U.S. at 123 (2000)).


141. United States v. Rodriguez, 739 F.3d 481, 485 (10th Cir. 2013) (quoting United States v. Gatlin, 613 F.3d 374, 378 (3d Cir. 2010)).


143. Salas-Garcia, 698 F.3d at 1252.

A *Terry* stop “must be temporary and last no longer than is necessary to effectuate the purpose of the stop.” If reasonable suspicion is not confirmed, “[e]ven a very brief extension of the detention without consent or reasonable suspicion violates the Fourth Amendment.” Thus, an officer violates the Fourth Amendment by continuing to detain a person after realizing that the person is not the correct suspect. However, a *Terry* stop may continue “after the initial suspicion has dissipated[] if the additional detention is supported by [new] reasonable suspicion of criminal activity.” Thus, the reasonable suspicion required to detain a person does not have to be grounded in the same facts as the initial detention, but it nonetheless must exist via other facts.

b. Plain View and Plain Feel

Kansas recognizes the plain view doctrine as an exception to the search warrant requirement. An officer may seize evidence of a crime pursuant to the plain view exception if “(1) the initial intrusion which afforded authorities the plain view is lawful; (2) the discovery of the evidence is inadvertent; and (3) the incriminating character of the article is immediately apparent to searching authorities.” In *State v. Harris*, the Kansas Court of Appeals held that “inadvertency is no longer required.” The intrusion that initially places the officer in plain view of the evidence may be supported by a warrant or an exception to the search warrant requirement. Thus, when an officer conducts a search of a vehicle incident to the driver’s arrest for Driving Under the Influence (DUI) and happens to see a glass pipe in an unzipped makeup

145. United States v. Westhoven, 562 Fed. App’x 726, 732 (10th Cir. 2014); United States v. De La Cruz, 703 F.3d 1193, 1197 (10th Cir. 2013).
146. *De La Cruz*, 703 F.3d at 1197 (alteration in original) (quoting United States v. Burleson, 657 F.3d 1040, 1045 (10th Cir. 2011)).
147. *Id.* at 1198 (border agents violated the Fourth Amendment when they continued to detain De La Cruz after comparing his likeness to a photograph of the sought after suspect).
148. *Id.* at 1197 (alteration in original) (citing United States v. Soto-Cervantes, 138 F.3d 1319, 1322 (10th Cir. 1998)).
149. *Id.* (citing *Soto-Cervantes*, 138 F.3d 1319, 1322 (10th Cir. 1998)).
151. *Id.*
152. *Id.* (citing Horton v. California, 496 U.S. 128 (1990)).
bag, the plain view doctrine permits him to seize the pipe.\textsuperscript{154}

The Kansas Supreme Court adopted the plain feel exception to the search warrant requirement in \textit{State v. Wonders}.\textsuperscript{155} The elements that must be satisfied for the plain feel exception to apply are identical to those of plain sight, except officers must readily feel the incriminating nature of the object while conducting a lawful pat down search rather than view the object.\textsuperscript{156}

c. Protective Sweeps of Premises

An officer without a warrant or probable cause may also conduct “a quick and limited search of [a] premises, incident to an arrest and to protect the safety of police officers or others.”\textsuperscript{157} However, the scope of the search is limited to “a cursory visual inspection of those places in which a person might be hiding.”\textsuperscript{158} The U.S. Supreme Court instructed that the sweeps cannot last longer than needed to dispel the “suspicion of danger,” which will always be shorter than the time necessary to “complete the arrest” and leave.\textsuperscript{159}

d. Search Incident to a Lawful Arrest

An officer may also act without a warrant pursuant to the search incident to a lawful arrest exception,\textsuperscript{160} which stems from the officer-safety and preservation-of-evidence concerns often accompanying arrests.\textsuperscript{161} The scope of the search is confined to “the arrestee’s person and the area ‘within his immediate control,’” which is defined as the area from which he could obtain a weapon.\textsuperscript{162} If the arrestee could not reach

\textsuperscript{154} \textit{Id.} at 28–29.
\textsuperscript{155} \textit{State v. Wonders}, 952 P.2d 1351, 1359 (Kan. 1998).
\textsuperscript{157} \textit{State v. Johnson}, 856 P.2d 134, 143 (Kan. 1993); \textit{accord United States v. Denson}, 775 F.3d 1214, 1219 (10th Cir. 2014).
\textsuperscript{158} \textit{Johnson}, 856 P.2d at 143 (citing Maryland v. Buie, 494 U.S. 325, 327 (1990)).
\textsuperscript{159} \textit{Buie}, 494 U.S. at 335–36.
\textsuperscript{162} \textit{Gant}, 556 U.S. at 339 (quoting \textit{Chimel v. California}, 395 U.S. 752, 763 (1969)).
the area the officer wants to search, then the exception cannot apply.\(^{163}\)

When a vehicle occupant is arrested, an officer may only search the vehicle if “(1) the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or (2) it is ‘reasonable to believe’ evidence relevant to the crime of arrest might be found in the vehicle.”\(^{164}\) In *Arizona v. Gant*, the U.S. Supreme Court found that the exception did not apply because the arrestee was not near the vehicle and the arrest was for driving with a suspended license, making it unreasonable to believe that evidence relating to the crime would be found in the vehicle—unlike prior cases involving drug arrests.\(^{165}\) In *State v. Ewertz*, the Kansas Court of Appeals considered the validity of a search incident to a lawful arrest for DUI, and asserted that “[w]hether it was ‘reasonable to believe’ evidence relevant to the crime of [DUI] might be found in Ewertz’s vehicle” depends upon the interpretation of *Gant*’s “reasonable to believe” standard.\(^{166}\) The *Ewertz* court explained that while some courts have interpreted the standard to mean that certain offenses will never provide reasonable belief and others always will,\(^{167}\) other courts equate the standard with reasonable suspicion.\(^{168}\) Noting that the Kansas Supreme Court has yet to interpret *Gant*’s “reasonable to believe” standard, the court found it unnecessary to choose between the two existing interpretations because the officer’s search would survive either standard.\(^{169}\) Thus, in Kansas, it remains unclear which reasonableness interpretation governs.

The United States Supreme Court recently held that the search incident to arrest exception does not apply to cell phones.\(^{170}\) The Court reasoned that this was in part due to the massive amounts of private information stored on cell phones.\(^{171}\) The Court noted, however, that warrantless searches on cell phones could still be available under other

\(^{163}\) Id. (citing Preston v. United States, 376 U.S. 364, 367–68 (1964)).

\(^{164}\) *Ewertz*, 305 P.3d at 26 (quoting *Gant*, 556 U.S. at 343–44).

\(^{165}\) Id. (citing *Gant*, 556 U.S. at 344).

\(^{166}\) Id.

\(^{167}\) Id. at 26–27 (citing People v. Nottoli, 130 Cal. Rptr. 3d 884, 902 (Cal. Ct. App. 2011); *State v. Cantrell*, 233 P.3d 178, 184–85 (Iowa Ct. App. 2010)).

\(^{168}\) Id. at 27 (citing United States v. Taylor, 49 A.3d 818, 822–24 (D.C. 2012); People v. Chamberlain, 229 P.3d 1054, 1057 (Colo. 2010); People v. Evans, 133 Cal. Rptr. 3d 323, 334–37 (Cal. Ct. App. 2011)).

\(^{169}\) Id. at 27–28.


\(^{171}\) Id. at 2490.
exigent circumstances exceptions. 172

c. Inventory Searches After Arrest

Another exception to the search warrant requirement is the inventory search after arrest, 173 the purpose of which is “to protect an owner’s property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger.” 174 An inventory search must be “conducted according to standardized procedures,” and cannot be used as a pretext to dig for incriminating evidence. 175 In United States v. Sitlington, the Tenth Circuit noted that while it had yet to determine whether an inventory search log “that lacks sufficient detail” violates the Fourth Amendment, other circuits are split on the issue. 176 The court found it unnecessary to answer the question because it found that Defendant’s “rifle would have been inevitably discovered in a properly-conducted inventory search.” 177

d. Administrative Searches of Closely Regulated Industries

Warrantless administrative searches of pervasively regulated businesses constitute another exception to the search warrant requirement. 178 The rationale behind the exception is that “[c]ertain industries hav[ing] such a history of government oversight” have a

172. Id. at 2494.
175. United States v. Haro-Salcedo, 107 F.3d 769, 772 (10th Cir. 1997) (citing Bertine, 479 U.S. at 377 (Marshall, J., concurring); Florida v. Wells, 495 U.S. 1, 4 (1990)).
176. United States v. Sitlington, 527 F. App’x 788, 792 (10th Cir. 2013) (unpublished decision) (citing United States v. Kindle, 293 F. App’x 497, 500 (9th Cir. 2008) (“[U]nder the totality of the circumstances . . . an incomplete inventory list does not establish that the inventory was subterfuge for an unconstitutional investigatory search.”); United States v. Lopez, 547 F.3d 364, 371 (2d Cir. 2008) (“The concept of an inventory does not demand the separate itemization of every single object.”); United States v. Rowland, 341 F.3d 774, 780–82 (8th Cir. 2003) (holding that an inventory search was invalid when law enforcement failed to follow standardized procedures and searched the vehicle for only incriminating evidence)).
177. Id.
reduced expectation of privacy, and thus the government’s heightened interest in regulating the industry may make a warrantless search reasonable.\textsuperscript{179} Searches pursuant to the exception are permissible only when (1) “there is a ‘substantial’ government interest that informs the regulator scheme pursuant to which the inspection is made,” (2) the search is “necessary to further [the] regulatory scheme,” and (3) “the statute’s inspection program, in terms of the certainty and regularity of its application, [provides] a constitutionally adequate substitute for a warrant.”\textsuperscript{180} A search pursuant to this exception “must be ‘carefully limited in time, place, and scope.’”\textsuperscript{181}

D. The Exclusionary Rule

1. General Exclusion of Evidence from Illegal Searches

The exclusionary rule was judicially created to redress unconstitutional searches.\textsuperscript{182} The rule serves to “safeguard Fourth Amendment rights” by excluding evidence from criminal prosecutions that was obtained in an illegal search.\textsuperscript{183} While Kansas recognizes the exclusionary rule, neither the Fourth Amendment nor the Kansas Constitution prohibits the introduction of evidence obtained in unlawful searches.\textsuperscript{184} Thus the exclusionary rule is not a personal right; its purpose is to “protect Fourth Amendment rights through deterrence.”\textsuperscript{185}

Because the application of the exclusionary rule could preclude the conviction of a guilty person, there must be a cost-benefit analysis to determine whether illegally obtained evidence should be subject to the rule.\textsuperscript{186} The rule’s application should be “restricted to those situations in which its remedial purpose is effectively advanced.”\textsuperscript{187}

\textsuperscript{180} Marsh, 823 P.2d at 827 (citing Burger, 482 U.S. at 702–03).
\textsuperscript{181} Id. at 828.
\textsuperscript{183} Id.
\textsuperscript{184} Id.
\textsuperscript{185} Daniel, 242 P.3d at 1190.
\textsuperscript{186} Pettay, 326 P.3d at 1043.
\textsuperscript{187} Id. (citing Daniel, 242 P.3d at 1188).
2. Good Faith Exception

Kansas recognizes the good faith exception to the exclusionary rule, which permits the introduction of evidence obtained in violation of the Fourth Amendment if “officers relied in good faith on a signed warrant in conducting a search.” The exception encourages officers to obtain warrants “by affording them greater protection for doing so,” thereby discouraging warrantless searches. Additionally, excluding evidence obtained pursuant to a warrant would not further the exclusionary rule’s purpose because judges do not purposely offend the Fourth Amendment.

The good faith exception cannot apply where:

1. the judicial officer issuing the warrant has been misled by information the author of the affidavit knew or should have known to be false;
2. the judicial officer has ‘wholly abandoned’ the role of a detached and neutral official and has merely rubberstamped the request for a warrant;
3. the affidavit is ‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable’; or
4. the warrant itself is patently deficient, for example, in describing with particularity the place to be searched or the items to be seized.

The exception “presumes a ‘well trained’ officer who has knowledge of the Fourth Amendment’s general prohibitions and is able to “recognize an obviously deficient warrant.” Because good faith is measured [from] a “reasonable” officer’s perspective, an officer ignorant of basic Fourth Amendment requirements cannot utilize the exception simply “because he subjectively believes” the obviously deficient warrant is valid. However, “[t]he threshold to avoid the . . . good faith

189. Id. (citing Leon, 468 U.S. at 913–14, 920–21).
190. Id. (citing Leon, 468 U.S. at 916–17).
191. Id. (quoting Leon, 468 U.S. at 923); accord State v. Powell, 325 P.3d 1162, 1170 (Kan. 2014) (“Leon applies in Kansas without modification.”).
192. Althaus, 305 P.3d at 724 (citing Leon, 468 U.S. at 919 n. 20, 923; United States v. Gonzales, 399 F.3d 1225, 1230 (10th Cir. 2005); United States v. Roach, 582 F.3d 1192, 1204 (10th Cir. 2009)).
3. Inevitable Discovery

The inevitable discovery exception allows unconstitutionally obtained evidence to be admitted “if it ultimately or inevitably would have been discovered by lawful means.” The State has the burden of proving by a preponderance of the evidence that the unconstitutionally seized evidence would have been discovered during the officer’s investigation even in the absence of the Fourth Amendment violation. Discovery of the unlawfully seized evidence must occur by means “independent of the police conduct tainting the evidence in the first instance.”

4. Knock-and-Announce General Rule and No-Knock Entry

Kansas recognizes the general rule that before entering a dwelling, officers “must knock on the door and announce their identity and purpose.” To execute a no-knock warrant, officers “must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.” The United States Supreme Court held that violations of the knock-and-announce rule do not warrant application of the exclusionary rule. The rationale for not applying the exclusionary rule to knock-and-announce violations is that the rule “has never protected an individual’s interest in preventing the government from seeing or taking evidence described in a warrant,” and thus the rule is unrelated to the seizure of evidence.

194. Powell, 325 P.3d at 1171.
196. Christy, 739 F.3d at 534; Beltran, 300 P.3d at 98.
197. Beltran, 300 P.3d at 104 (citing Murray v. United States, 487 U.S. 533, 539 (1988); Murray, 487 U.S. at 544–45 (Marshall, J., dissenting); United States v. Jackson, 596 F.3d 236, 241 (5th Cir. 2010)).
199. Id. at 263 (citing Richards v. Wisconsin, 520 U.S. 385, 386 (1997)).
E. Search of Open Fields, Trash and Curtilage

Generally, police officers and government agents need a warrant to search a person’s home.202 Outside the home, or in the “open fields,” police do not need a warrant to perform a search because the Fourth Amendment’s protections do not extend to these areas.203 However, the same protections that apply to a house also apply to a home’s “curtilage”—the area outside the home that is “so intimately tied to the home itself that it should be placed under the home’s ‘umbrella’ of Fourth Amendment protection.”204 The United States Supreme Court identified four factors to help lower courts differentiate between curtilage and open fields: (1) the proximity of the area to the home; (2) whether the area is within an enclosure surrounding the home; (3) the nature and uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by passerby.205

In Florida v. Jardines, the Supreme Court clarified its definition of curtilage. In Jardines, police used a drug-sniffing dog to investigate a suspect’s porch.206 The Court reiterated its general definition of curtilage as the area immediately surrounding and associated with the home.207 The Court held that the use of the dog was a search under the Fourth Amendment because the porch was part of the home’s curtilage.208 Therefore, the porch was given the same Fourth Amendment protections as the inside of the home.209

In contrast to curtilage, searches in open fields are not subject to Fourth Amendment scrutiny.210 Observations made from public roads are equivalent to searches of open fields and therefore are not subject to Fourth Amendment analysis.211 In State v. Ibrahim, the Kansas Court of

204. Id. at 301.
205. Id.
207. Id. at 1414.
208. Id. at 1415.
209. Id.
Appeals held that officers did not violate the Fourth Amendment by taking photographs of endangered horses from a public road. The Court of Appeals also held that the officers’ inspections of the horses on the defendant’s property did not violate the Fourth Amendment because the inspections took place in an open field. In State v. Jones, which also involved photographs of horses in an open field, the Court held that the Fourth Amendment was not violated when officers accessed the field via an access road, but no gate or fence prevented public access to the field in question.

In State v. Talkington, the Kansas Court of Appeals reversed the district court’s ruling and held that, based on the Dunn factors, police did not violate the Fourth Amendment by conducting a warrantless search in the defendant’s backyard. The police in Talkington entered the backyard, searched a bag that was three to four feet from the house, and arrested the defendant after finding a substance that appeared to be methamphetamine in the bag. The proximity factor weighed in favor of the defendant, but the backyard was surrounded only by “remnants of a chain-link fence” and a few rocks, leading the court to conclude that the area was not within an enclosure surrounding the home. Additionally, the court found that the defendant had taken few steps to protect the area from observation, and therefore the factors weighed in favor of the state.

Police officers may conduct some investigatory activities within a home’s curtilage without reasonable suspicion. When officers have a “knock and talk” purpose, they can enter that part of the curtilage that is within the “normal route of access” to the home. For example, as long as officers use a route that normal visitors would use, the officers can walk to the front door of the house and knock even if that area is part of the curtilage. If police use a normal route of access, they can also use what they smell to form the basis for probable cause. Additionally, a

212. Id. at 17.
213. Id.
216. Id.
217. Id.
219. Id. at 568.
220. Id.
221. Id.; see also United States v. McDowell, 713 F.3d 571, 574 (10th Cir. 2013) (finding no Fourth Amendment violation when an officer smelled marijuana while standing in the defendant’s
“knock and talk” conducted in an area of the curtilage is not a Fourth Amendment violation despite the interaction occurring in the midnight hour.\textsuperscript{222}

\textbf{F. Standing to Object to Search}

1. Generally

To object to a search on Fourth Amendment grounds, a defendant must establish standing as a threshold matter.\textsuperscript{223} In \textit{Rakas v. Illinois}, the United States Supreme Court held that a defendant must have a reasonable expectation of privacy—either a proprietary or lawful possessory interest in the area searched—to satisfy the standing requirement.\textsuperscript{224} The Supreme Court of Kansas has applied the same analysis and held that defendants who do not assert a possessory or proprietary interest in the area searched lack standing.\textsuperscript{225}

A defendant’s possessory interest must be lawful to satisfy the standing requirement.\textsuperscript{226} The Tenth Circuit Court of Appeals held in \textit{United States v. Wilfong} that the defendant had no standing to challenge the search of a car he stole because the defendant did not have lawful possession of the car.\textsuperscript{227} Although the defendant had possession of the car, his possession was not lawful and therefore he had no “legitimate expectation of privacy.”\textsuperscript{228}

Although a defendant may lack standing to challenge the search of a general area—such as a car or house—a defendant may have standing to

driveway).

\textsuperscript{223} Rakas v. Illinois, 439 U.S. 128, 139 (1978) (stating that the standing requirement is subsumed under the substantive Fourth Amendment doctrine).
\textsuperscript{224} Id. at 134–52.
\textsuperscript{225} State v. Gilbert, 254 P.3d 1271, 1275 (Kan. 2011) (denying defendant’s argument that a defendant with nonpossessory interest can satisfy standing requirement).
\textsuperscript{226} United States v. Worthon, 520 F.3d 1173, 1183 (10th Cir. 2008) (citing Rakas, 439 U.S. at 143).
\textsuperscript{227} United States v. Wilfong, 528 F. App’x 814, 817 (10th Cir. 2013).
\textsuperscript{228} Id.
challenge the search of personal belongings in that area. A defendant who does not establish a connection between herself and the owner of a car that the defendant is driving does not have standing to object to a search of the car. However, the defendant may have standing to object to the search of a bag in the car if she can demonstrate a legitimate possessory or proprietary interest in that bag.

A defendant may establish standing to challenge the search of a letter or package by demonstrating a possessory interest in the package. Although the defendant’s name may not be on the package, the defendant has standing to challenge the search of the package if the defendant has a possessory interest in it. By placing the package in his car or another area where he has a reasonable expectation of privacy, the defendant demonstrates a possessory interest in the package regardless of to whom the package is addressed.

2. Search of Third Parties

To establish standing to challenge the search of a vehicle, a passenger must demonstrate a legitimate possessory or proprietary interest. If the passenger does not have standing to challenge the search of the vehicle, the passenger can challenge the basis for the stop of the vehicle. In United States v. Osorio-Torres, the United States District Court for the District of Kansas held that although the defendant did not have standing to challenge the car’s search, he could challenge the initial seizure of the car because, as a passenger, the defendant had been seized. In State v. Martynowicz, the defendant passenger twice told police officers that she did not own the vehicle, therefore failing to assert a legitimate possessory or proprietary interest. Although the

229. Worthon, 520 F.3d at 1182 (10th Cir. 2008).
231. Id.
233. Id. at 13.
234. Id. at 14.
defendant lacked standing to challenge the vehicle’s search, the court held that she could challenge the initial seizure.239

G. Technology & Searches

1. Wiretapping

The use of wiretapping in criminal investigations is regulated by the Omnibus Crime Control and Safe Streets Act of 1968.240 The Act requires investigators to apply for a judicial order to use wiretaps.241 Among other elements, the application must contain a “full and complete statement” whether “other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.”242 Additionally, the court issuing the wiretap order must find that “normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.”243 These elements form the basis of the necessity requirement of § 2518.244

To meet the necessity requirement, applicants must provide information that is sufficiently detailed to establish that normal investigative procedures will not suffice.245 However, courts will tolerate some boilerplate language in the application, and the government is not required to exhaust all normal investigative procedures.246 Courts will also extend a wiretap order upon a showing of necessity even if the first order successfully reveals information.247 Once a judge authorizes a wiretap, a presumption arises that the order is proper and the defendant

239. Id.
245. Id. at *2.
246. Id.
has the burden to prove otherwise.\cite{248}

A court may find that the necessity requirement is still met although the government includes some generalized or conclusory language in its wiretap application.\cite{249} In \textit{United States v. McDowell}, the Tenth Circuit held that the government met the necessity requirement even though some statements in the wiretap application were generalized.\cite{250} The court held that the statements, which expressed that a law enforcement officer knew certain facts based on “training and experience,” could be given weight by the district court in determining whether the necessity requirement is met.\cite{251}

In addition to the showing of necessity, the federal wiretap statute also limits the submission of wiretap applications to “the principal prosecuting attorney” of a state or a political subdivision of the state.\cite{252} The Kansas wiretap statute does not place a similar restriction on wiretap applicants.\cite{253} However, the Kansas Supreme Court has held that the federal wiretap statute preempts the Kansas wiretap statute on the submission issue.\cite{254} In \textit{State v. Bruce}, the Kansas Attorney General delegated the submission of a wiretap application to an assistant attorney general.\cite{255} The Kansas Supreme Court held that the delegation violated the federal statute’s submission limitation, and that because the limitation was a “central provision” of the statute, the evidence gained from the wiretap must be suppressed.\cite{256} However, a wiretap application is not fatally flawed if the wiretap application relies on information from a pen register or trap and trace device obtained by an assistant attorney general.\cite{257} A defendant must present evidence such as the wiretap application or other reason to believe the wiretap application was improperly authorized.\cite{258}

\begin{itemize}
\item 248. \textit{Id. at *1}.
\item 249. \textit{Id.}
\item 250. \textit{Id.}
\item 251. \textit{Id.}
\item 252. 18 U.S.C. § 2516(2).
\item 253. \textit{See id.; State v. Bruce, 287 P.3d 919, 924 (Kan. 2012)}.
\item 254. \textit{Bruce, 287 P.3d at 924}.
\item 255. \textit{Id. at 920}.
\item 256. \textit{Id. at 924–27}.
\item 258. \textit{Id.}
\end{itemize}
2. Electronic Surveillance

The Tenth Circuit in *United States v. Wilfong*\(^{259}\) recently considered the applicability of the trespassory rule from *United States v. Jones*, which analyzes whether the government physically intrudes into a constitutionally protected area for the purpose of determining what constitutes a search.\(^{260}\) In *Jones*, the Supreme Court held that it would use both the “reasonable expectation of privacy” test announced in *Katz v. United States*\(^ {261}\) and the trespassory test to evaluate the existence of searches within the electronic surveillance context.\(^{262}\) In *Wilfong*, the government placed a GPS tracking device on the defendant’s car after learning that the defendant had an outstanding arrest warrant and had recently stolen a car.\(^ {263}\) The defendant argued that the *Jones* trespassory test applied and made the use of the tracker a search.\(^ {264}\) The court disagreed, holding that the *Jones* test did not apply to the facts of the case.\(^ {265}\) Whereas the government in *Jones* used the tracker to investigate criminal activity, the government in *Wilfong* used the tracker to find and arrest the defendant.\(^ {266}\) The court found this distinction made the situation in *Wilfong* look much more like exigent circumstances, and therefore the *Jones* test did not apply to the government’s conduct.\(^ {267}\)

In *United States v. Wells*, the Tenth Circuit interpreted the reasonable expectation of privacy test.\(^ {268}\) The government in *Wells* recorded conversations in a motel room involving a defendant suspected of conspiring to steal public funds.\(^ {269}\) The court held that because the defendant was in the room for only about 15 minutes, he had no socially

\(^{259}\) *United States v. Wilfong*, 528 F. App’x 814, 819 (10th Cir. 2013).


\(^{262}\) *Id.* at 952 (“The Katz reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test.”).

\(^{263}\) *Id.* at 815.

\(^{264}\) *Id.* at 816.

\(^{265}\) *Id.* at 819.

\(^{266}\) *Id.* (“The placement of the GPS was not to obtain information connecting him to a crime but to find and arrest him.”).

\(^{267}\) *Id.*

\(^{268}\) *United States v. Wells*, 739 F.3d 511, 524–25 (10th Cir. 2014).

\(^{269}\) *Id.* at 514–15.
meaningful connection to the room, and therefore lacked any reasonable expectation of privacy. Without a reasonable expectation of privacy, the use of electronic surveillance alone did not make the government’s conduct unreasonable. The court found that ruling for the defendant on this basis would require a rule of exclusion for electronic surveillance without limitation.

In *United States v. Banks*, the District Court for the District of Kansas considered whether the court must suppress text message evidence because investigators intercepted them pursuant to orders authorizing interception of wire communications only, not electronic communications. Text messages constitute electronic communications and not wire communication because they involve no aural transfer. The Tenth Circuit has not decided whether individuals have a legitimate expectation of privacy in text messages, but other circuits and district courts have. The government, therefore, had the burden to prove that the search was reasonable under the good faith exception to the warrant requirement. The court ultimately held that the judge who issued the order and the executing officers both understood the intended scope of the wiretap authorization to include interception of text messages, which fell within the good faith exception.

The District Court for the District of Kansas considered whether the good faith exception to the exclusionary rule applied in the context of electronic surveillance from GPS tracking in *United States v. Mitchell*. In *Mitchell*, police attached a GPS device to the defendant’s vehicle without a search warrant. The defendant filed a motion to suppress evidence obtained from the GPS device because police did not have probable cause to attach the GPS and if they did, they were still required to obtain a warrant before attaching the GPS. The defendant also

270. *Id.* at 524.
271. *Id.* at 524–25.
272. *Id.*
275. *Id.* at *3.
276. *Id.*
277. *Id.* at *5.
279. *Id.*
280. *Id.* at *2.
argued that the good faith exception to the exclusionary rule should not apply because the Tenth Circuit had not decided the issue\(^ {281}\) and a split of authority existed among other circuits.\(^ {282}\) The court concluded the good faith exception did apply because at the time officers attached the GPS device to the defendant’s vehicle, the majority of federal circuit courts of appeals had found that attaching a GPS device to a vehicle was not a search under the Fourth Amendment and did not require a warrant.\(^ {283}\) Where there was no binding precedent, the court concluded police could reasonably believe that placing a GPS device on the outside of a defendant’s vehicle did not violate the Fourth Amendment.\(^ {284}\) The officers’ actions were not a deliberate attempt to ignore the law, but rather a good faith effort to comply with the law as it existed at the time.\(^ {285}\)

In *United States v. Dahda*, the District Court for the District of Kansas considered whether wiretap orders were facially invalid under the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2516 et seq., when the court permitted interception outside of the issuing jurisdiction and if so, whether evidence obtained under such orders must be suppressed.\(^ {286}\) The case was a drug conspiracy where the court issued orders authorizing the government to intercept communications on targeted cellular telephones.\(^ {287}\) The orders stated that “in the event [the target telephones] are transported outside the territorial jurisdiction of the court, interception may take place in any jurisdiction within the United States.”\(^ {288}\) The tapped phones went outside of Kansas – the issuing jurisdiction – and the government monitored communication from a

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\(^ {281}\) In *United States v. Barajas*, the Tenth Circuit considered the good-faith exception when the government had not requested GPS tracking in its affidavit, but the order also granted authorization for GPS data. 710 F.3d 1102 (10th Cir. 2013). The court held that because the law was “very much unsettled” on whether a wiretap order could authorize the collection of GPS data, the government agents were not required to know whether the affidavit was proper. *Id.* The good-faith exception permitted the government to obtain the GPS information even if the affidavit was defective. *Id.*

\(^ {282}\) *Id.*

\(^ {283}\) *Id.* at *4.

\(^ {284}\) *Id.* at *5.

\(^ {285}\) *Id.*


\(^ {287}\) *Id.* at *5–6.

\(^ {288}\) *Id.* at *6.*
listening post in Kansas. The defendant moved to have the recorded telephone calls suppressed from evidence because the order did not explicitly require the government to maintain a listening post in Kansas when the telephones left the state, which exceeded the court’s territorial jurisdiction. The court held that the evidence obtained under the wiretap orders should not be suppressed because the silence of the legislative history on the matter and the overall purpose of the act for privacy and prevention of unauthorized surveillance were not implicated. The court noted that because cellular phones are likely to be carried out of the issuing district given their mobility, the requirement to obtain a wiretap order from the district in which the listening post was located would complicate law enforcement “even though that location is entirely fortuitous from the standing of the criminal investigation.”

3. Chemical Drug Tests

Both the legislature and the courts have recently revisited the Kansas statute regulating the administration of drug and alcohol tests and refusal to submit to such tests. The amended statute provides that once a driver enters a vehicle, the driver impliedly consents to drug and alcohol testing, including tests of “blood, breath, urine or other bodily substance.” This is known as the implied consent provision. The statute also allows criminal penalties for refusal to submit to testing.

Although drivers under K.S.A. § 8-1001(a) consent to testing, officers may request testing only under certain circumstances. To request testing, an officer must have “reasonable grounds to believe” that the driver was operating or attempting to operate a motor vehicle under the influence of drugs or alcohol. Additionally, the driver must be

289. Id. at *8.
290. Id. at *6–7.
291. Id. at *17–18.
292. Id. at *11.
293. KAN. STAT. ANN. § 8-1001(a) (year).
295. KAN. STAT. ANN. § 8-1025.
296. Id. § 8-1001(b).
297. Id. (requiring that “the officer has reasonable grounds to believe the person was operating or attempting to operate a vehicle while under the influence of alcohol or drugs, or both, or to believe that the person was driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person’s system, or was under the age of 21 years and was operating or attempting to operate a vehicle while having alcohol or other drugs in such person’s system”).
arrested (for any violation of any statute), or be involved in an automobile accident causing property damage or non-serious personal injury, or be involved in an accident causing serious physical injury or death and be subject to a traffic citation. The statute states that in accidents causing serious injury or death, a traffic citation provides probable cause for testing. The Kansas Court of Appeals revisited its holding that the “reasonable grounds to believe” requirement equates to probable cause in Canas-Carrasco v. Kansas Department of Revenue. To establish “reasonable grounds to believe” the driver is intoxicated for testing purposes, the Kansas Supreme Court previously interpreted K.S.A. § 8-1001(b)(2) to mean that probable cause to arrest is the reasonable belief, drawn from the totality of information and reasonable inferences available to the arresting officer, that the defendant has committed or is committing a specific crime. In Canas-Carrasco, the Kansas Court of Appeals considered whether the arresting officer had reasonable grounds to believe Canas-Carrasco had operated a vehicle under the influence of alcohol such that he could be taken into custody for evidentiary testing with the Intoxilyzer. The court concluded that the fact that Canas-Carrasco failed the PBT constituted reasonable grounds for the officer to arrest him for DUI under K.S.A. § 8-1012(d). The court also stated

298. Id.
299. Id.
301. Sloop v. Kan. Dep’t of Revenue, 290 P.3d 555, 559 (Kan. 2012) (concluding that an officer does not have reasonable grounds to believe that a person is driving under the influence just because he was stopped early in the morning, smelled of alcohol, had watery and bloodshot eyes, and admitted to drinking a beer. Other factors must exist for an officer to have reasonable grounds to believe a person is driving under the influence). Compare Campbell v. Kan. Dep’t of Revenue, 962 P.2d 1150, 1151 (Kan. Ct. App. 1998) (concluding an officer had probable cause to arrest a motorist for DUI when the officer saw the driver commit a traffic violation, the violation occurred early in the morning, the driver smelled of alcohol, the driver admitted to drinking, and the driver’s eyes were bloodshot).
303. Id. at *11. See KAN. STAT. ANN. § 8-1012(d) ("[L]aw enforcement officer may arrest a person based in whole or in part upon the results of a preliminary screening test.").
the arresting officer had reasonable grounds to believe that Canas-Carrasco had committed a DUI notwithstanding the PBT because of a variety of factors: video of a dash cam showing he ran a red light, watery and bloodshot eyes, the smell of alcohol, slurred words, slow movement, fumbling to retrieve his license and insurance, and admitting that he had been drinking.\textsuperscript{304}

In \textit{State v. Declerck}, the Kansas Court of Appeals considered the constitutionality of two provisions of K.S.A. § 8-1001.\textsuperscript{305} First, the court considered § 8-1001(b)(2), which provides that officers have probable cause to arrest when a driver is involved in an automobile accident resulting in serious injury or death and the driver is given a traffic citation.\textsuperscript{306} The court held that “K.S.A. 2011 Supp. 8–1001(b)(2) is unconstitutional to the extent it requires a search and seizure absent probable cause the person was operating or attempting to operate a vehicle under the influence of drugs or alcohol.”\textsuperscript{307} Second, the court held that the implied consent provision was unconstitutional as applied to the case.\textsuperscript{308} The court held that the implied consent provision, standing alone, could not provide the basis for an exception to the warrant requirement.\textsuperscript{309}

The Kansas Court of Appeals considered whether an act was sufficient to rescind a refusal to take a blood test under KSA § 8-1001.\textsuperscript{310} In \textit{Hammerschmidt v. Kansas Department of Revenue}, Hammerschmidt’s driver’s license was suspended after he refused to consent to a blood test following his arrest for driving under the influence.\textsuperscript{311} He was involved in a single-vehicle accident and taken to the hospital after sustaining injury.\textsuperscript{312} He initially refused to submit to a blood alcohol test and later

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{304} \textit{Canas-Carrasco}, No. 111,814, 2014 Kan. App. LEXIS 1076, at *11.
  \item \textsuperscript{306} KAN. STAT. ANN. § 8-1001(b)(2); \textit{Declerck}, 2014 WL 497511, at *6–8.
  \item \textsuperscript{307} \textit{Declerck}, 2014 WL 497511, at *8.
  \item \textsuperscript{308} Id. at *10.
  \item \textsuperscript{309} Id.
  \item \textsuperscript{310} See KAN. STAT. ANN. § 8-1001; see Standish v. Dep’t of Revenue, 683 P.2d 1276, 1280 (Kan. 1984) (holding an initial refusal may be changed or rescinded, and if rescinded in accordance with the following rules, it will cure prior refusal. To be effective, subsequent consent must: (1) be made within a very short and reasonable time after prior refusal; (2) maintain accuracy upon subsequent consent; (3) equipment must be readily available; (4) not be substantially inconvenient or expensive to the police to administer the request; and (5) be in the custody of the arresting officer and under observation for the whole time.).
  \item \textsuperscript{312} Id. at *2.
\end{itemize}
\end{footnotesize}
agreed to a blood draw by sticking out his arm and expressing consent with the word “okay” when the officer stated it was medically necessary due to his injuries. The court relied on precedent to determine that rescission of a prior test refusal requires a specific request to take the test. The court held that Hammerschmidt’s actions and statement expressed a willingness to submit to a blood draw only for medical purposes and not for determining the level of alcohol in his blood. Ultimately, the court concluded that Hammerschmidt did not withdraw his refusal to submit to a blood alcohol test. Thus, consenting to a later medical blood test does not rescind an earlier refusal to consent to a blood draw for the purpose of testing for blood alcohol content.

In *Hoeffner v. Kansas Department of Revenue*, the Kansas Court of Appeals considered what constituted unlawful coercion for submission to a breath test. The arresting officers read Hoeffner the required implied consent advisory before requesting he submit to a breath test. He refused to submit until officers repeatedly threatened to obtain a search warrant. Hoeffner claimed his consent was not freely given but instead was a direct result of the officers’ repeated warnings that they would obtain a search warrant. To resolve whether the consent was unlawfully coerced, the court considered whether officers lawfully could have obtained a search warrant to involuntarily extract blood. Under K.S.A. § 8-1001(d), because Hoeffner already had refused to submit to a test, the officer was permitted to direct a medical professional to draw a sample of blood from Hoeffner only if he was operating or attempting to operate a vehicle that was involved in an accident resulting in serious

313. *Id.*
316. *Id.* at *2.
317. *Id.* at *3–4.
319. *Id.* at 687.
320. *Id.*
321. *Id.* at 690.
322. *Id.*
injury or death and the driver could be cited for any traffic offense.\textsuperscript{323}

In \textit{City of Dodge City v. Webb}, a panel of the Kansas Court of Appeals held the statute does not apply in those instances when the officer has probable cause to obtain a search warrant after refusal.\textsuperscript{324} The court in \textit{Hoeffner} rejected the conclusion of the panel in \textit{Webb} that a search warrant exception existed to K.S.A. § 8-1001(d) in instances of a prior refusal.\textsuperscript{325} The court held that based on K.S.A. § 8-1001(d), an officer is prohibited from obtaining a search warrant to extract blood after a person has refused to consent.\textsuperscript{326} Therefore, the officer erroneously informed Hoeffner they could obtain a search warrant and consent was obtained involuntarily.\textsuperscript{327}

In \textit{State v. Janssen}, the Kansas Court of Appeals considered whether reasonable suspicion to request a preliminary breath test (PBT) disappeared when the defendant passed the field sobriety test.\textsuperscript{328} Although the defendant satisfactorily completed the field sobriety test, the arresting officer requested Janssen take a PBT based on information relayed to him by an informant: observation of slow response to emergency lights, bloodshot eyes, difficulty exiting the vehicle, and odor of alcohol.\textsuperscript{329} The court relied on \textit{State v. Edgar}\textsuperscript{330} for the proposition that the “whole picture” must be taken into account and “competing evidence of sobriety does not negate initial evidence of intoxication.”\textsuperscript{331} The court concluded that although Janssen performed well on his field sobriety test, the other evidence could not be ignored and reasonable suspicion existed to request the PBT.\textsuperscript{332}

The court in \textit{Janssen} also considered whether Janssen consented to the PBT.\textsuperscript{333} The statute regulating PBTs contains an implied consent provision similar to that in § 8-1001.\textsuperscript{334} Before administering a PBT, an officer must give the driver notice that (1) there is no right to consult with an attorney regarding whether to submit to testing; (2) refusal to

\begin{itemize}
  \item \textsuperscript{323} Id. at 691.
  \item \textsuperscript{324} Dodge City v. Webb, 329 P.3d 515, 522 (Kan. Ct. App. 2014).
  \item \textsuperscript{325} Hoeffner, 335 P.3d at 696.
  \item \textsuperscript{326} Id. at 697.
  \item \textsuperscript{327} Id. at 698.
  \item \textsuperscript{329} Id. at *15.
  \item \textsuperscript{330} 294 P.3d 251, 261 (Kan. 2013).
  \item \textsuperscript{331} Id. at 259.
  \item \textsuperscript{332} Janssen, No. 110,816, 2014 WL 690968, at *15–16.
  \item \textsuperscript{333} Id. at *16.
  \item \textsuperscript{334} KAN. STAT. ANN. § 8-1012(a) (2011).
\end{itemize}
submit to testing is a traffic infraction; and (3) further testing may be required after the PBT. However, the defendant cannot use as a defense any failure by the officer to provide such notice. In Edgar, the Kansas Supreme Court held that because the officer stated that the defendant had no right to refuse the PBT, the implied consent provision does not apply because it transforms the request for a PBT contemplated by K.S.A. §8-1012(b) into an involuntary search. Although an officer’s complete failure to give notice cannot serve as a defense, the court held that an officer cannot give incorrect notice. In Janssen, the Kansas Court of Appeals considered whether Janssen consented to a PBT when the police officer failed to provide any notice to Janssen before administering the PBT. The court held the argument that Janssen did not consent failed because although the statute requires an officer to provide notice when requesting submission to a PBT, the statute states that failure to do so is of no consequence.

4. DNA Testing

In State v. Carr, the Kansas Supreme Court considered whether a district judge erred in admitting evidence of the results of a mitochondrial DNA testing of hairs found at the crime scene, which narrowed the list of contributors to maternal relatives of the defendant. The case admitted mitochondrial DNA evidence of four hairs in a murder, assault, rape, and robbery spree committed by brothers. The hairs were used as circumstantial evidence of the defendant’s presence at the scene, even though more precise nuclear DNA analysis of one hair was admitted at trial that implicated his co-defendant brother and not the

335. Id. § 8-1012(b).
336. Id.
338. Id. (“[A]s the district court noted, the statute concerns the failure to give notice—not failing to provide the correct notice.”) (emphasis in original).
340. Id.
342. Id. at 683.
defendant. Two of the four hairs collected from the crime scene matched both defendants, and one hair was submitted for more precise nuclear DNA testing that ultimately excluded one brother as a possible source. The excluded brother argued that the results of the DNA testing were more prejudicial than probative, and he should not be convicted merely because more precise DNA testing proved his brother’s presence at the crime scene. The court concluded that although more precise DNA testing eliminated the brother as the source of one hair, it did not eliminate him as a source of the other. The evidence that he could not be excluded through mitochondrial DNA testing was not meaningless because it narrowed the class of individuals present at the crime scene to anyone not in the Carrs’ maternal line of descent.

III. SEIZURES

A. Fourth Amendment, Generally

The Fourth Amendment to the U.S. Constitution provides that “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable . . . seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the . . . persons or things to be seized.” The State of Kansas adopted nearly identical language when it created Section 15 of its Bill of Rights. The Supreme Court of Kansas has recognized that the “wording and scope” of both provisions is “identical for all practical purposes.”

B. Seizures and Warrants, Generally

The protection afforded by the Fourth Amendment prohibits government actors from executing unreasonable seizures. A seizure is an action that “deprives [an] individual of dominion over his or her

343. Id.
344. Id.
345. Id.
346. Id. at 684.
347. Id.
348. U.S. CONST. amend. IV.
349. KAN. CONST. B. of R. § 15.
Whether such a seizure is unreasonable depends on an analysis of the totality of the circumstances, including a “balance of the nature and quality of the intrusion . . . against the countervailing governmental interests at stake.”

Some seizures are per se unreasonable unless the government actor has obtained a warrant. The Fourth Amendment provides that no such warrant shall issue without probable cause and a specific description of the person or property to be seized. In determining whether there is probable cause to issue the warrant, an impartial magistrate judge must make a “practical, common-sense decision” based on the “totality of the circumstances.”

Kansas has identified a handful of exceptions that permit law enforcement to forego obtaining a required warrant, including: consent, searches incident to lawful arrests, a stop and frisk, probable cause combined with an exigent circumstance, situations covered by the emergency doctrine, inventory searches, plain view or feel, and administrative searches of regulated businesses. A number of exigent circumstances have been identified and include: 1) preventing harm to officers by capturing a dangerous individual, 2) gathering necessary evidence before its imminent loss, 3) hot pursuit of a fleeing individual, and 4) stopping the escape of a criminal suspect. Moreover, this list is not exclusive, and the facts of any given case may render a warrantless seizure reasonable.

C. Types of Seizures

1. Seizure of Items

Generally, meaningful interference with a person’s possessory

355. U.S. CONST. amend. IV.
359. Id.
interest in her property implicates the Fourth Amendment’s protections against seizures. The Supreme Court of the United States has repeatedly stated that a seizure can occur even though law enforcement does not invade the privacy of the individual while seizing their property. A seizure of tangible property occurs when law enforcement takes control of property by removing it from another’s possession, or when the officer merely states his intent to take the property. There has been no seizure when law enforcement picks up an object to look at it.

a. Seizure of Mail

The Fourth Amendment, subject to certain limitations, encompasses protections to limit interference with a person’s mail. However, the temporary detention of mail pursuant to an investigation by law enforcement is not an unreasonable seizure under the Fourth Amendment if officers have a reasonable suspicion of criminal activity. The U.S. Postal Service uses certain identifiers to discern packages likely to contain narcotics, called the narcotics package profile. The existence of more than one identifier found within the narcotics package profile provides justification for the detention or interruption of mail delivery.

In State v. Bierer, the Kansas Court of Appeals clarified that due to its mandate to follow U.S. Supreme Court precedent, it would apply the holding in Acevedo, that “officers can conduct a warrantless search of a package located within an automobile if they have probable cause to believe contraband or evidence is contained therein.”

2. Seizure of Persons, Generally

For purposes of the Fourth Amendment, a person is seized “when an

363. Id.
366. Duhon, 109 P.3d at 1287.
367. Id.
officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen.”

Courts determine that a person has been seized by a show of authority when the person reasonably believed, based on all of the circumstances, that she was not free to leave and so submits to the authority. In *State v. Reiss*, the Kansas Supreme Court held that Reiss had been seized when an officer commanded him to return to his vehicle during a traffic stop. The court further held that this seizure was not unreasonable because it was an appropriate response to ensure officer safety and the invasion on Reiss’s liberty interest was minimal.

a. Detentions of Third Parties During Search

In *Summers*, the U.S. Supreme Court affirmed the right of law enforcement executing a search warrant to detain individuals located on the premises where the search was taking place. The Court found that detention of persons occupying the area of the search was reasonable because it promoted officer safety and an efficient search, and it prevented flight by persons who might face criminal charges.

In 2013, the Court placed a limitation on the reach of this detention exception by holding that only those within the immediate vicinity of the premises being searched could be detained. In *Bailey*, police had detained an individual connected to the premises after he was one mile away. The Court reasoned that the “search-related law enforcement interests are diminished and the intrusiveness of the detainment is more severe” when an occupant is beyond the immediate vicinity of the search.

371. *Id.* at 1096–97.
373. *Id.* at 374–75.
376. *Id.* at 1041.
377. *Id.* at 1033–34.
378. *Id.* at 1042.
b. Detentions During Traffic Stops

The Supreme Court has identified a traffic stop as a seizure under the Fourth Amendment. Whether the seizure is reasonable depends on a two-part test—“first, whether the . . . action was justified at its inception, [and] second, whether it was reasonably related in scope to the circumstances which justified the interference in the first place.” Generally, the initial seizure is not a Fourth Amendment violation when it is the result of an observed traffic violation or if law enforcement has a “reasonable suspicion” that a violation of the law has occurred or is occurring. After this initial seizure, a lawful traffic stop may not last longer than needed to “effectuate the purpose of the stop.” Once the reason for the traffic stop has come to a conclusion, the officer must permit the individual to leave unless the officer has an “objectively reasonable and articulable suspicion that the individual is engaged in illegal activity.”

If officers do not have a reasonably articulable suspicion of criminal activity, they may detain persons after the conclusion of a traffic stop only when the continuance is consensual. Courts determine if the “continued encounter” with law enforcement is consensual by considering whether a reasonable person in the situation would have believed she could refuse law enforcement’s requests or end the encounter altogether.

In 2014, the Kansas Supreme Court affirmed a lower court decision to suppress evidence when an officer pulled a driver over for traffic violations but kept her beyond the time necessary to provide a traffic citation. The court held that the officer’s observation of the driver’s erratic driving pattern, the presence of an empty plastic baggie in the vehicle, and the officer’s perceived slurred speech of the driver during

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381. Hein, 733 F.3d at 556; Swanson v. Town of Mountain View, Colo., 577 F.3d 1196, 1201 (10th Cir. 2009).
382. U.S. v. Cash, 733 F.3d 1264, 1273 (10th Cir. 2013) (citing U.S. v. Pena-Montes, 589 F.3d 1048, 1052 (10th Cir. 2009)).
383. Courtney v. Oklahoma, 722 F.3d 1216, 1223–24 (10th Cir. 2013) (quoting U.S. v. Lyons, 510 F.3d 1225, 1237 (10th Cir. 2007)).
384. State v. Murphy, 293 P.3d 703, 705 (Kan. 2013) (citing State v. Thompson, 166 P.3d 1015, 1037 (Kan. 2007)).
385. Id.
the stop were not enough to justify prolonging the detention. 387

c. Community Caretaking

Courts have recognized that law enforcement officers sometimes act as “community caretak[ers]” wholly apart from detecting and investigating crimes. 388 When acting in this role, warrantless seizures may be considered reasonable. 389 A few identified examples of officers acting as community caretakers include taking individuals to safety, impounding vehicles on the side of the road, and restraining intoxicated persons. 390 Any detentions that occur while an officer is acting as a community caretaker are required to be based on “specific and articulable facts which reasonably warrant an intrusion into the individual’s liberty.” 391

d. Police Interrogations

Law enforcement officers can approach individuals in public spaces and ask if they would mind answering some questions; if the individuals agree, officers can then engage in conversation that may later be used as evidence in court. 392 However, individuals may decline to answer the officer’s questions without facing repercussions. 393 In fact, no individual may be detained for questioning without reasonable, objective grounds for doing so. 394 Law enforcement maintains reasonable, objective grounds for detaining someone when they have a reasonable and articulable suspicion that the person “has committed, is about to commit, or is currently committing a crime.” 395 The use of handcuffs during such

387. Id. at 898–99.
389. Id.
391. Id. (citing United States v. Garner, 416 F.3d 1208, 1213 (10th Cir. 2005)).
393. Id.
394. Id.
a detention will not necessarily render an otherwise lawful detention an unreasonable seizure. The Tenth Circuit has found the use of handcuffs permissible when an officer had a reasonable fear for his safety and the handcuffs were only used for a short period of time.

The level of reasonable suspicion required for officers to detain an individual briefly must be more than an “unparticularized suspicion or hunch.” On the other hand, reasonable suspicion requires much less than a preponderance of the evidence for probable cause. An officer must only articulate a “minimal level of objective justification” for detaining an individual.

When courts analyze whether an investigatory detention is valid under the Constitution, they consider if the detention was “justified at its inception” and “reasonably related in scope to the circumstances which justified the interference in the first place.” If the investigatory detention cannot pass this two-prong test, it must then be considered an arrest and justified on different grounds. Even when an arrest warrant is discovered after an initial stop, Kansas courts have found that this does not correct a stop that was unlawful in the beginning.

i. Navarette v. California

In 2014, the United States Supreme Court found an investigatory stop constitutional when the totality of the circumstances led to the reasonable belief that the driver of a car was intoxicated. In Navarette v. California, an officer pulled over a truck matching the description of a vehicle that had reportedly run another driver off the road, according to a 911 call. When the officer and another who was responding to the call smelled marijuana coming from the truck, they conducted a search and uncovered forty pounds of the drug. The driver and passenger of the

397. Id. at 1251–52.
399. Id.
400. Id.
403. State v. Williams, 300 P.3d 1072, 1083 (Kan. 2013).
405. Id. at 1686–87.
406. Id. at 1687.
vehicle were arrested. Their petition to suppress the evidence based on the argument that the officer lacked reasonable suspicion of criminal activity was denied by the Magistrate and Superior Court. The California Court of Appeals affirmed and the California Supreme Court denied review.

After granting certiorari, the Supreme Court affirmed the decisions of the lower courts. It found that the 911 call was a credible indicator that the driver of the vehicle had been engaging in the reported behavior because the identified features of the car were specific, the reported location correct, and the use of the 911 system suggested the caller’s truthfulness because it is a system that can trace and identify those who call in. The Court then explained that even if reliable, the tip still had to create reasonable suspicion of criminal activity. Because the reported behavior of running another driver off the road was highly suggestive of drunk driving, and not just a minor traffic infraction, the Court held that the report created reasonable suspicion and thus warranted an investigatory stop.

c. Seizures Based on Mistake of Law

In 2014, the Supreme Court held that a “seizure may be permissible even though the justification for the action includes a reasonable factual mistake.” In Hein v. North Carolina, an officer pulled a driver over after noticing that his vehicle had only one brake light. During this stop, the driver gave consent for the officer to search the vehicle. After the officer found cocaine as a result of this search, the driver was

407. Id.
408. Id.
409. Id.
410. Id.
411. Id. at 1689–90.
412. Id. at 1690.
413. Id. at 1691–92.
415. Id.
416. Id.
arrested and charged with attempted trafficking.\textsuperscript{417}

While the trial court denied the driver’s motion to suppress the seized evidence, the North Carolina Court of Appeals reversed when it found that the initial stop of the vehicle was based on the officer’s misunderstanding of the law.\textsuperscript{418} Because North Carolina law only requires that a driver have one working light, the justification for the stop was unreasonable.\textsuperscript{419} The North Carolina Supreme Court reversed this decision, finding that the mistake was reasonable and the stop was consequently valid under the Fourth Amendment.\textsuperscript{420}

The United States Supreme Court affirmed the judgment of the North Carolina Supreme Court after finding that the officer’s mistake was objectively reasonable.\textsuperscript{421} The Court assessed the statute in question, noting its lack of clarity and potential contradictory provisions.\textsuperscript{422} Furthermore, the North Carolina appellate courts had never construed the statute.\textsuperscript{423} Under these circumstances, the Supreme Court found the officer’s mistake of law objectively reasonable and thus held the justification for the stop reasonable.\textsuperscript{424}

i. Portable Breath Test

The Supreme Court of Kansas recently explained what happens to the admissibility of a PBT when an officer misstates an individual’s choice to submit to the test. According to Kansas law, before an officer can administer a PBT, he must first inform the individual that 1) there is no right to counsel regarding whether to submit to testing, 2) a refusal will result in a traffic infraction, and 3) more testing may be required following the preliminary screening.\textsuperscript{425}

In \textit{State v. Edgar}, the officer correctly instructed Edgar that he was not permitted to consult with a lawyer about the test, and that he might be subject to further testing depending on the PBT results, but he incorrectly informed Edgar that he could not refuse the PBT.\textsuperscript{426} The
court held that the officer’s misstatement that Edgar had no right to refuse the PBT rendered the test involuntary.\textsuperscript{427} The Supreme Court of Kansas ruled that the lower court erred by not suppressing the PBT results, and thus reversed the lower court’s decision.\textsuperscript{428}

In \textit{State v. Janssen}, the officer failed to provide “any notice” to Janssen before administering the PBT test.\textsuperscript{429} The court stated that although statute clearly requires an officer to provide the notice when requesting an individual to submit to a PBT, the statute also clearly states that a failure to provide the notice is of no consequence.\textsuperscript{430} Therefore, failing to provide any notice did not require the suppression of the PBT results.\textsuperscript{431}

\textbf{f. Arrest}

Kansas law permits law enforcement officers to arrest individuals under four circumstances.\textsuperscript{432} An arrest by a law enforcement officer must be lawful.\textsuperscript{433} The officer may have a warrant for arrest or have probable cause to believe that a warrant for the person’s arrest has been issued in this state or in another jurisdiction for a felony committed therein.\textsuperscript{434} Without a warrant, an arrest must be supported by probable cause.\textsuperscript{435} Specifically, the officer may arrest an individual when the officer has probable cause to believe the person has committed or is committing a crime, or when the person commits a crime in view of the officer, excluding traffic and tobacco infractions.\textsuperscript{436}

Courts have identified probable cause as “the reasonable belief that a specific crime has been or is being committed and that the defendant

\begin{itemize}
\item \textsuperscript{427} \textit{Id.} at 262.
\item \textsuperscript{428} \textit{Id.} at 263.
\item \textsuperscript{430} \textit{Id.; KAN. STAT. ANN. §} 8-1012 (West 2012).
\item \textsuperscript{431} \textit{Id.}
\item \textsuperscript{432} \textit{KAN. STAT. ANN. §} 22-2401 (West 2012).
\item \textsuperscript{433} \textit{Sloop v. Kan. Dep’t of Rev.}, 290 P.3d 555, 559 (Kan. 2012).
\item \textsuperscript{434} \textit{KAN. STAT. ANN. §} 22-2401 (West 2012).
\item \textsuperscript{435} \textit{Sloop}, 290 P.3d at 559.
\item \textsuperscript{436} \textit{KAN. STAT. ANN. §} 22-2401 (West 2012).
\end{itemize}
committed the crime.”\textsuperscript{437} Moreover, the existence of probable cause requires the consideration of the totality of the circumstances, meaning that there is no rigid formula courts can use to make such a determination.\textsuperscript{438} Case law from Kansas used to say that an officer could successfully intimate he had probable cause if he demonstrated that “guilt [wa]s more than a possibility.”\textsuperscript{439} However, in a 2012 case, the Kansas Supreme Court clarified that this emphasized language had crept inexplicably into the case law and that the proper determination was whether probable cause can support an arrest considering “the information and fair inferences therefore known to the officer at the time of the arrest.”\textsuperscript{440}

In \textit{State v. Stevenson}, the Kansas Supreme Court stated that “[a] review of the totality of the circumstances should, as the phrase implies, also include a consideration of the exculpatory factors.”\textsuperscript{441} In \textit{Stevenson}, the defendant was stopped based upon a turn signal violation.\textsuperscript{442} The officers searched the vehicle because they observed a very strong odor of alcohol emanating from inside the vehicle after Stevenson, the lone occupant, had exited.\textsuperscript{443} The search resulted in the discovery of methamphetamine and the subsequent prosecution of Stevenson.\textsuperscript{444} The district court refused Stevenson’s request to suppress the fruits of the search, holding that “the odor of alcohol inside the vehicle was sufficient to establish probable cause to search the vehicle for an open container of alcohol.”\textsuperscript{445} The Kansas Supreme Court determined the search was unlawful based on the totality of circumstances.\textsuperscript{446} Officers performed a field sobriety test on Stevenson and concluded that he was not under the influence.\textsuperscript{447} While the test was being performed, an officer stuck his head into the vehicle and did not observe an open container of alcohol.\textsuperscript{448} The officers, however, proceeded to search his vehicle for an open

\begin{itemize}
\item \textsuperscript{437} \textit{Sloop}, 290 P.3d at 559.
\item \textsuperscript{438} \textit{Id.} at 559–60 (citing \textit{State v. McGinnis}, 290 Kan. 547, 552–53 (2010)).
\item \textsuperscript{439} \textit{Id.} at 560 (citing \textit{Bruch v. Kan. Dep’t of Rev.}, 282 Kan. 764, 775–76 (2006)).
\item \textsuperscript{440} \textit{Id.}
\item \textsuperscript{441} \textit{State v. Stevenson}, 321 P.3d 754, 763 (Kan. 2014) (quoting \textit{Allen v. Kan. Dep’t of Rev.}, 256 P.3d 845, 850–51 (Kan. 2011) (Johnson, J., dissenting)).
\item \textsuperscript{442} \textit{Id.} at 756.
\item \textsuperscript{443} \textit{Id.}
\item \textsuperscript{444} \textit{Id.}
\item \textsuperscript{445} \textit{Id.}
\item \textsuperscript{446} \textit{Id.}
\item \textsuperscript{447} \textit{Id.}
\item \textsuperscript{448} \textit{Id.} at 763.
\end{itemize}
container, based solely on the odor of alcohol. The court concluded that “[t]he officers’ failure to acquire additional inculpatory facts relating to the crime being investigated before commencing their search of the vehicle rendered the search unreasonable and unlawful.”

g. Confessions Following Illegal Arrests

Despite a prosecution being able to continue despite an unlawful arrest, certain evidence obtained at the time of the unlawful arrest must be suppressed. The status of information or evidence obtained during an interrogation following an unlawful arrest requires a separate analysis. Courts have produced four factors to be considered when determining whether information gathered subsequent to an unlawful arrest is admissible. Courts consider: 1) whether Miranda warnings were given to the defendant, 2) the proximity of the unlawful arrest and the confession or statements, 3) “the purpose and flagrancy of the officer’s misconduct, and 4) other intervening circumstances.” No one factor controls, and other factors may be relevant to the analysis.

D. Standing to Object to a Seizure

For a defendant to object to the seizure of his property, he must first have standing to challenge the search. A defendant has standing if he can demonstrate a “legitimate expectation of privacy in the . . . property seized” and establish that “the expectation of privacy is one that society recognizes as reasonable.” Fourth Amendment guarantees against

449. Id. at 756.
450. Id. at 763.
452. Id. at 13.
453. Id.
455. Id.
unreasonable searches and seizures are personal; thus a defendant
 generally does not have standing to object to the illegal seizure of a third
 person’s property. Under some circumstances, however, social guests
 may have standing to object to unreasonable searches and seizures of
 their host’s property. Even if a defendant does not have standing to
 challenge a search, he may still be able to object to the admissibility of
 evidence if its discovery was the fruit of the unlawful seizure of his
 person.

E. Fifth and Sixth Amendment Issues

1. Applicable Language of the Fifth Amendment – Self-
Incrimination & Due Process

Under the Fifth Amendment of the U.S. Constitution, “[n]o
person . . . shall be compelled in any criminal case to be a witness against
himself; nor be deprived of life, liberty, or property, without due process
of law . . . .” The protection against compelled statements applies only
to testimonial evidence. Courts should construe the provision
liberally, covering not just confessions but any statement that may
incriminate the defendant.

2. Applicable Language of the Sixth Amendment

The Sixth Amendment of the U.S. Constitution provides that “[i]n all
criminal prosecutions, the accused shall . . . have the Assistance of
Counsel for his defense.” The Sixth Amendment right to counsel
attaches once adversarial judicial proceedings have begun against the

459. See United States v. Poe, 556 F.3d 1113 (10th Cir. 2009) (finding social guests who have
“acceptance” into host’s home have a reasonable expectation of privacy); State v. Huff, 92 P.3d 604
(Kan. 2004) (finding guest had standing to challenge warrantless entry and search of host’s home).
460. See State v. Smith, 184 P.3d 890 (Kan. 2008) (finding passenger was seized within the
meaning of the Fourth Amendment during traffic stop and the search of her purse left in the
automobile exceeded the scope of the stop); United States v. DeLuca, 269 F.3d 1128 (10th Cir.
2001) (finding passenger who did not have standing to challenge search of automobile did have
standing to challenge lawfulness of his detention and thus seek suppression of contraband found
in automobile as a result).
461. U.S. CONST. amend. 5.
defendant and applies to all critical stages of those proceedings. A defendant may waive this right as long as he does so voluntarily, knowingly, and intelligently.

Kansas law also guarantees a defendant’s right to counsel. The Kansas Bill of Rights provides that “[i]n all prosecutions, the accused shall be allowed to appear and defend in person, or by counsel.” In addition to this constitutional provision, the right to counsel in Kansas is guaranteed by statute—Kan. Stat. Ann. § 22-4503 provides that any defendant charged with a felony has a right to counsel at every stage of the proceedings against him.

In State v. Lawson, the Supreme Court of Kansas considered whether a signed Miranda waiver form was a valid waiver of a defendant’s right to counsel after the initiation of adversarial judicial proceeding. Lawson was represented by counsel at his first court appearance, and his application for appointment of counsel was filed later that same day. The next day, a law enforcement officer transported Lawson from his jail cell to the Leavenworth Police Department. There, the officer read Lawson his Miranda warnings, Lawson signed a waiver form, and the officer conducted a polygraph examination and interview of Lawson. The court held that “after the statutory right to counsel has attached, the defendant’s uncounseled waiver of that right will not be valid unless it is made in writing and on the record in open court.” The court further held that a Miranda waiver form, which primarily serves to protect the defendant’s Fifth Amendment rights, is not a sufficient substitute for the required waiver procedure.

In State v. Carr, the Kansas Supreme Court discussed the differences

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467. KAN. CONST. B. OF R. § 10.
468. KAN. STAT. ANN. § 22-4503(a) (2013) (“A defendant charged by the state of Kansas in a complaint, information or indictment with any felony is entitled to have the assistance of counsel at every stage of the proceedings against such defendant . . . .”)
470. Id. at 1166.
471. Id. at 1167.
472. Id. at 1098.
473. Id.
in language between the Sixth Amendment and Kan. Stat. Ann. § 22-4503. The court noted that the Sixth Amendment guarantees a defendant a constitutional right to counsel at all “critical stages” of a proceeding, whereas Kan. Stat. Ann. § 22-4503 provides that a defendant is entitled to have assistance of counsel at “every stage” of the proceedings against him or her. The court, noting that the Kansas statute “has potentially broader coverage,” concluded that it is doubtful the legislature had intended to provide greater protection. Therefore, the court found that the nonevidentiary jury view in this case was not a “critical stage” of the proceeding, and the defendant’s Sixth Amendment right to counsel was not violated.

3. Miranda Warnings – Additional Protection to Fifth & Sixth Amendments

a. Generally

Prior to a custodial police interrogation, officers must inform the suspect of: (1) his right to remain silent; (2) the consequences of a failure to remain silent (e.g., “anything said can and will be used against the individual in court”); (3) his right to an attorney; and (4) his right to have the court appoint an attorney if he is unable to afford one. If a defendant makes any incriminating statements in a custodial police interrogation prior to receiving these warnings, the statements are subject to a presumption of police coercion and generally are not admissible in the prosecution’s case-in-chief. Courts have, however, recognized exceptions allowing a suspect’s otherwise uncoerced statements given in the absence of Miranda warnings to be admitted as evidence in specific instances.

475. Id.
476. Id. at 694–95.
477. Id. at 695.
b. Custodial Police Interrogation

A person is in custody if the police have restrained his freedom of movement in a significant way. The test to determine whether someone is in custody is if a reasonable person in the situation would not feel free to leave. Notably, “a suspect’s prior experience with law enforcement is not a relevant factor in the custody inquiry.”

Interrogation is defined as “any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.”

c. Investigatory Interrogation versus Custodial Interrogation

Miranda applies only when an accused is (1) in custody and (2) subject to interrogation. A custodial interrogation occurs when law enforcement officers initiate questioning after a person has been taken into custody or otherwise deprived of his or her freedom in any significant way. A custodial interrogation is distinguishable from an investigatory interrogation. An investigatory interrogation occurs as a routine part of the fact-finding process, before the investigation reaches the accusatory stage.

The following factors are considered when determining whether an interrogation is investigative or custodial:

1. the interrogation’s time and place;
2. its duration;
3. the number of law enforcement officers present;
4. the conduct of the officer and the

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486. Id.
487. Id.
488. Id.
person questioned; (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 questioned was escorted by officers to the interrogation location or arrived under his or her own power; and (8) the interrogation’s result, e.g., whether the person was allowed to leave, was detained further, or was arrested after the interrogation.  

When considering these factors, “[n]o single factor outweighs another, nor do the factors bear equal weight.”

d. Police Officers’ Duties During Interrogations

In situations that pose an imminent threat to the safety of police officers or the public, police officers may forgo the usual procedural safeguards and question a suspect without first administering Miranda warnings.  

The public safety exception is a narrow one and is justified by the objective reasonableness of questioning the suspect, not the officer’s subjective intent.

The Court of Appeals of Kansas recently addressed the limits of the public safety exception in an unpublished decision, State v. Riggans. Two officers went to the home of Alonzo Riggans based on a tip that two people wanted on arrest warrants, including Riggans, were in the apartment. Riggans, a man in his sixties who used an oxygen tank, answered the door and let the officers into the apartment. Inside, the officers found five other people, as well as evidence of drug use and paraphernalia. As the officers checked the other inhabitants for outstanding warrants, two more officers, including Captain Haulmark, arrived. Captain Haulmark asked Riggans if there were any weapons in the apartment, and Riggans replied there was a rifle in one of the

489. Id.
490. Id.
494. Id. at *2.
495. Id.
496. Id. at *2–3.
497. Id. at *3.
closets. Captain Haulmark did not know Riggans was a convicted felon, making his possession of a firearm a felony. Captain Haulmark later testified he asked about the weapon because he was concerned about officer safety due to the large number of people in such a confined space. The court, citing the Fourth Circuit, found that without more specific information, a general suspicion of the presence of weapons was not sufficient to qualify as an objectively reasonable concern for an imminent threat to officer or public safety. The court noted that applying the public safety exception in such circumstances would virtually eliminate the *Miranda* protections and allow the State to interview suspects any time weapons might “hypothetically” be present.

i. Interpreters

Under Kan. Stat. Ann. § 75-4351, anyone whose primary language is not English or who is hearing or speech impaired must be appointed an interpreter prior to interrogation or making a statement. A violation of this statute does not necessarily require the suppression of any statements obtained or invalidate a *Miranda* waiver. The relevant inquiry is whether the defendant understood the *Miranda* warnings sufficiently in order to be able to voluntarily waive them.

ii. Failure to Record Interrogation

Kansas follows the majority rule that an interrogation does not need to be recorded in order to be admissible at trial.

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498. *Id.* at 4.
499. *Id.*
500. *Id.*
501. *Id.* at *13 (citing United States v. Mobley, 40 F.3d 688, 693 n.2 (4th Cir. 1994)).
502. *Id.* at *15–*16.
503. KAN. STAT. ANN. § 75-4351.
505. *Id.*
e. Invocation of the Right to Remain Silent

A suspect wishing to invoke the right to remain silent in a custodial interrogation must do so unambiguously. If the suspect makes an ambiguous statement as to whether he is invoking the right to remain silent, the interrogating officer is allowed, but not required, to ask for clarification and may continue the interrogation. An interrogator who continues the interrogation without first seeking clarification as to whether the suspect is invoking his or her right to remain silent risks a ruling that the invocation was unambiguous, thereby rendering the suspect’s subsequent statements inadmissible. When determining whether an invocation of the right to remain silent was clear and unambiguous, courts may consider only the defendant’s prior statements and alleged statement of invocation. A defendant’s post-invocation statements are irrelevant.

In State v. Morse, the court held that the defendant’s interruption of the officer’s line of question with the statement, “I think we’re done here,” coupled with a wave of his arm “as if to cut off further questioning,” was sufficiently unequivocal such that a reasonable officer would have understood his statement and actions to be an invocation of his right to remain silent. Therefore, the Court of Appeals of Kansas held that the district court did not err by suppressing the defendant’s subsequent statements.

Once a suspect has properly invoked the right to remain silent, the interrogating officers must scrupulously honor it and cease all questioning or its functional equivalent. A suspect in custody may also invoke the right at any point during an interrogation or may invoke it selectively regarding certain questions or subject matter.

508. State v. Scott, 183 P.3d 801, 816–17 (2008) (citing State v. Gonzalez, 145 P.3d 18, 41 (2006)). If the officer does continue questioning without seeking clarification, however, he runs the risk that a court may find the statement unambiguous and any subsequent statements thus inadmissible. Id.
510. Id.
511. Id.
512. Id. at *9.
513. Id. at *10.
514. Id. (citing State v. Carty, 644 P.2d 407 (Kan. 1982)).
515. State v. Waugh, 712 P.2d 1243, 1250 (Kan. 1986) (citing United States v. Thierman, 678 F.2d 1331, 1335 (9th Cir. 1982)).
invoking the right, a suspect may initiate a conversation with law enforcement officers or validly waive the right, after which questioning may recommence. 516

f. Invocation of the Right to Counsel

Like the right to remain silent, the right to counsel must also be invoked unambiguously, meaning in a manner that a reasonable offer would understand to be a request for counsel. 517 The statement must communicate both the desire to have an attorney present and that the suspect is seeking assistance with the interrogation and not later proceedings. 518 If the statement is ambiguous, officers may seek clarification or continue questioning. 519 Once a suspect has invoked the right to counsel, questioning of the suspect must stop. 520 Officers can only resume interrogation once an attorney is present or the suspect reinitiates conversation. 521

g. Statements Made During Police Interrogation

For a statement made during a police interrogation to be admissible at trial, the statement must be voluntarily made. 522 If the defendant made the statement as a result of coercion, the statement will be excluded as evidence. 523 Coercion by an officer may be either mental or physical. 524 If a statement has been extorted by fear or induced by hope of profit, benefit, or amelioration, it will be excluded as involuntary. 525

516. Id. at 1250–51.
519. Id.
520. Id. at 1137 (citing Fare v. Michael C., 442 U.S. 707, 718 (1979)).
521. Id. (citations omitted).
523. Id.
525. Id. at 668.
i. Voluntariness Requirement

In determining if a defendant’s statement was voluntary, courts look to the totality of the circumstances, and Kansas courts consider a non-exclusive list of factors in making their determination:

(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. 526

In State v. Garcia, the Kansas Supreme Court analyzed the voluntariness of a confession after police officers denied the defendant medical treatment for a gunshot wound and used the defendant’s girlfriend to deliver a promise of leniency. 527

In determining voluntariness regarding the withholding of medical treatment, [t]he inquiry ... is whether the officers’ withholding of medical treatment influenced Garcia’s decision to confess to robbery. If law enforcement officers make an accused endure pain, even less than debilitating pain, until the accused gives a statement that the officers will accept, the voluntariness of that confession is, at best, suspect. 528

The court noted the record indicated such were the circumstances in this case. 529 The court concluded that the withholding of medical treatment for Garcia’s gunshot wound was “inherently coercive” and weighed heavily in favor of a finding of involuntariness. 530

For a confession to be involuntary due to promises of benefit, including leniency, the promise must relate to the actions of a public official; it must be likely to cause someone to make a false statement to acquire the promised benefit; and it must be made by someone who could reasonably be believed to have the authority to fulfill the promise. 531 In Garcia, the court was somewhat constrained by the trials court’s factual finding that the officers had not actually promised any

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527. Garcia, 301 P.3d at 665.
528. Id.
529. Id.
530. Id. at 667.
531. Id. at 667–68 (citing State v. Harris, 162 P.3d 28, 579–80 (Kan. 2007)).
benefit to Garcia. As the Supreme Court noted, however, the trial court had not analyzed the portion of the interrogation involving Garcia’s girlfriend, Malkawi. Malkawi had entered the interrogation room at the invitation of the interrogating officer and communicated to Garcia that he would not be booked for murder if he confessed to the robbery. The court found that this incident met all the requirements of a promise of benefit: booking Garcia related to the actions of a public official, the ability to erase a murder charge would likely cause someone to make a false statement, and even though a third party relayed the promise, Malkawi was clearly referring to the interrogating officer who had the authority to fulfill the promise. Thus, the promise of leniency in this case met the requirements of a promise that may have rendered a confession involuntary despite the use of a third party. Looking at the totality of the circumstances, the court found Garcia’s confession was involuntary due to the coercive effects of the withholding of medical treatment and the officer’s promises of leniency.

In State v. Craig, the Court of Appeals of Kansas considered the voluntariness of a confession following the promise of leniency. Billy Craig, Jr. was brought in for questioning regarding the murder of Jennifer Heckel. Craig admitted to selling drugs but denied any knowledge as to the murder. Craig was then arrested on charges unrelated to the murder and was assigned an attorney for those charges, Donald Snapp. The district attorney later interviewed Craig in the presence of Sapp, during which the district attorney advised that the “better the information Craig gave law enforcement, the better the deal

532. Id. at 667.
533. Id.
534. Id. 667–68.
535. Id. at 668.
536. Id.
537. Id.
539. Id. *1–2.
540. Id. at *2.
541. Id. at *3.
would be. 

The district attorney proceeded to question Craig regarding the murder. Craig vehemently denied any knowledge of the murder and specifically denied that he had driven any individuals to the scene of the murder. 

Later, Craig was interviewed again, this time without Snapp. At this time, Craig had still not been assigned an attorney regarding the murder investigation, as Sapp was appointed only on Craig’s pending drug charges. Furthermore, law enforcement knew that Craig had not been appointed an attorney regarding the murder investigation. When Craig asked about an attorney for the murder case, law enforcement stated he did not have an attorney appointed for the murder case because he had not been charged with murder.

A couple weeks later, the topic of a plea agreement arose. The State promised not to file murder charges against Craig and agreed to probation or community corrections on Craig’s other charges. The district attorney told Craig, “This is your last chance. You better tell me what I want to hear or you’re going to be spending the rest of your life in jail.” Craig then admitted that he drove two individuals to the scene of the murder and proceeded to discuss other events pertaining to the murder.

Craig later sought to suppress his statements as involuntary. The district court, considering the totality of the circumstances, suppressed the confession. The district court concluded:

[Craig] believed, and justifiably so, that if he did not make the statements as requested by the State he would spend the rest of his life in prison, and if he did make the statements he would be let out of jail and not prosecuted for murder. It is likely, in the situation that [] Craig found himself, an accused would make false statements to secure the indicated

542. Id. at *4.
543. Id. at *4–5.
544. Id. at *5.
545. Id. at *6.
546. Id.
547. Id.
548. Id. at *6–7.
549. Id. at *7.
550. Id. at *33.
551. Id.
552. Id. at *34–35.
553. Id. at *36.
554. Id. at *36–37.
benefits. At this time the Defendant had spent weeks in jail in lockdown, either without counsel on the homicide case, or if he had counsel, counsel that was ineffective.\footnote{555}

The Court of Appeals of Kansas, “recogniz[ing] that it is extremely rare to suppress a confession that takes place when counsel is in the room with the defendant,” affirmed the district court’s decision to suppress.\footnote{556} The Court of Appeals of Kansas determined that Snapp had not been appointed to represent Craig in the murder case, Snapp was uninformed as to the details of the murder case, and Snapp inaccurately relayed the agreement to Craig.\footnote{557}

ii. Tainted Statements

A statement may be tainted and thus inadmissible as evidence if it is obtained as the result of an illegal search, illegal detention, or prior coerced statement.\footnote{558} In determining whether a subsequent statement is tainted, courts consider “(1) whether Miranda warnings were given, (2) the proximity of the illegal [act] and the statement or confession, (3) the purpose or flagrancy of the officer’s misconduct, and (4) other intervening circumstances.”\footnote{559}

IV. PRE-TRIAL ISSUES

A. Formal Charges

The Due Process Clause of the Fifth Amendment, which applies to the States through the Fourteenth Amendment, provides in part that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor be

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\footnote{555}{Id at *36–37.}

\footnote{556}{Id at *38.}

\footnote{557}{Id at *38–40.}


\footnote{559}{State v. Weis, 792 P.2d 989, 992 (Kan. 1990) (citing Dunaway v. New York, 442 U.S. 200, 218 (1979)). See also Swanigan, 106 P.3d at 41–43.}
deprived of life, liberty, or property, without due process of law . . . .”
An accused is entitled to know the “nature and cause” of the allegations he faces. The requirements of K.S.A 22-3201 regarding the charging document protect this constitutional guarantee. A charge is a “written statement presented to a court accusing a person of the commission of a crime." In Kansas, charging documents include the complaint, information, and the indictment.

1. Charging Instruments: Complaint, Information, and Indictment

A complaint is a written statement of the facts alleged to constitute a criminal offense, given under oath, and signed by “a person with knowledge” of those facts. An indictment is a written statement prepared by a grand jury to be presented to a court, charging the accused of committing a crime. The presiding juror of the grand jury must sign the indictment. The information is a written statement verified by an authorized agent of the state, charging the accused of committing a crime. The county attorney, attorney general or “any legally appointed assistant or deputy of either” must sign the information.

The charging document must establish the “essential facts constituting the crime charged” in order to initiate criminal prosecution. To be sufficient, the document must be “drawn in the language of the statute,” making it clear to the accused the specific provision of law he has allegedly violated. Moreover, a charging document is sufficient if it establishes alternative theories under which the defendant could have committed the crime. A non-prejudicial mistake or omission in the citation is not fatal to the validity of the

560. U.S. CONST. amend. V.
561. KAN. CONST. B. of R. § 10.
563. KAN. STAT. ANN. § 22-2202(7).
564. Id.
565. Id. § 22-2202(8).
566. Id. § 22-3201(b).
567. Id. § 22-2202(11).
568. Id. § 22-3201(b).
569. Id. § 22-2202(12).
570. Id. § 22-3201(b).
571. Id.
572. Id.
charging document, nor is it grounds for reversal of the conviction.574

The statute also allows the state to file a motion to request the joining
of multiple charges in separate counts in a single charging document.575
The state must show that the crimes and/or misdemeanors charged (1)
are of similar nature; (2) arise from the same act or transaction; or (3)
result from different acts or transactions that are “connected together” as
parts of the same scheme.576

Two acts are “connected together” when the same weapon is used in
both acts and the defendant had possession of the weapon during both
acts.577 In State v. Smith-Parker, the Kansas Supreme Court decided a
case involving a challenge to the district court’s joining of charges.578
This case involved two crimes being consolidated by the district court.579
The first crime occurred when a victim was murdered in his home and
the home was burglarized.580 A review of the crime scene showed a .22
casing on the floor and a Sony PS3 stolen.581 The second crime was
about a week later when Smith-Parker took a victim to the hospital after
Smith-Parker shot the victim in the neck with a .22.582 Smith-Parker said
he shot the victim, who was a friend, after a heated debate.583 Parker
claimed he did not know where the gun was currently located.584 At trial,
Smith-Parker admitted he disposed of the gun on the way to the
hospital.585 When a search warrant was served, the police found the
stolen Sony PS3 and .22 shells.586 A ballistics analysis confirmed the
same gun was used in the murders of both victims.587

The Kansas Supreme Court determined the crimes were not of a

574. Id.
575. Id. § 22-3202(1).
576. Id.
578. Id. at 502–05.
579. Id. at 490–91.
580. Id.
581. Id.
582. Id. at 491–92.
583. Id.
584. Id. at 492.
585. Id. at 504.
586. Id. at 492.
587. Id.
similar nature because the murders lacked similarities besides the charge. 588 One murder occurred during a burglary. 589 The other murder occurred in a car between friends after a heated argument. 590 Generally crimes of a similar nature have more than one similarity. 591 The court also decided the crimes did not arise from the same act or transaction for the same reasons. 592

Finally, the Court considered whether the crimes were “connected together” enough to meet the condition for consolidation. 593 The Court reiterated the holding in State v. Hurd that crimes are only “connected together” in three different situations:

(1) when the defendant provide[s] evidence of one crime while committing another;

(2) when some of the charges [are] precipitated by other charges; or

(3) when all of the charges stem[] from a common event or goal. 594

The court restated that temporal proximity and similar witnesses are not enough to warrant consolidation of trials. 595 The court also could not rely on the stolen Sony PS3 evidence because it was not provided by the defendant while he was committing another crime. 596 On these grounds, the court found the district court’s reasoning was flawed. 597

However, the court considered other factors. 598 First and foremost, it considered the the evidence that the same gun was used in both murders was enough to warrant consolidation. 599 The court also considered the fact that the defendant got rid of the gun en route to the hospital. 600 There was also evidence that the second victim and the defendant had possession of this gun when the first murder occurred. 601 The court concluded that the evidence that would support a conviction in the

588. Id. at 503.
589. Id.
590. Id.
591. Id.
592. Id.
593. Id. at 503–04.
594. Id. at 504 (citing State v. Hurd, 298 Kan. 555, 562 (2013) (deciding that a court calendar, temporal proximity, and similar witnesses are not sufficient to be connected together)).
595. Id.
596. Id.
597. Id.
598. Id.
599. Id.
600. Id.
601. Id.
second murder would also support a conviction in the first murder and ruled that the district court had not made an error in joining the charges.\textsuperscript{602}

2. Bill of Particulars

If the charging document is defective or incomplete, both the State and the defendant can avail themselves of curative procedural measures: the State can request leave to amend the charges, while the defendant can request a bill of particulars or move to arrest the judgment.\textsuperscript{603} The defendant can file a motion requesting a bill of particulars if the charging document is not sufficiently precise as to allow the defendant to prepare a defense.\textsuperscript{604} The court may grant the motion and require the prosecution to then produce a bill of particulars, to which the state’s evidence must be confined at trial.\textsuperscript{605}

Three main aspects are considered in reviewing defendant’s motion for a bill of particulars: “(1) meaningful opportunity to prepare [defendant’s] defense; (2) assurances against unfair surprises at trial; and (3) protection from double jeopardy.”\textsuperscript{606} Furthermore, the court will consider whether the government has already supplied all the relevant information to the defendant through “other disclosures.”\textsuperscript{607}

When a defendant challenges the sufficiency of a bill of particulars, the defendant must show how the bill of particulars is insufficient and show how his defense is prejudiced.\textsuperscript{608} In 2014, the Kansas Court of Appeals decided a case that dealt with the sufficiency of a bill of particulars.\textsuperscript{609} In this case, the defendant was charged with forty-two

\textsuperscript{602} Id. at 505.

\textsuperscript{603} State v. Tapia, 287 P.3d 879, 885 (Kan. 2012).

\textsuperscript{604} KAN. STAT. ANN. § 22-3201(f) (West YEAR).

\textsuperscript{605} Id.


\textsuperscript{607} Id. (citing United States v. Cheever, No. 05–10050–01–MLB, 2006 WL 1360519, at *9 (D. Kan. May 18, 2006)).


\textsuperscript{609} Id.
counts of rape. The defendant requested and was granted a bill of particulars, an amended bill of particulars, and an amended information. The defendant was denied a third bill of particulars by the district court. The defendant alleged that the amended bill of particulars was insufficient because it contained generalities about the timing on counts six and twenty. The Court of Appeals affirmed the district court’s decision because the bill of particulars was sufficient: it stated the elements of the crime, and timing may be stated generally because the rape of a child was involved. Further, even if it was insufficient, the defendant failed to show how his defense was prejudiced. The defendant was not prejudiced by the bill of particulars because he was not surprised and his defense did not rely upon an alibi but instead relied upon an absolute denial defense.

3. Changes to Charging Instruments

a. Amendments and Variances

The court, at its discretion, may allow for the amendment of the charging document at any time before the jury delivers a verdict. In making its determination, the court will engage in a two-step inquiry to establish (1) whether the amendment charges “an additional or different crime”; and (2) whether the amendment is prejudicial to the “substantial rights” of the defendant. The ruling on the amendment of the charging document can be reviewed for abuse of discretion.

A different crime is not charged when the prosecutor changes the “theory” upon which the crime is committed. In 2015, the Kansas Court of Appeals reviewed a case involving an inmate in a correctional institution being charged with trafficking in contraband. The original

610. Id. at *9.
611. Id.
612. Id. at *10.
613. Id.
614. Id. at *11–12.
615. Id. at *12.
616. KAN. STAT. ANN. § 22-3201(e) (West).
618. See id. at 850.
620. Id.
information stated the defendant was trafficking in contraband by introducing or attempting to introduce the contraband into the correctional facility. At the close of discovery, the district court permitted the prosecutor to amend the information to state an alternative theory of trafficking in contraband by upon possession.

The Court of Appeals reviewed this decision and ruled the prosecutor did not change the crime charged but instead changed the “theory” upon which the original crime occurred. The relevant statute allows the prosecutor to charge a defendant with trafficking of contraband for any one of many theories, including attempting to introduce the contraband into the facility and possession. Only the theory of the crime changed with the amendment. The Court of Appeals also found the amendment was not prejudicial to the defendant because the evidence did not change against the defendant, the Defendant was already aware of the evidence through other preliminary means, and the defendant’s defense would not have changed under the new alternative theory.

b. Challenges

A defendant can challenge the validity of the charging document by making a showing that a defect or insufficiency in the document either “(1) prejudiced the defendant’s preparation of a defense; (2) impaired the defendant’s ability to plead the conviction in any subsequent prosecution; or (3) limited the defendant’s substantial rights to a fair trial.” The validity of a charging document may not be challenged in a motion to correct an illegal sentence.

621. Id. at *5.
622. Id.
623. Id. at *6.
624. Id.
625. Id.
626. Id. at *8–9.
In 2014, the Kansas Supreme Court upheld the validity of a complaint that presented alternative means by which the defendant might have committed the alleged crime. 629 The charging document did not fail to meet the statutory requirement when it charged “the commission of the same offense in different ways.”630 It has been traditionally established law in Kansas that the State can validly present the charges in alternative means and that it need not “elect one means or another” to present the case to the jury or to request jury instructions.631

B. Initial Appearances

The rights to a speedy trial and to effective assistance of counsel are guaranteed by the United States Constitution, which provides in its Sixth Amendment that the person accused of committing a crime “shall enjoy the right to a speedy and public trial... and to have the Assistance of Counsel for his defence. [sic]”632 The Kansas Constitution establishes mirror protections in its Bill of Rights.633

1. Speedy Public Trial

In 2014, the State of Kansas amended the speedy trial statute in Kansas.634 Previously, a defendant had to have been brought to trial within 90 days of an arraignment. Under the new statute, the state must bring a defendant who is held in jail to trial within 150 days after his arraignment, unless the defendant is being held in custody for other charges unrelated to the trial.635 If a person is not in jail but is being held to answer on appearance of bond, then that defendant must be brought to trial within 180 days after an arraignment.636 However, the statute also prescribes grounds on which the time for trial may be extended, including: (1) when the defendant is found to be incompetent to stand trial; (2) when the determination of whether the defendant is incompetent is pending; (3) when “there is material evidence which is unavailable;

629. *Littlejohn*, 316 P.3d at 152.
630. *Id.*
631. *Id.* (citing State v. Stevens, 172 P.3d 570 (Kan. 2007), *overruled on other grounds* by State v. Ahrens, 290 P.3d 629 (Kan. 2012)).
632. U.S. CONST. amend. VI.
633. KAN. CONST. Bill of Rights § 10.
635. *Id.* § 22-3402(a).
636. *Id.* § 22-3402(b) (Supp. 2014).
that reasonable efforts have been made to procure such evidence . . . ”; and (4) when the court calendar does not permit the court to begin trial within the specified time.637

In State v. Dobbs, the defendant claimed that the district court violated his right to a speedy trial when it granted State’s motion for a continuance under K.S.A. § 3402(e)(3), while the prosecution waited on crime scene DNA evidence to be processed by the Kansas Bureau of Investigation.638 The Kansas Supreme Court reviewed the decision to grant the continuance for abuse of discretion.639

The court held that material evidence for the purposes of continuance under the statute is defined as “evidence that may have a legitimate and effective bearing on the decision of the case, i.e., when the evidence has the potential to inculpate or exculpate the defendant.”640 The court found that the crime scene DNA evidence was “material” and that the KBI delay in processing the evidence would not be counted against the state.641 The granting of the continuance did not violate the defendant’s right to a speedy trial.642

The Kansas Supreme Court has also ruled that the speedy trial “clock” may stop running temporarily if a delay is “a result of the application or fault of the defendant.”643 In State v. Sievers, the defendant was released on bond and failed to attend a pretrial hearing.644 Following the issue of a warrant, the defendant surrendered to law enforcement.645 A week before the rescheduled trial, the defendant moved to dismiss based upon violation of the right to a speedy trial.646

The Kansas Supreme Court applied de novo review to the trial court and

637. Id. at § 3402(e).
639. Id. at 1264.
640. Id. at 1266 (citing State v. Brown, 973 P.2d 773, 779 (Kan. 1999); Smith v. Deppish, 807 P.2d 144, 150 (Kan. 1991)).
641. Id.
642. Id.
643. State v. Sievers, 323 P.3d 170, 173 (Kan. 2014) (citing KAN. STAT. ANN. § 22-3402(b)).
644. Id. at 171.
645. Id. at 172.
646. Id.
appellate court’s rejection of Sievers’s claim. Ultimately, the court held that the defendant’s trial was delayed because of his own actions, and the speedy trial clock was stopped for the period between his failure to appear and when he surrendered himself to law enforcement.

2. Right to Counsel

The Bill of Rights of the Kansas Constitution affords the criminal defendant with the right to assistance of counsel. The Supreme Court of the United States established that the criminal defendant’s right to counsel arises when charges are filed. In 2012, the Kansas Supreme Court resolved, as an issue of first impression, whether the right to effective assistance of counsel attached to the defendant during a probation revocation proceeding.

In State v. Galaviz, the Kansas Supreme Court held that a defendant has a right to be represented by an attorney in probation revocation proceedings—which are not technically part of the criminal prosecution—but that the right arose from a state statute and not directly from the protections of the Sixth Amendment. The Kansas Legislature provided unequivocally that a defendant who is charged with probation violation is entitled to assistance of counsel and to court-appointed counsel if the defendant is indigent. Because the statute is analogous to the Constitutional protection, the representation enjoyed by the defendant must be “free from conflicts of interest.” The Kansas Supreme Court found that there could be a conflict of interest in the relationship between the defendant and his counsel in this case; therefore it remanded the case to the district court with directions to either afford the defendant new counsel and conduct a conflict-free probation revocation hearing or ascertain the nature of the conflict and whether a reversal of the probation revocation is warranted.

If a defendant claims he was prejudiced by ineffective assistance of counsel, a defendant may file a claim with the court. 

647. Id.
648. Id. at 174.
649. KAN. CONST. Bill of Rights § 10.
652. Id. at 176.
653. Id. at 176 (citing KAN. STAT. ANN § 22-3716(b)(2) (Supp. 2014)).
654. Id. at 174.
655. Id. at 194.
ineffective assistance of counsel is reviewed de novo and focuses upon the factual findings and legal conclusions of the district court.\textsuperscript{656} To prove ineffective assistance of counsel, a defendant must prove: “(1) his counsel’s performance was deficient; and (2) this deficient performance was prejudicial.”\textsuperscript{657}

\textbf{C. Pretrial Release and Bail}

The Eighth Amendment of the Constitution of the United States protects the criminal defendant from the imposition of excessive bail and fines.\textsuperscript{658} The Bill of Rights of the Kansas Constitution mirrors this protection by prohibiting the requirement of excessive bail and imposition of excessive fines.\textsuperscript{659} The person accused of having committed a capital offense, however, shall not be eligible for bail “where proof is evident or the presumption is great.”\textsuperscript{660}

In Kansas, “[b]ail is the security given for the purpose of insuring compliance with the terms of an appearance bond.”\textsuperscript{661} In 2013, the Kansas Court of Appeals resolved whether signing a traffic citation and a notice to appear was equivalent to executing a bond or instrument of bail, for the purposes of convicting the defendant for aggravated false impersonation.\textsuperscript{662} In \textit{State v. Diaz}, officers with the Hutchinson Police Department responded to a traffic accident in which the defendant was involved.\textsuperscript{663} The defendant was not carrying a driver’s license at the time of the accident, so he identified himself under a false name. The police officer issued a citation for driving without a license and inattentive driving, as well as a notice to appear before the Hutchinson Municipal Court.\textsuperscript{664}

\textsuperscript{657} Id.
\textsuperscript{658} U.S. \textsc{const.} amend. VIII.
\textsuperscript{659} \textsc{kan. const.} Bill of Rights § 9.
\textsuperscript{660} Id.
\textsuperscript{661} \textsc{kan. stat. ann.} § 12-4113(e) (2007).
\textsuperscript{663} Id.
\textsuperscript{664} Id.
On the day of his court appearance, the defendant again identified himself under the false name and executed a “Waiver of Right to Counsel and Trial” and a “Promise to Appear and Pay fines” with the false name. Later, the defendant appeared at the police station for fingerprinting and presented a false identification card, bearing the false name. Before the fingerprinting process was completed, however, the defendant confessed that the name on the citation and on the card was not his real name.

The defendant was arrested, charged, and subsequently convicted under K.S.A 21-3825(a)(1) with “falsely representing or impersonating another . . . and in such falsely assumed character executing any bond or other instrument as bail for any party in any proceeding . . . .” The Kansas Court of Appeals clarified that a “bail” can only exist in conjunction with an “appearance bond”; and an “appearance bond” can only be undertaken by a person “in custody.” Because the defendant was not in custody when he signed the traffic citation, the waiver of counsel, and the notice to appear, these instruments are not equivalent to “bail” for the purposes of the aggravated false impersonation charges. Therefore, the Kansas Court of Appeals reversed the defendant’s conviction on that charge.

The authority to define the bail rests with the magistrate and should be “sufficient to assure the appearance of [the defendant] before the magistrate when ordered and to assure the public safety.” Excessive bail and denial of petition to refuse the bail amount are not grounds for reversal of convictions and release from sentences. If the defendant faces a felony charge, the bond must require the defendant to appear before the district court in person or via teleconference. If the charges are for a person felony or personal misdemeanor, the bond must also

665. Id.
666. Id.
667. Id.
668. Id. at 19.
669. Id. at 22; see also KAN. STAT. ANN. § 12-4113(c) (2007).
670. Id. at 22; see also KAN. STAT. ANN. § 12-4113(a) (2007) (“‘Appearance bond’ means an undertaking, with or without security, entered into by a person in custody by which the person is bound to comply with the conditions of the undertaking.”); KAN. STAT. ANN. § 12-4113(h) (2007) (“‘Custody’ means the restraint of a person pursuant to an arrest.”).
671. Id.
672. Id.
require that the defendant cease all contact with the alleged victim for at least seventy-two hours. 676

At the magistrate’s discretion, additional conditions of release can be imposed to “reasonably assure” the appearance of the defendant, including: placing the defendant under specified supervision; restricting travel and association; imposing a curfew; placing the defendant under house arrest; and imposing monitoring by a court services officer. 677 The magistrate may also order drug and alcohol testing; dispense with the requirement of sureties; and accept a cash deposit in lieu of the execution of the bond, generally on the same amount. 678 Finally, the court cannot impose administrative fees. 679

The court also enjoys discretion over whether to allow a defendant to be released upon his own recognizance, without requiring a cash deposit from the defendant, but requiring him to guarantee the payment of the amount of the bond if he fails to appear in court. 680 The magistrate may impose conditions of release, which shall be enumerated in the appearance bond. 681 Conditions of release can be amended any time by the magistrate, who can impose additional or different terms. 682 If the defendant in custody is persistently unable to meet the imposed conditions to be released, he may petition the magistrate who imposed them (or any other magistrate available in the court) to review the conditions without undue delay. 683 K.S.A §§ 22-2802 (12)–(15) also bring detailed rules to govern the processing of the defendant’s bond and release.

Under the Bail Reform Act of 1984, the accused will generally be released, unless the court finds that “no condition or combination of conditions will reasonably assure the appearance of the person as

676. Id.
677. Id. § 22-2802(1)(a)–(e).
678. Id. § 22-2802(2)–(5).
679. Id. § 22-2802(7).
680. Id. § 22-2802(6).
681. Id. § 22-2802(8)–(9).
682. Id. § 22-2802(11).
683. Id. § 22-2802(10).
684. Id. § 22-2802(12)–(15).
required and the safety of any other person and the community.**685
Factors to be considered are (1) the “nature and circumstances” of the
charge; (2) the “weight of the evidence” against the accused; (3) the
“history and characteristics” of the accused, including physical,
psychological, familial, and financial elements, as well as the existence
of a criminal record; and (4) the “nature and seriousness of the danger”
the release of the accused would pose to the community.686 Any
conflicts should be resolved in favor of releasing the accused.687

In United States v. Wang, for example, the defendant was a national
of China, who was living in Kansas without authorization and was
charged with “willfully failing to depart the United States within a period
of ninety days from the date a final order of removal was entered against
him” and detained for deportation.688 In making its release
determination, the district court considered (1) that the charge “did not
involve violence, a minor, controlled substances or weapons”; (2) that
the weight of the evidence against the defendant did not tend to favor one
side or the other; (3) that the defendant was a middle-aged married man
with health issues, who required eight types of medication, lived with
family in a fixed address, and had no prior criminal record—and as such
tended to pose a low risk of flight; and (4) that government had not
shown that defendant could be dangerous to the community.689
Therefore, the district court denied the government’s motion for pretrial
detention and ordered a hearing to determine the conditions of release.690

D. Preliminary Hearing

1. The Right to a Preliminary Hearing

All persons charged with a felony in Kansas have a statutory “right
to a preliminary hearing before a magistrate,” pursuant to Section 22-2902
of the Kansas Statutes.691 The statutory right does not exist when a
person is charged as a result of a grand jury indictment.692 Such a

686. Id. § 3142(g).
27, 2013)
688. Id. at *1.
689. Id. at *2-3.
690. Id. at *3.
691. KAN. STAT. ANN. § 22-2902(1).
692. Id.
preliminary hearing must take place in the county of venue and must occur within 14 days after the personal appearance, or arrest, of the defendant.\textsuperscript{693} This time requirement, however, is viewed as “directory rather than mandatory.”\textsuperscript{694} The defendant and the state may both waive the right to a preliminary hearing; if the statutory right is waived, the magistrate will order the defendant bound over to the judge with proper jurisdiction.\textsuperscript{695}

While the preliminary hearing must take place within a prescribed amount of time after the arrest, the statute does not require a certain amount of time between the preliminary hearing and the trial.\textsuperscript{696} The court in \textit{State v. Rivera} held that there was no error in holding the trial on August 2, when the last preliminary hearing was held on July 30.\textsuperscript{697} Because the case had been pending for a year, the court found that the defendant’s lawyer had adequate time to prepare for the trial.\textsuperscript{698} Additionally, requiring a defendant to attend multiple preliminary hearings is not by itself prejudicial.\textsuperscript{699} A defendant would need to present some unique fact to show multiple preliminary hearings were prejudicial.\textsuperscript{700}

Preliminary hearing continuances are excluded from the calculation of time for purposes of a right to a speedy trial claim.\textsuperscript{701} Such requests are counter to the purpose behind the right to a speedy trial and should not be counted.\textsuperscript{702} Preliminary hearings are excluded from the speedy trial guarantee.\textsuperscript{703} In \textit{State v. Everts}, the court found that a significant delay between the defendant’s arrest and preliminary hearing (two years)

\begin{itemize}
\item \textsuperscript{693} \textit{Id.} § 22-2902(2).
\item \textsuperscript{695} \textit{KAN. STAT. ANN.} § 22-2902(4).
\item \textsuperscript{696} \textit{Id.} § 22-2902(2).
\item \textsuperscript{697} 291 P.3d 512, 536 (Kan. Ct. App. 2012).
\item \textsuperscript{698} \textit{Id.}
\item \textsuperscript{699} \textit{State v. Sprague}, No. 105,827, 2012 WL 3822625 (Kan. Ct. App. Aug. 31, 2012) (finding that requiring a defendant to attend multiple preliminary hearings over the course of a 15-month period was not prejudicial to the defendant).
\item \textsuperscript{700} \textit{Id.} at *6.
\item \textsuperscript{702} \textit{Id.}
\end{itemize}
and the additional six months between the hearing and trial did not violate the defendant’s right to a speedy trial. The court found the State’s understaffing argument reasonable and, further, that the defendant had not suffered any undue prejudice because he had not been incarcerated or otherwise hampered during that period.

Under Kansas law, the right to a preliminary hearing is statutory, not a constitutional right. In Moral v. Babcock, the defendant argued that the district court violated his constitutional rights with an unfair and unreliable preliminary hearing process that denied him access to evidence that could have proved his innocence. The court found that because the right to a preliminary hearing is statutory, the defendant was not entitled to the right to put on the same defense he would have had with a constitutional right. Because the defendant had an opportunity to cross-examine witnesses and present his own witnesses at the preliminary hearing, the court found that his right was satisfied.

In State v. Allen, the appeals court found that an evidentiary hearing did not constitute a de facto preliminary hearing. The court reasoned that if the hearing was a de facto preliminary hearing, then the district court could not have arraigned the defendant until after the hearing, or have accepted pleas from the defendant. Preliminary hearings are a requirement and do not need to be motioned for. To be a preliminary hearing, the hearing must comply with the preliminary hearing requirements: “Simply because two different kind of hearings . . . may end in the same result . . . does not make them the same type of hearing.”

2. Self Representation at Preliminary Hearing

The Sixth Amendment guarantees a defendant the right to self-representation at a preliminary hearing. In State v. Jacobs, the
defendant was convicted of failing to register as a sex offender and appealed his conviction. The defendant alleged the district court violated his right to self-representation at the preliminary hearing. The appellate court found that the defendant did not clearly and unequivocally assert his self-representation right. The defendant in this case asserted his right in two separate unclear motions. Because the defendant’s motions were unclear about his desire to proceed pro se, the appeals court found that his right to pro se representation had not been violated. The defendant’s motion did not meet the standard of clarity necessary to entitle him to pro se representation.

3. Juvenile’s Right To Preliminary Hearing

Juveniles have no constitutional right to a preliminary hearing. Additionally, if the juvenile is charged under the Juvenile Code, there is no statutory right to a preliminary hearing, either. The Kansas Supreme Court has found that no statutory right exists because the defendant is not being charged with a felony: “a juvenile is charged with having committed an offense ‘which if committed by an adult would constitute the commission of a felony.’”

4. Effect of Guilty Plea on Preliminary Hearing Rights

In State v. Chavarin, the 17-year-old defendant made a plea agreement with the State, agreeing to plead guilty to a count of aggravated robbery in exchange for the State’s recommendation on

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715. Id. at *1.
716. Id.
717. Id.
718. Id. at *3.
719. Id.
720. Id.
sentencing and joining the defendant’s motion for probation.\textsuperscript{724} After violating the terms of his probation, the defendant was ordered to serve 120 months imprisonment.\textsuperscript{725} The defendant moved to withdraw his plea, citing a violation of his due process rights during the preliminary hearing.\textsuperscript{726} The court found the defendant’s argument immaterial, noting that “[the defendant] waived his due process claim and any other irregularities on the day he entered his plea of guilty.”\textsuperscript{727}

5. Sufficiency of Evidence

In \textit{State v. Kendall}, the defendant argued that the State failed to establish the crime of stalking at his preliminary hearing.\textsuperscript{728} The court rejected this argument, stating that “[a]s a general principle, after an accused has gone to trial and has been found guilty beyond a reasonable doubt, any error at the preliminary hearing stage is harmless. . . .”\textsuperscript{729} The court acknowledged an exception to this rule in the case where a defendant can prove that the insufficient evidence at the preliminary hearing was prejudicial at trial.\textsuperscript{730} The only way to challenge the sufficiency of evidence at a preliminary hearing is to file a motion to dismiss at the district court level.\textsuperscript{731} This type of challenge is reviewed de novo on appeal.\textsuperscript{732}

6. Preliminary Hearing Procedure

Unless defendant is indicted by a grand jury, a preliminary hearing for all persons charged with a felony must be held within 14 days of either the personal appearance, or arrest of the defendant.\textsuperscript{733} Good cause must be shown before any continuances will be granted.\textsuperscript{734} A magistrate conducts the hearing with the purpose of (1) determining whether a felony has been committed, and (2) determining if the defendant

\begin{footnotes}
\item \textsuperscript{724} \textit{Id.}.
\item \textsuperscript{725} \textit{Id. at *2.}
\item \textsuperscript{726} \textit{Id.}
\item \textsuperscript{728} \textit{Id. at *5.}
\item \textsuperscript{729} \textit{Id. (Quoting State v. Jones, 290 Kan. 373, 381 (2010)).}
\item \textsuperscript{730} \textit{Id. at *5.}
\item \textsuperscript{731} \textit{State v. Washington, 293 Kan. 732, 734 (2012).}
\item \textsuperscript{732} \textit{Id.}
\item \textsuperscript{733} \textit{KAN. STAT. ANN. § 22-2902(1), (2).}
\item \textsuperscript{734} \textit{Id. § 22-2902(1).}
\end{footnotes}
committed the felony.\textsuperscript{735}

The State must present evidence to satisfy both of the magistrate’s criteria.\textsuperscript{736} In reviewing the evidence, “the court must determine whether there is sufficient evidence to cause a person of ordinary prudence and caution to entertain a reasonable belief of the defendant’s guilt.”\textsuperscript{737} As part of this determination, the court makes inferences that are beneficial to the prosecution.\textsuperscript{738} This standard further favors the prosecution by only requiring the prosecution to establish probable cause.\textsuperscript{739}

In making these determinations, the court is not supposed to consider the reasonableness of the charges or the likelihood of a conviction.\textsuperscript{740} If the magistrate determines that both elements are satisfied, then “the magistrate shall order the defendant bound over to the district judge having jurisdiction to try the case.”\textsuperscript{741} If, however, the judge determines that both elements are not met, the judge must discharge the defendant.\textsuperscript{742}

The rules controlling who can preside over a preliminary hearing are lax.\textsuperscript{743} Any district judge may conduct the preliminary hearing, and the statute expressly allows a district judge who presided over the preliminary hearing to preside over the subsequent trial.\textsuperscript{744}

At a preliminary hearing, the defendants may either represent themselves pro se or be represented by counsel.\textsuperscript{745} A defendant wanting to represent himself must do so clearly and unequivocally.\textsuperscript{746} The constitutional rights a defendant would have at trial are granted to the defendant during a preliminary hearing.\textsuperscript{747}

There are important distinctions between a trial and a preliminary

\textsuperscript{735} \textit{Id.} \textsuperscript{\textsection} 22-2902(3).
\textsuperscript{737} \textit{Id.} (citing State v. Anderson, 270 Kan. 68, 71 (2000)).
\textsuperscript{738} \textit{Id.} at *2.
\textsuperscript{739} \textit{Id.} at *2.
\textsuperscript{740} \textit{Id.} at *2.
\textsuperscript{741} KAN. STAT. ANN. \textsuperscript{\textsection} 22-2902(3).
\textsuperscript{742} \textit{Id.}
\textsuperscript{743} \textit{See id.} \textsuperscript{\textsection} 22-2902(5).
\textsuperscript{744} \textit{Id.}
\textsuperscript{746} \textit{Id.} at *3.
\textsuperscript{747} \textit{Id.}
hearing. Like a trial, the defendant is entitled to be present at the preliminary hearing with the witness examined in the defendant’s presence. If, however, the defendant chooses not to be present at the preliminary hearing, the hearing will still go on.

The right to be present during examination of witnesses does not extend to witnesses who are under the age of 13. A defendant cannot enter a plea agreement at the preliminary hearing. However, a defendant can cross-examine witnesses—except those under age 13—and can also put forth any evidence on his behalf. If a felony victim is under 13, probable cause findings can be made based on hearsay evidence from video recordings or by some other means.

The state may admit controlled substances into evidence at the preliminary hearing if: (1) the substance was subject to an approved field test, (2) the field test was done by a certified officer, and (3) the field test was positive. If the field test was positive, that fact is sufficient to establish probable cause that the tested substance is the alleged controlled substance. Evidence of the controlled substance is admissible at a preliminary hearing if it is accompanied by a receipt certifying the substance’s continued possession by law enforcement.

E. Competency to Stand Trial

1. Determination of Competency

A defendant is presumed to be competent. In Kansas state courts, the burden of proving incompetency is put on the party raising the issue; the party must prove competency or incompetency by a preponderance of the evidence. Federal statutes are silent with regard to who bears the burden of proving incompetency. The Tenth Circuit has not clearly

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748. KAN. STAT. ANN. § 22-2902(3).
749. Id. § 22-2902(3).
750. Id.
751. Id.
752. Id.
753. Id.
754. Id. § 22-2902c(a).
755. Id. § 22-2902c(a)(2).
756. Id. § 22-2902c(b).
758. Id.
decided who bears the burden,\textsuperscript{760} but there are strong indications that the burden falls on the defendant.\textsuperscript{761} As defined by Kansas law, a defendant is "incompetent to stand trial" when he is charged with a crime and, because of mental illness or defect, is unable: (a) to understand the nature and purpose of the proceedings against him; or (b) to make or assist in making his defense."\textsuperscript{762} A criminal defendant may not be tried unless the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [and] a rational as well as factual understanding of the proceedings against him."\textsuperscript{763} A defendant may request a competency to stand trial determination at any time after the defendant has been charged with a crime but before pronouncement of the sentence.\textsuperscript{764} Notably, this rule does not apply to civil proceedings, including civil commitment proceedings.\textsuperscript{765}

Competency involves due process issues that are reviewable for the first time on appeal.\textsuperscript{766} The trial court has an independent duty to hold a competency hearing when the evidence raises a "bona fide" doubt as to the defendant’s competency.\textsuperscript{767} Failure to do so constitutes a denial of due process rights.\textsuperscript{768} Appellate courts review decisions regarding defendants’ competency to stand trial under an abuse of discretion standard.\textsuperscript{769} Discretion is abused if it (1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on error of fact.\textsuperscript{770}

\textsuperscript{760} U.S. v. Wayt, 24 F. Appx 880, 883 (10th Cir. 2001) (noting that the court need not resolve that question, as the district court’s allocation of the burden of proof to the defendant did not change the outcome of the competency determination).
\textsuperscript{761} U.S. v. Sanchez-Gonzalez, 109 F. Appx 287, 290 (10th Cir. 2004).
\textsuperscript{762} KAN. STAT. ANN. § 22-3301(1) (2007).
\textsuperscript{764} KAN. STAT. ANN. § 22-3302 (Supp. 2014).
\textsuperscript{766} State v. Foster, 233 P.3d 265, 272 (Kan. 2010).
\textsuperscript{768} Id.
\textsuperscript{769} State v. Hill, 228 P.3d 1027, 1045 (Kan. 2010).
2. Involuntary Medication to Render Defendant Competent to Stand Trial

Antipsychotic drugs may be involuntarily administered to a mentally ill defendant facing serious criminal charges to render the defendant competent to stand trial, but the treatment must be medically appropriate, substantially unlikely to have side effects that may undermine the fairness of the trial, and necessary to significantly further important governmental interests related to trial.\textsuperscript{771} When an order to involuntarily medicate a non-dangerous defendant is issued solely to render the defendant competent to stand trial, the order must specify which medications may be administered, including each maximum dosage.\textsuperscript{772} However, as long as all drugs that may be administered are specified, a court may approve a treatment plan identifying a range of medications that may be used should the initial drugs prove unsatisfactory.\textsuperscript{773} Either the government or the defendant may move to revise the court’s order should circumstances change during the defendant’s treatment.\textsuperscript{774}

3. Effects of Involuntary Commitment

Commitment to a mental health facility may be counted against the sentence a defendant is required to serve. In \textit{State v. Sult}, the Kansas Court of Appeals considered for the first time whether a defendant is entitled to post-sentence jail time credit for time spent in a state hospital.\textsuperscript{775} In \textit{Sult}, the defendant was found incompetent to proceed with his probation revocation after his arrest for violation of his probation.\textsuperscript{776} The defendant was involuntarily held at a state mental health facility, presumably until he was deemed competent.\textsuperscript{777} Because the defendant did not voluntarily commit himself to the state hospital, and was not free to leave, the court found that the defendant’s freedom was restricted and the days spent in the state hospital should be credited against his sentence.\textsuperscript{778}

\textsuperscript{772} U.S. v. Chavez, 734 F.3d 1247, 1253 (10th Cir. 2013).
\textsuperscript{773} \textit{Id.} at 1254.
\textsuperscript{774} \textit{Id.}
\textsuperscript{775} \textit{Id.} at *2.
\textsuperscript{776} \textit{Id.} at *9.
F. Jurisdiction and Venue

1. Jurisdiction

The Kansas Constitution establishes that “[t]he district courts shall have such jurisdiction in their respective districts as may be provided by law.”

In Kansas, the state legislature has given the district court[s] “exclusive jurisdiction to try all cases of felony and other criminal cases arising under the statutes of the state of Kansas.”

On appeal, the issue of jurisdiction is a question of law over which the appeals court has an unlimited scope of review.

Jurisdiction and venue are “not, strictly speaking, elements of every criminal case.”

2. Venue

The issue of venue is “a necessary jurisdictional fact that must be proven along with the elements of the actual crime.” Venue as a component of jurisdiction is subject to the same standard of review as jurisdiction; the appeals court reviews venue issues de novo.

Except where otherwise provided by law, prosecution of a crime “shall be in the county where the crime was committed.” When a crime requires two or more acts and such acts occur in different counties, prosecution may be in any county in which any of the acts occur.

The defendant in State v. Castleberry was charged with unlawful use of a communication facility after using a cell phone while in one county to facilitate a drug purchase

779. KAN. CONST. ART. III, § 6(b).
780. KAN. STAT. ANN. § 22-2601.
782. State v. Quakenbush, 288 P.3d 871 (Kan. Ct. App. 2012) (finding that when a defendant, on the basis of one criminal act, is charged in two separate criminal cases in neighboring counties, it is irrelevant for purposes of the same elements test that the State would have been required to prove a different jurisdiction for each charge because jurisdiction and venue are not elements of the offense in question).
784. Id.
786. Id. § 22-2603.
with a purchaser located in another county. The court held that unlawful use of a communication facility occurs simultaneously where the parties to the communication are located and therefore venue is proper in either location. Similarly, when the defendant in State v. Kendall was charged with violation of a protection order, the Kansas Supreme Court found jurisdiction to be proper in either the county where the defendant initiated the contact with the victim, or in the county where the victim received the contact. However, the legislature, rather than the courts, should decide how to treat possible venue issues caused by new technology. Circumstantial evidence may be used to establish that venue is proper.

a. Venue for a Failure to Register

Federal law requires sex offenders who travel in interstate commerce to register, as required by the Sex Offender Registration and Notification Act (SORNA). In United States v. Lewis, the Tenth Circuit found that a convicted sex offender, who had abandoned his residence in one state and moved to another state without updating his registration as required, could be prosecuted for failure to register as a sex offender in the state from which he departed. The court reached this conclusion because the reporting obligation begins at the moment the sex offender abandons his former residence, regardless of whether he has yet established a new, permanent residence. The interstate travel of the offender creates two or possibly more venues in which the crime may be prosecuted; the crime begins in the district where the offender abandons his residence and is ongoing where the offender establishes a new residence without registering. Similarly, a defendant who abandons his residence in Kansas and boards a plane to the Philippines does not escape his duty to

788. Id. at 801.
790. State v. Coty, 297 P.3d 305, 309 (Kan. Ct. App. 2013) (finding that, in prosecution of a defendant for criminal use of a financial card based on the defendant’s use of the credit card number without the cardholder’s consent, venue was improper in the county where the cardholder resided and the card was physically located when the defendant had never visited that county and the unauthorized purchases were not for goods or services in that county).
792. 18 U.S.C. § 2250.
793. United States v. Lewis, 768 F.3d 1086, 1087 (10th Cir. 2014).
794. Id. at 1090.
795. Id. at 1093–94.
register as a sex offender by virtue of moving to a non-SORNA jurisdiction. The abandonment of the residence in Kansas triggers a registry obligation in Kansas that, if left unfulfilled by the defendant, results in a failure to register in Kansas and thus venue in Kansas is proper.

G. Statute of Limitations

K.S.A. § 21-5107 outlines the criminal statute of limitations in Kansas. The default statute of limitations for offenses not specifically mentioned in other sections of § 21-5107 is five years. Crimes committed against the Kansas public employees retirement system (KPERS) have an increased statute of limitations of ten years. K.S.A. § 21-5107 also provides for the tolling of the statute of limitations period given specific circumstances.

1. Recent Statutory Changes

During the 2013 Kansas Legislative Session, the Kansas Legislature amended section (a) of K.S.A. § 21-5107 to repeal the statute of limitations for the offenses of rape and aggravated criminal sodomy. Therefore, charges against defendants suspected of either crime may now be brought at any time, exclusive of any sort of window of time. Additionally, the Legislature amended subsection (c)(1) and added subsection (c)(2) to allow for different treatment of other “sexually violent” crimes based on the age of the victim. In cases where the victim is over the age of eighteen, a ten-year statute of limitations is imposed unless the identity of the suspect is established by DNA testing. If DNA testing establishes the identity of the suspect, a one-

796. United States v. Nichols, 775 F.3d 1225, 1230 (10th Cir. 2014).
797. Id.
799. § 21-5107(b).
800. § 21-5107(c)(1)-(6).
801. § 21-5107(a); H.R. 2252, 85th Leg., Reg. Sess. (Kan. 2013).
802. § 21-5107(c)(1)-(2).
803. § 21-5107(c)(1).
year statute of limitations is applied.\textsuperscript{804}

Subsection (c)(2) of K.S.A. § 21-5107 provides that the relevant statute of limitations period for crimes against victims under the age of eighteen is ten years after the victim’s eighteenth birthday.\textsuperscript{805} Subsection (c)(2) also includes a DNA testing clause that mirrors the rule from (c)(1).\textsuperscript{806} Thus, unless a prosecutor has DNA evidence that establishes the identity of the suspect, charges may be brought against suspects of violent sexual offenses against minors up until the victim’s twenty-eighth birthday.\textsuperscript{807} The prior statute of limitations for sexually violent crimes against minors was five years after the victim’s eighteenth birthday, or before the victim turned twenty-three years old.\textsuperscript{808}

The Legislature also made a few cosmetic changes to K.S.A. § 21-5107. The word “offense” has been replaced with “crime” in the prefatory portion of section (c); presumably to add further clarity, but also, perhaps, to stop a savvy defense attorney from successfully parsing the words. The latter portion of section (f) is removed to avoid contradiction with the amendments made in (c)(1) and (c)(2).\textsuperscript{809} In the 2014 legislative session, section (f) was further updated to specify that “time starts to run on the day after the offense is committed” at the end of the section.\textsuperscript{810}

The effect of this change in law is obvious for the practitioner. To avoid potential malpractice suits, defense attorneys will need to keep in mind while counseling clients that rape and aggravated criminal sodomy are no longer protected by any statute of limitations. For the same reasons, the ten-year statute of limitations for sexually violent crimes against adults and the additional five years that prosecutors now have to bring charges for sexually violent crimes against minors are equally important. On the economic side, the Kansas Division of the Budget predicts that amendments to K.S.A. § 21-5107 will result in increased prosecutions in both Kansas’ district and appellate courts.\textsuperscript{811} The Division also asserts that the exact fiscal effect cannot be determined

\begin{footnotesize}
\begin{enumerate}
\item Id.\textsuperscript{804}  
\item § 21-5107(c)(2).\textsuperscript{805}  
\item Id.\textsuperscript{806}  
\item Id.\textsuperscript{807}  
\item SUMMARY OF H.R. 2252, 85th Leg., Reg. Sess. (Kan. 2013).\textsuperscript{808}  
\item H.R. 2252, 85th Leg., Reg. Sess. (Kan. 2013).\textsuperscript{809}  
\item H.B. 2448, 86th Leg., Reg. Sess. (Kan. 2014).\textsuperscript{810}  
\item Corrected Fiscal Note for HB 2252 from Steven J. Anderson, Kansas Director of the Budget, to John Rubin, Chairperson, House Committee on Corrections and Juvenile Justice (March 4, 2013) (on file with author).\textsuperscript{811}
\end{enumerate}
\end{footnotesize}
because of the unpredictability of the complexity of the new cases filed.\textsuperscript{812} However, even assuming an adverse effect on both judicial economy and the state budget, the amendments to K.S.A. § 21-5107 are arguably justified by the state’s interest in prosecuting violent sexual crime.

2. Statute of Limitations Enacted After Commission of a Crime

The petitioner in \textit{Harms v. Cline} committed his offenses in March 2004, when the statute of limitations was two years.\textsuperscript{813} The next year, the statute of limitations was extended to five years.\textsuperscript{814} Petitioner was charged for the crimes in question in February 2006, within the original two-year statute, but was not arrested until June 2006, outside the original two-year statute.\textsuperscript{815} Petitioner argued that the five-year statute of limitations was retroactively applied to him in violation of the Constitution’s ex post facto clause.\textsuperscript{816} The district court disagreed, finding that while applying a state law enacted \textit{after the expiration} of a previously-applicable limitations period violates the ex post facto clause, the rule does not apply to \textit{unexpired} statutes of limitations.\textsuperscript{817} When the statute of limitations is extended before the original limitations period has expired, application of the newly extended statute of limitations does not violate the ex post facto clause.\textsuperscript{818}

\textbf{H. Joinder of Charges}

In Kansas, K.S.A. § 22-3202 covers joinder of charges and defendants.\textsuperscript{819} The joinder of multiple charges for an individual defendant is governed by K.S.A. § 22-3202(1).\textsuperscript{820} In order to join two or

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{812} \textit{Id.}
\item \textsuperscript{813} \textit{Harms v. Cline}, 27 F.Supp.3d 1173, 1186 (D. Kan. 2014).
\item \textsuperscript{814} \textit{Id.}
\item \textsuperscript{815} \textit{Id.} at 1186–87.
\item \textsuperscript{816} \textit{Id.} at 1187.
\item \textsuperscript{817} \textit{Id.}
\item \textsuperscript{818} \textit{Id.}
\item \textsuperscript{819} \textsc{Kan. Stat. Ann} § 22-3202 (2007).
\item \textsuperscript{820} § 22-3202(1).
\end{itemize}
\end{footnotesize}
more crimes into a single charging document, the crimes charged – whether felonies, misdemeanors, or both – must be: (1) of the same or similar character; or (2) based on the same act or transaction; or (3) based “on two or more acts or transactions connected together or constituting parts of a common scheme or plan.” Additionally, if the prosecutor elects not to consolidate charges into a single charging document, § 22-3203 allows for the court to consolidate a defendant’s separate charging documents into one trial if the separate crimes could have been consolidated into a single charging document. Potential joinder errors are evaluated in a three-step analysis: (1) whether K.S.A. 22–3203 permitted joinder; (2) whether the district court abused its discretion in permitting joinder; and (3) whether the error resulted in prejudice.

In late 2013, the Kansas Supreme Court decided State v. Hurd, which delved into the third “connected together” prong of K.S.A. § 22-3202. The issue in Hurd was whether Hurd’s separate charges were properly joined by the district court. The outcome depended on whether his charges for failure to register as a sex offender were “connected together” with his charges for battery, assault, and making a criminal threat. The Kansas Supreme Court has found, for joinder purposes, acts or transactions to be “connected together” in any three of the following scenarios: (1) the defendant provides evidence of one crime while committing another; (2) when some of the charges are precipitated by other charges; and (3) when all of the charges stem from a common event or goal. A court’s calendar considerations are never a valid basis for joinder.

In Hurd, one of Hurd’s victims in the assault gave evidence about Hurd’s living situation when reporting the assault, which became evidence for the failure to register charge. The Court of Appeals in Hurd thus found that the crimes were “connected together” by virtue of the first prong of the “connected together” analysis, the defendant

821. Id.
822. § 22-3203.
824. Id.
825. Id. at 701.
826. Id. at 702.
827. Id.
828. Id.
829. Id.
providing evidence of one crime while committing another.\textsuperscript{830}

In reaching this conclusion, the Court of Appeals looked to \textit{State v. Anthony}, a 1995 Kansas Supreme Court case which held that the defendant, who gave evidence about a murder and a robbery to police during a drug sting operation, provided evidence of one crime while committing another, and thus made the crimes “connected together.”\textsuperscript{831} However, the Supreme Court distinguished \textit{Hurd} from \textit{Anthony} by “a crucial distinction;” a victim, not the defendant Hurd, was providing the evidence.\textsuperscript{832} The Court thus found joinder improper.\textsuperscript{833} Practitioners should look to this case and take away two main points: (1) the defendant, not a third party, must be the one providing the evidence to support the finding that two distinct crimes are “connected together”; and (2) the court’s calendar needs are not an extra-statutory justification for joinder.

After finding the joinder to be improper in \textit{Hurd}, the Kansas Supreme Court next considered whether the joinder prejudiced Hurd.\textsuperscript{834} The party benefiting from the error bears the burden of demonstrating that there is no reasonable probability the error affected the trial’s outcome, in light of the whole record.\textsuperscript{835} Because the State’s case against Hurd was weak in regards to the battery, assault, and criminal threat charges, the court found that the jury may well have been influenced by the evidence of prior convictions allowed in by the improper joinder and thus reversed.\textsuperscript{836}

Another recent development in the Kansas criminal joinder realm comes in an unpublished Kansas Court of Appeals case, \textit{State v. Fogle}.\textsuperscript{837} While not binding precedent, \textit{Fogle} appears to be a case of first impression in Kansas on how to treat joined crimes for sex offender registry purposes.\textsuperscript{838} In \textit{Fogle}, as a result of a plea agreement between

\begin{footnotes}
\item[830] \textit{Id.}
\item[831] \textit{Id.}, citing \textit{State v. Anthony}, 898 P.2d 1109 (Kan. 1995).
\item[832] \textit{Id. at} 703.
\item[833] \textit{Id.}
\item[834] \textit{Id.}
\item[835] \textit{Id.}
\item[836] \textit{Id. at} 703–04.
\item[838] \textit{Id.}
\end{footnotes}
the state and Fogle, separate charges of sexual misconduct were joined into a single charging document.\footnote{839} After joinder, Fogle pleaded guilty on both counts.\footnote{840} For purposes of registry, the district court treated both counts as separate convictions and required Fogle to become a lifetime registrant, rather than for just ten years as required by one conviction.\footnote{841} Fogle appealed, citing Kansas sentencing guidelines, which treated multiple counts in joined claims as a single conviction.\footnote{842} However, the court found that since each count was distinct and featured separate victims on separate occasions, each count would be treated as a separate conviction for registry purposes.\footnote{843}

In \textit{State v. Carr}, brothers Reginald Carr (R. Carr) and Jonathan Carr (J. Carr) were jointly charged, tried, convicted, and sentenced for crimes committed in a series of three incidents.\footnote{844} The first incident, in which Andrew Schreiber was the victim, resulted in charges against the brothers for kidnapping, aggravated robbery, aggravated battery, and criminal damage to property.\footnote{845} R. Carr was convicted on all counts, while J. Carr was acquitted on all counts.\footnote{846} The second incident, in which Linda Ann Walenta was the victim, resulted in first-degree felony murder convictions for both brothers.\footnote{847} For the third incident, in which Heather M., Aaron S., Brad H., Jason B., and Holly G. were the victims, both brothers were charged with eight alternative counts of capital murder, one count of attempted first-degree murder, five counts of aggravated kidnapping, nine counts of aggravated robbery, thirteen counts of rape, three counts of aggravated criminal sodomy, seven counts of attempted rape, one count of burglary, and one count of theft.\footnote{848} The brothers were also charged with one count of animal cruelty for the killing of one victim’s dog.\footnote{849} The brothers were both convicted of all charges arising out of the third incident (the third incident, which began with the invasion at the male victim’s Birchwood Drive home, was
referred to as the Birchwood incident). In a subsequent capital penalty proceeding, both brothers were sentenced to death for the four capital murders and received a hard 20 life sentence for the Walenta felony murder.

R. Carr raised issues tied to both the guilt phase of his prosecution and to the death penalty phase of his prosecution, including claims of improper joinder of both charges and co-defendants. As to the improper joinder of charges, R. Carr challenged the joinder of his noncapital and capital charges, arguing that the charges could not be “of the same or similar character” because they were not subject to the same punishment. While the Kansas Supreme Court had previously looked to similarity of punishment as one factor to consider, it noted that the statute did not expressly require joined offenses to have similar punishments and the court was “loath to add a requirement not set out by the legislature.” Instead, it found that the plain language of the statute, which allowed for felonies and misdemeanors to be tried together, to expressly provide for joinder of offenses with different punishments, as the punishments for felonies and misdemeanors are “widely divergent.”

I. Joinder and Severance of Co-Defendants

In addition to the joinder of charges, K.S.A. § 22-3202 also allows for the joinder of two or more defendants in the same charging document. To qualify, defendants must have: (1) participated in the

850. Id.
851. Id.
852. Id. (for the remaining non-death-eligible crimes, J. Carr received a controlling total of 492 months imprisonment consecutive to the hard 20 life sentence and R. Carr received a controlling total of 570 months imprisonment consecutive to the hard 20 life sentence).
853. Id. (R. Carr raised 21 issues tied to the guilt phase and 19 issues tied to the death penalty phase).
854. Id. at 620.
855. Id.
856. Id. at 621.
same act or transaction; or (2) in the same series of acts or transactions constituting the crime(s). Additionally, while no statutory authority exists for consolidating defendants charged in separate charging documents into a single trial, Kansas case law has said that the rule for consolidation is the same as the rule for joinder in § 22-3202. Two or more defendants will satisfy the common law rule allowing consolidation, or in other words, will be deemed to have met the parallel § 22-3202 requirement, when: (1) each defendant is charged for each offense; or (2) each defendant is charged with conspiracy and some of the defendants are charged with an offense in furtherance of the conspiracy; or (3) in the absence of conspiracy, the several offenses charged were part of a common scheme or so closely related that proof of one charge would require proof of the others.

Inherently connected to joinder of defendants is severance of defendants. K.S.A. § 22-3204 governs severance of criminal defendants. Under § 22-3204, a judge may order severance into separate trials upon request of either the prosecutor or a defendant. While the “may” language of the statute certainly allows for substantial discretion on the part of the trial judge, that discretion is limited. A trial judge should grant a defendant’s motion to sever if defendant can show that she would suffer actual prejudice if the cases were tried jointly. However, “evolving case law now generally places the burden of demonstrating harmlessness on the party benefiting from the error.” Failure to grant defendant’s motion to sever when prejudice exists is an abuse of discretion and will result in reversal on appeal if the defendant meets his burden. Factors to consider in determining whether prejudice exists include: (1) the existence of antagonistic defenses; (2) important evidence favorable to one defendant is inadmissible in a joint trial; (3) evidence that is inadmissible against one defendant, but admissible as to the other would be prejudicial to the former; (4) a confession by one defendant would be calculated to prejudice the jury against the other defendants; and (5) one of the defendants who could give evidence for

858. Id.
859. Id.
860. KAN. STAT. ANN. § 22-3204.
863. Id.
864. Id. at 617.
865. Id. at 616.
the other defendants could become competent and compellable in separate trials.\footnote{866} In \textit{State v. Carr}, there was no question that defendants had antagonistic defenses.\footnote{867} Each defendant attempted to deflect the focus from himself in the Birchwood crimes by “assisting in the prosecution of the other.”\footnote{868} R. Carr also argued that the denial of severance forced exclusion of testimony from a witness that exculpated him but would have violated J. Carr’s Sixth Amendment confrontation rights; additionally, each defendant apparently made at least one personally incriminating statement about being the one who fired the shots that killed four of the victims.\footnote{869} These statements were both referenced during the penalty phase of the trial.\footnote{870} The court found that each statement could have been admitted in separate trials, and that R. Carr could have used J. Carr’s statement of personal responsibility in his “J. Carr-plus-third-person” defense.\footnote{871}

Evidence that was inadmissible in the joint trial but would have been admissible in separate trials also included R. Carr’s eventually proffered testimony about what J. Carr said to him on the night of the Birchwood crimes.\footnote{872} The court found that if the district court had not erroneously excluded these statements due to evidence rules, he would have had to consider these statements in the severance decision.\footnote{873} Despite finding that the third and fifth factors were inapplicable in \textit{Carr} and that the fourth factor cut in favor of the State, the Kansas Supreme Court concluded that the first two factors, weighing heavily in favor of the defendants, warranted a finding that the district court’s repeated refusal to sever the guilt phase of the prosecution was an abuse of discretion.\footnote{874}

\footnote{866}{\textit{Id.} at 616.}
\footnote{867}{\textit{Id.} at 617 (noting State’s concession of the existence of antagonistic defenses).}
\footnote{868}{\textit{Id.} R. Carr argued that his brother, J. Carr, committed the Birchwood crimes with another person. J. Carr stressed the evidence of R. Carr’s guilt in the Birchwood incident.}
\footnote{869}{\textit{Id.} The defendants’ sister testified that R. Carr told her he shot the four victims, while J. Carr allegedly made a similar statement to fellow prisoners while incarcerated prior to trial.}
\footnote{870}{\textit{Id.}}
\footnote{871}{\textit{Id.} at 617–18.}
\footnote{872}{\textit{Id.} at 618.}
\footnote{873}{\textit{Id.}}
\footnote{874}{\textit{Id.}}
Despite finding an abuse of discretion, the Kansas Supreme Court held that R. Carr was not entitled to reversal.\textsuperscript{875} The court found that “[a]lthough its path to R. Carr’s convictions was made somewhat smoother and straighter” by the errors, the State had “presented compelling evidence of R. Carr’s guilt, all of which would have been admissible in a severed trial.”\textsuperscript{876}

A 2012 Kansas Supreme Court case, \textit{State v. Stafford}, can be contrasted with the improper joinder found in \textit{Carr}. \textit{Stafford} dealt with the first factor listed above: the existence of antagonistic defenses.\textsuperscript{877} In \textit{Stafford}, Wells, the mother of the victim, and her boyfriend, Stafford, were convicted of rape and aggravated criminal sodomy of Wells’ 7-year old daughter.\textsuperscript{878} On appeal, Stafford argued that he suffered prejudice because he was tried jointly with Wells, asserting that the parties had antagonistic defenses.\textsuperscript{879} However, each defendant presented the united defense of denying any wrongdoing; Stafford was really asking the court to speculate that he might have brought up a different defense had his trial been severed from Wells’.\textsuperscript{880} The court was not persuaded, and held that mere speculation that a different defense would have been provided was insufficient to show prejudice.\textsuperscript{881} The court also held that defenses would not be deemed antagonistic unless the defendants blame the other party for the crime; here, neither Wells nor Stafford implicated the other party in their respective defenses.\textsuperscript{882}

\textit{J. Plea Agreements}

In Kansas, a plea agreement is a contract between the accused and the state and is governed by general contract principles.\textsuperscript{883} Since the defendant has given up many rights in conjunction with his plea agreement, if the state breaches the agreement, it is considered a due process violation.\textsuperscript{884} Therefore, prosecutors must be careful to ensure

\textsuperscript{875} \textit{Id.} at 620.
\textsuperscript{876} \textit{Id.}
\textsuperscript{877} \textit{State v. Stafford}, 290 P.3d 562 (Kan. 2012).
\textsuperscript{878} \textit{Id.} at 575.
\textsuperscript{879} \textit{Id.}
\textsuperscript{880} \textit{Id.}
\textsuperscript{881} \textit{Id.}
\textsuperscript{882} \textit{Id.} at 575–76.
\textsuperscript{884} \textit{Peterson}, 293 P.3d at 734.
they live up to the agreements made with defendants. In 2013, two Kansas Supreme Court cases measured whether prosecutors had lived up to those agreements. In 2014, a Tenth Circuit Court of Appeals case evaluated whether, when a defendant’s guilty plea is found not to be knowing and voluntary, the waiver of the defendant’s right to appeal the plea is likewise invalid.

1. Recent Plea Agreement Cases

In *State v. Peterson*, Peterson was charged with two counts of sexual exploitation of a child. In exchange for a plea of no contest to one count of attempted sexual exploitation of a child, the prosecutor agreed not to oppose Peterson’s motion for a dispositional departure to probation. Additionally, the prosecutor agreed to remain silent at the sentencing hearing. However, the prosecutor conducted a cross-examination of a psychologist who testified at sentencing that Peterson was a good candidate for probation, and argued that Peterson’s lack of candor “should be considered by the court that he cannot or will not address his looking at child pornography or desire to look at child pornography.”

The court found that to the extent that the prosecutor spoke in an effort to fill in the gaps and correct misinformation provided by Peterson, the prosecutor did not breach the agreement. A promise to remain silent in a plea agreement does not require a prosecutor to remain silent in the face of factual misimpressions presented by the defendant. However, if a prosecutor agrees to remain silent at sentencing, she may not argue against defendant’s efforts to minimize culpability. Therefore, the prosecutor’s continued examination after clarifying

885. *Id.* at 730; *State v. Urista*, 293 P.3d 738 (Kan. 2013).
886. *Rollings*, 751 F.3d at 1186.
888. *Id.*
889. *Id.*
890. *Id.* at 734.
891. *Id.* at 737.
892. *Id.* at 736–37.
893. *Id.* at 737.
misimpressions was a breach of the plea agreement.

In State v. Urista, the plea agreement provision at issue was a promise by the prosecutor to make a specific sentencing recommendation.\textsuperscript{894} The prosecutor half-heartedly made the recommendation, but then proceeded to make comments undermining the recommendation he had just made.\textsuperscript{895} The court, looking to the contractual duty of good faith and fair dealing, held that these statements sufficiently undermined the agreed sentencing recommendation to constitute a breach of the plea agreement.\textsuperscript{896}

The major takeaway from these two cases is that prosecutors need to take seriously the obligations they enter into in plea agreements. Attempting to sneak arguments in under the guise of correcting misimpressions or half-heartedly making then undermining the agreed sentencing recommendation is not acceptable. Prosecutors would be wise to follow the plain meaning of their plea agreements, or they may run the risk of losing their convictions on appeal.

2. Waiver of Right to Appeal the Plea

In determining whether an appellate waiver is knowing and voluntary, the court may consider whether the entire plea agreement, including the plea, was entered knowingly and voluntarily.\textsuperscript{897} This rule was set forth in United States v. Rollings, a Tenth Circuit case in which the defendant argued that his guilty plea was not knowing and voluntary, and thus his waiver of his right to appeal the plea was likewise invalid.\textsuperscript{898} Rollings signed a plea deal admitting the basic elements of the crime, as well as affirming that he knowingly and voluntarily waived his right to appeal or collaterally challenge his “guilty plea, sentence, restitution imposed, and any other aspect of his conviction.”\textsuperscript{899} Rollings contended that the appellate waiver was invalid because he did not knowingly and voluntarily enter the plea agreement that contained the waiver, alleging that the court misled him about the elements of the crime to which he pleaded guilty, and that it failed to inform him of the possibility that it

\textsuperscript{894} State v. Urista, 293 P.3d 738, 741 (Kan. 2013).
\textsuperscript{895} Id. at 742–43.
\textsuperscript{896} Id. at 744, 751.
\textsuperscript{897} United States v. Rollings, 751 F.3d 1183, 1186 (10th Cir. 2014).
\textsuperscript{898} Id.
\textsuperscript{899} Id.
could order substantial restitution in sentencing. The government urged the court to limit the analysis only to the appellate waiver provision of the plea agreement in determining whether the agreement as a whole was entered in to knowingly and voluntarily.

The court concluded that the preferred reading of the law is that where the parties intended the agreement to stand or fall as a whole, the court may examine all of the terms of the plea agreement in deciding whether to enforce the appellate waiver provision. The court was guided by *United States v. Hahn*, which calls for the enforcement of an appellate waiver if (1) the disputed appeal falls within the scope of the waiver of appellate rights; (2) the defendant knowingly and voluntarily waived his appellate rights; and (3) a miscarriage of justice would not result from enforcing the waiver. The burden of establishing these elements is with the defendant. To determine whether waiver was knowing and voluntary, the court should look to the plea agreement and the explanation provided to the defendant by the district court, which “ordinarily” entails looking at (1) whether the language of the plea agreement states that the defendant enters into the agreement knowingly and voluntarily and (2) whether an adequate Federal Rule of Criminal Procedure 11 colloquy was provided to the defendant by the court. The totality of the circumstances will be considered.

The Tenth Circuit in *Rollings* attempted to clear up the inconsistencies in determining whether appellate waivers were knowingly and voluntarily made that followed *Hahn*. The court pinpointed the ambiguity as being whether an *appellate waiver* contained in a plea agreement can be knowing and voluntary if the *plea* in the plea agreement was not also knowing and voluntary. The court held that it is appropriate to consider the knowing and voluntary nature of the entire

900. *Id* at 1187.
901. *Id*.
902. *Id*.
903. *Id*.
904. *Id*.
905. *Id* at 1188.
906. *Id*.
907. *Id*.
908. *Id* (emphasis in original).
plea agreement while conducting such evaluation; if the defendant does not enter into the agreement voluntarily, then the appellate waiver subsumed in the agreement also cannot stand.\(^9\)

\textbf{K. Arraignment}

K.S.A. § 22-3205 governs the arraignment process in Kansas.\(^9\) The purpose of the arraignment is to present the defendant with the charges against him in order to satisfy the notice requirement of defendant’s due process rights.\(^9\) Subsection (a) of § 22-3205 requires: (1) the arraignment to occur in open court; (2) reading or stating the substance of the charge to defendant; (3) giving defendant a copy of the complaint, information, or indictment; and (4) defendant’s plea to the charges brought.\(^9\) Felony offenses require the defendant to be actually present at the arraignment.\(^9\) Misdemeanor offenses allow for defendant to appear by counsel.\(^9\)

Subsection (b) of K.S.A. § 22-3205 allows for arraignment by two-way video conferencing technology in lieu of an actual appearance in court.\(^9\) Defendants must be apprised of their right to be actually present in court, and are not prejudiced by choosing to enforce that right.\(^9\) Under the current subsection (b), arraignment by two-way video conferencing is done at the discretion of the court.\(^9\)

On February 20, 2015, the Kansas Senate Judiciary Committee published a committee report recommending the passage of a bill that amends K.S.A. § 22–3205(b) to allow two-way video conferencing at any arraignment at which the defendant stands mute or enters a not guilty plea . . . unless good cause is shown why such audio-visual communication should not be utilized.\(^9\) The bill would also strike language regarding the discretion of the court in section (b), as well as these two sentences: “The defendant shall be informed of the defendant’s right to be personally present in the courtroom during arraignment.

\(^9\) Id.
\(^9\) Id.
\(^9\) § 22-3205(a).
\(^9\) Id.
\(^9\) Id.
\(^9\) Id.
\(^9\) Id.
\(^9\) § 22-3205(b).
\(^9\) Id.
\(^9\) Id.
\(^9\) Id.
Exercising the right to be present shall in no way prejudice the defendant.” 919 While the bill retains the word “may,” unlike a similar bill introduced by the Committee in January of 2014, the bill differs in another important way. 920 The 2014 bill would have replaced “may” with “shall” and would have, as the 2015 bill intends to, strike completely the “in the discretion of the court” language. 921 The 2014 bill, unlike the 2015 bill, would also add language limiting the mandatory nature of this rule to districts that have two-way video conferencing technology available. 922 Additionally, and likely most importantly, the 2014 bill would have left intact the defendant’s ability to enforce her right to be actually present in the courtroom should she desire it. 923 The 2015 bill may not, at least not expressly. The Kansas Office of the Budget estimated that the 2014 bill could have saved counties money by reducing expenditures associated with transporting prisoners. 924

L. Discovery

K.S.A. § 22-3212 and § 22-3213 govern criminal discovery in Kansas. 925 § 22-3213 sets out that prosecutorial witness statements are not discoverable until after the witness has testified. 926 § 22-3212 is the main discovery statute. The basic rule of § 22-3212, codified in subsection (a), is that prosecutors must, upon request, provide to the defense any relevant: (1) written or recorded statements or confessions made by defendant in prosecution’s possession; (2) results of physical and mental examinations and scientific tests made in connection with the case; (3) defendant’s recorded testimony before grand jury; (4)

919. Id.
921. Id.
922. Id.
923. Id.
924. Fiscal Note for SB 290 from Jon Hummell, Kansas Interim Director of the Budget, to Jeff King, Chairperson, Senate Committee on Judiciary (Jan. 28, 2014) (on file with author).
926. § 22-3213.
memoranda of any oral confession made by defendant and a list of witnesses to the oral confession. Additionally, subsection (b) of K.S.A § 22-3212 adds a catchall provision that allows defense to discover any photograph books, papers, documents, tangible objects, and buildings or places that have been within the possession or control of the prosecution. Requests under subsection (b) must be material to the case and must not place an undue burden on the prosecution. If the defense seeks to discover the results of a scientific test or mental or physical examination or pursues discovery under subsection (b), then the prosecution may also pursue certain types of discovery under subsection (c). This discovery includes scientific reports or photographs, books, documents or portions thereof, and tangible objects that the defense intends to produce at any hearing. Similar to requests under subsection (b), the prosecution’s discovery under subsection (c) is limited to information that is material to the case and does not place an unreasonable burden on the defense. However, with the exception of scientific or medical reports, subsection (c) does not authorize the discovery of internal defense documents, memoranda or statements made in connection with the case.

Effective July 1, 2014, the Kansas Legislature enacted House Bill 2445, which changes the word “defendant” in § 22-3212 to “defense.” This potentially nullifies the recent Kansas Supreme Court ruling in State v. Marks, which held that the defendant as well as defense counsel is entitled to personal discovery of the documents. It may well be that only defense counsel is entitled to personal discovery under § 22-3212.

In State v. Lewis, the Kansas Court of Appeals made it clear that the Kansas Rules of Civil Procedure do not apply in criminal cases. The court recognized that while some portions of the Kansas Code of Criminal Procedure make the Kansas Code of Civil Procedure
applicable, the Kansas Code of Criminal Procedure has its own discovery statutes. Neither K.S.A. § 22-3212 nor K.S.A. § 22-3213 purports to make any portion of the discovery rules in the Kansas Code of Civil Procedure applicable in criminal discovery.

M. Motions to Suppress

Motions to suppress are governed by K.S.A. § 22-3215 and § 22-3216. K.S.A § 22-3215 governs the suppression of admissions and confessions, and § 22-3216 governs suppression of illegal evidence obtained in violation of the Fourth Amendment. Both statutes require that, absent certain circumstances, motions to suppress be filed before trial, and require that defendant allege facts to show she is entitled to relief.

N. Pretrial Conference & Motions in Limine

K.S.A. § 22-3217 governs pretrial conferences. The main purpose of these pre-trial conferences is to ensure a fair and expeditious trial. One means by which pre-trial conferences do this is through motions in limine. There is no statutory authority to file motions in limine in Kansas, but Kansas’s courts have inferred that the ability to hear a motion in limine is inherent by virtue of the trial court’s statutory power in § 22-3217 to call pretrial conferences. The main purpose of

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939. Id.
940. Id.
941. KAN. STAT. ANN. § 22-3215 (covering admissions and confessions); § 22-3216 (covering illegally obtained evidence).
942. § 22-3215(1); § 22-3216(1).
943. § 22-3215(2); § 22-3216(2).
944. § 22-3217.
945. Id.
946. Id.
948. State v. Crume, 22 P.3d 1057, 1067 (Kan. 2001); Quick, 597 P.2d at 1112.
motions in limine is to ensure that inadmissible prejudicial evidence is not brought up during trial.\textsuperscript{949} To that end, a successful motion in limine must not only prove that the evidence in question will be inadmissible at trial, but must also show that the mere offer or mention of that evidence at trial would cause unfair prejudice, confuse the issues, or mislead the jury.\textsuperscript{950}

V. TRL RIGHTS

A. Fifth Amendment Issues

The Fifth Amendment states, “no person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.”\textsuperscript{951} The Fifth Amendment provides several important safeguards to criminal defendants, including protection from double jeopardy, a right against self-incrimination, and the guarantee of due process of law.\textsuperscript{952} Kansas provides similar protections to criminal defendants in the Kansas Constitution’s Bill of Rights and in Kansas Statutes. Section 10 of the Kansas Constitution’s Bill of Rights states, “no person shall be a witness against himself, or be twice put in jeopardy for the same offense.”\textsuperscript{953} Additionally, section 22-3102 of the Kansas Statutes codifies a defendant’s privilege against self-incrimination.\textsuperscript{954}

1. Self-Incrimination

The Fifth Amendment protection against self-incrimination is generally broadly construed, but has been limited by courts.\textsuperscript{955} One such limitation occurs when a defendant chooses to testify. In \textit{Kansas v. Cheever}, the Supreme Court made it clear that when a defendant chooses

\textsuperscript{949} State v. Frierson, 319 P.3d 515, 524 (Kan. 2014) (discussing the standard for motions in limine); Quick, 597 P.2d at 1112; State v. Shadden, 235 P.3d 436, 446 (Kan. 2010).

\textsuperscript{950} Frierson, 319 P.3d at 524; Shadden, 235 P.3d at 446–47.

\textsuperscript{951} U.S. CONST. amend. V.

\textsuperscript{952} Id.

\textsuperscript{953} KAN. CONST. B. of R. § 10.

\textsuperscript{954} KAN. STAT. ANN. § 22-3102.

to testify, the right against self-incrimination does not protect him from answering questions related to his testimony, even if the testimony includes evidence from a court ordered mental evaluation.\footnote{Cheever involved a defendant who shot and killed a local county sheriff after ingesting methamphetamine.} In response to his intoxication defense, the federal court ordered the defendant to submit to a psychiatric examination.\footnote{When the defendant later presented the testimony of a psychiatric pharmacist to support his defense in state court, the state presented rebuttal evidence from the court-ordered mental evaluation and testimony from the psychiatrist that examined the defendant.} On appeal, the defendant argued that the use of the court-ordered psychiatric evaluation violated his Fifth Amendment right against compulsory self-incrimination.\footnote{However, the Supreme Court, in a unanimous decision, stated that a defendant “has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts.”} Notably, this does not change the holding of \textit{Estelle v. Smith}, which stated that testimony from a court-ordered psychiatric examination violated the defendant’s Fifth Amendment rights when the defendant neither initiated the examination nor put his mental capacity in dispute at trial.\footnote{Anot}hern limitation on a defendant’s right against self-incrimination is acceptance of responsibility.\footnote{In \textit{U.S. v. Limon}, the Tenth Circuit recognized that when a defendant accepted responsibility for a crime, the District Court’s subsequent denial of a downward adjustment in his

\begin{itemize}
\item \footnote{Kansas v. Cheever, 134 S. Ct. 596, 601 (2013).}
\item \footnote{State v. Cheever, 284 P.3d 1007, 1014 (Kan. 2012).}
\item \footnote{Id. at 1015.}
\item \footnote{Id. at 1016.}
\item \footnote{Id. at 1018.}
\item \footnote{Cheever, 134 S.Ct. at 601.}
\item \footnote{Id. at 601.}
\item \footnote{Id. at 600 (citing Estelle v. Smith, 451 U.S. 454, 454 (1981)).}
\item \footnote{566 Fed. Appx. 723, 725 (2014).}
\end{itemize}
sentencing did not violate the defendant’s right against self-incrimination.\footnote{Id.} In other words, a defendant who is denied a downward adjustment after accepting responsibility is not protected by the Fifth Amendment if he wishes to recant his acceptance.

The right against self-incrimination can also offer broad protections for defendants. In \textit{State v. Fernandez-Torres}, the Kansas Court of Appeals found that the defendant’s right against self-incrimination was violated when there was evidence that the translator mistranslated police questions during interrogation.\footnote{Id.}

2. Immunity

A criminal defendant cannot be compelled to testify if she has invoked her Fifth Amendment privilege against self-incrimination, unless the government promises, “to immunize \[the defendant\] against use of the testimony in any criminal prosecution against \[her\].”\footnote{Id.} Kansas has codified the government’s ability to grant immunity in section 22-3102 of the Kansas Statutes.\footnote{Id.} County or district attorneys, or the attorney general, may grant a criminal defendant either (1) transactional immunity, or (2) use and derivative immunity.\footnote{Id.} Transactional immunity grants the defendant protection from prosecution for any crime “which has been committed for which such immunity is granted or for any other transactions arising out of the same incident.”\footnote{Id.} Use and derivative immunity prevent the state from using certain testimony against the defendant that was obtained under a grant of immunity.\footnote{Id.}

Both the Fifth Amendment of the United States Constitution and Section 10 of the Kansas Bill of Rights protect criminal defendants from being tried for the same crime twice.\footnote{See \textit{State v. Hensley}, 313 P.3d 814, 824 (Kan. 2013); U.S. \textit{CONST. amend. V. (“. . . be subject for the same offence to be twice put in jeopardy of life or limb”); see also KAN. \textit{CONST. B. of R. §10 (“no person shall be . . . twice put in jeopardy for the same offense”).}} As recently as 2013, the Supreme Court of Kansas recognized that despite differences between the two provisions, the level of double jeopardy protection afforded by the Kansas Bill of Rights is commensurate with that of the Fifth
Amendment.973

a. Generally

Recent United States Supreme Court decisions regarding the Double Jeopardy Clause have reaffirmed a half-century of precedent.974 In *Evans v. Michigan*,975 the trial court entered a directed verdict acquitting the defendant because the court mistakenly believed the State did not prove an element of the offense.976 It was later determined the unproved element was not required for conviction and the Michigan Supreme Court reversed.977 In reversing the Michigan Supreme Court, the United States Supreme Court held that erroneous midtrial acquittals remain “an acquittal for double jeopardy purposes as well.”978

In 2014, the Supreme Court reaffirmed that the Double Jeopardy Clause attaches when the jury is empaneled and sworn.979 In *Martinez v. Illinois*,980 the state struggled to locate two witnesses it planned to call at trial.981 After granting a number of continuances and subpoenas to no avail, the court informed the state that it intended to move forward with the trial, and the state could either call its available witnesses or move to dismiss.982 Just prior to swearing in the jury, the state notified the court it did not intend to participate if the trial went forward.983 The trial progressed, but the state did not make opening arguments, nor did it offer any witnesses.984 The defense subsequently moved for an acquittal, which was granted.985

975. 133 S. Ct. 1069 (2013).
976. Id. at 1073.
977. Id. at 1073–74.
978. Id. at 1073.
981. Id. at 2072.
982. Id.
983. Id.
984. Id. at 2073.
985. Id.
On appeal, the Illinois Court of Appeals reversed. Relying on an interpretation of *Serfass v. United States*, the Illinois Supreme Court affirmed, holding the defendant was functionally never in jeopardy because the state refused to participate in the trial. The Supreme Court, however, reversed. In expressly rejecting the Illinois Supreme Court’s functional interpretation of *Serfass*, the court reiterated, “[t]here are few if any rules of criminal procedure clearer than the rule that ‘jeopardy attaches when the jury is empaneled and sworn.’” Because the trial court had granted the motion for acquittal after the jury had been empaneled, the Supreme Court held the defendant could not be retried.

The Tenth Circuit has also reaffirmed that finality, for the purposes of the Double Jeopardy Clause, attaches after the judiciary has relinquished jurisdiction over the defendant. In *United States v. Thomas*, the defendant had two previous convictions for violent crimes when he entered a guilty plea for felony possession of a firearm. The trial court incorrectly ruled the prior convictions were not violent, substantially lowering the sentence. The United States timely appealed. When it was determined on appeal the trial court erred in ruling the prior convictions were non-violent, the trial court held a resentencing hearing. The defendant’s sentence was significantly increased at the hearing, and the defendant appealed on double jeopardy grounds. The Tenth Circuit held that because the United States’s appeal of the trial court’s decision had been timely, the defendant had never left the jurisdiction of the court and could not invoke the protections of the Double Jeopardy Clause at resentencing.

Finally, the federal courts have been consistent in distinguishing between procedural errors resulting in convictions being set aside, and

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986. *Id.*
989. *Id.* at 2077.
990. *Id.* at 2074–75.
991. *Id.* at 2071, 2075–76.
992. *United States v. Thomas*, 554 F. App’x. 742, 745 (10th Cir. 2014).
993. 554 F. App’x. 742 (2014).
994. *Id.* at 744.
995. *Id.*
996. *Id.*
997. *Id.*
998. *Id.* at 744–45.
999. *Id.* at 745–46.
acquittals due to lack of evidence when invoking the protections of the Double Jeopardy Clause.\textsuperscript{1000} The Double Jeopardy Clause will not bar retrial when a conviction is set aside due to a procedural error, so long as there is sufficient evidence upon which the conviction could stand absent the error.\textsuperscript{1001} When evidence as to the guilt of the defendant is lacking, however, the Double Jeopardy Clause will bar a retrial.\textsuperscript{1002}

\begin{enumerate}
\item[b.] Multiplicity
\end{enumerate}

Another function of both the Fifth Amendment of the United States Constitution and Section 10 of the Kansas Bill of Rights is to protect criminal defendants from multiplicity.\textsuperscript{1003} Multiplicity occurs when a single offense is charged in more than one count of a complaint, which “creates the potential for multiple punishments for a single crime” if convicted, and violates the Double Jeopardy Clause.\textsuperscript{1004}

In \textit{State v. Schoonover}, the Kansas Supreme Court developed a two-step method for analyzing double jeopardy claims arising from multiplicity.\textsuperscript{1005} The court first “determines whether the convictions arose from the same conduct” and then “considers whether by statutory definition there are two crimes or only one.”\textsuperscript{1006} The second prong requires the court to determine whether the legislature intended both crimes to be punished.\textsuperscript{1007} Generally, courts compare the statutory elements present in each charge to determine the legislature’s intent—if one of the charged offenses contains an element not present in the other offenses, then it is presumed the legislature intended to punish both crimes.\textsuperscript{1008}

\begin{enumerate}
\item[\textsuperscript{1000}]
\item[\textsuperscript{1001}]
\textit{Medina-Copete}, 757 F.3d at 1107; see also United States v. Bergman, 746 F.3d 1128, 1131–1132 (10th Cir. 2014).
\item[\textsuperscript{1002}]
\textit{Medina-Copete}, 757 F.3d at 1107.
\item[\textsuperscript{1003}]
\item[\textsuperscript{1004}]
Id.
\item[\textsuperscript{1005}]
\item[\textsuperscript{1006}]
State v. Hensley, 313 P. 3d 814, 824 (Kan. 2013) (citing State v. Schoonover, 133 P.3d 48, 64 (Kan. 2006).)
\item[\textsuperscript{1007}]
Id.
\item[\textsuperscript{1008}]
Id. at 824–25.
\end{enumerate}
comparison can also be used, however.\textsuperscript{1009}

Kansas’s courts are using the \textit{Schoonover} framework with increasing frequency. In the 2013 case \textit{State v. Hensley}, the Kansas Supreme Court held a defendant’s convictions of simple possession and possession with no tax stamp were multiplicitous.\textsuperscript{1010} In so doing, the court abrogated its holding in \textit{State v. Berberich}, which previously allowed conviction for both crimes.\textsuperscript{1011} Similarly, in \textit{State v. King}, the court determined that a defendant’s three convictions arising from a single terroristic threat violated the Double Jeopardy Clause using the \textit{Schoonover} analysis.\textsuperscript{1012}

The Kansas courts have continued to utilize the \textit{Schoonover} analysis. In \textit{State v. Carr}, two defendants sought to overturn their four capital murder convictions for a quadruple homicide in December 2000, although the defendants did not object at trial to the state pursuing four convictions.\textsuperscript{1013} In deciding the issue, the Kansas Supreme Court reiterated its prior precedent that it could consider a multiplicity claim for the first time on appeal because not reaching the issue might deny fundamental human rights.\textsuperscript{1014} Since all four of the capital murder convictions rested on the same element—the defendants killing multiple victims—the Kansas Supreme Court held only one conviction could stand under the statute without violating multiplicity.\textsuperscript{1015} The multiplicity analysis in \textit{Carr} signals implicitly that the Kansas Supreme Court has every intention to continue using the \textit{Schoonover} analysis in deciding multiplicity cases. Practitioners in Kansas will be well served to become familiar with the rule going forward.

\textbf{B. Sixth Amendment Issues}

The Sixth Amendment declares, “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the

\begin{footnotesize}
\textsuperscript{1009} \textit{Id.} at 825.
\textsuperscript{1010} \textit{Id.} at 826.
\textsuperscript{1011} \textit{Id.} at 824.
\textsuperscript{1012} \textit{State v. King}, 305 P.3d 641, 646 (Kan. 2013).
\textsuperscript{1014} \textit{Id.} at 655 (citing \textit{State v. Harris}, 162 P.3d 28 (Kan. 2007)).
\textsuperscript{1015} \textit{Id.}
\end{footnotesize}
The Sixth Amendment is an important safeguard of criminal defendants’ rights at trial.

1. Speedy and Public Trial

a. Speedy Trial

The United States Constitution, Kansas Constitution, and section 22-3402 of Kansas Statutes Annotated guarantee the right to a speedy trial in Kansas. In 1974, Congress codified a criminal defendant’s right to a speedy trial in the federal Speedy Trial Act. Congress designed the Act to benefit defendants and to reduce and prevent pretrial delay from “impairing the deterrent effect of punishment.” Congress emphasized this point when amending the act in 1979, affirming the Speedy Trial Act was enacted to protect a criminal defendant’s Sixth Amendment right to a speedy trial, as well as the societal interest in quickly addressing charges against a criminal defendant.

Section 22-3402 of Kansas Statutes Annotated codifies the right to a speedy trial in Kansas. Section 22-3402 states, “[i]f any person charged with a crime and held in jail solely by reason thereof shall not be brought to trial within 90 days after such person’s arraignment on the charge, such person shall be entitled to be discharged from further liability to be tried for the crime charged.” The statutory right to a speedy trial is measured differently in Kansas than the constitutional right to a speedy trial. Under § 22-3402, the 90-day speedy trial provision is triggered with the criminal defendant’s arraignment. The statute requires that the criminal defendant’s trial commence within 90 days of a valid arraignment. The accused is under no obligation to take affirmative action to protect his or her speedy trial right. The state alone is

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1016. U.S. CONST. amend. VI.
1019. Id.
1020. KAN. STAT. ANN. § 22-3402(a) (2012).
1022. KAN. STAT. ANN. § 22-3412(a) (2007); Sievers, 323 P.3d at 172.
1023. Sievers, 323 P.3d at 172.
responsible for ensuring the trial commences at least 90 days post-arraignment. The constitutional right to a speedy trial is not triggered until the criminal prosecution begins, “usually by either an indictment, an information, or an arrest, whichever first occurs.”

b. Public Trial

The Sixth Amendment of the United States Constitution and Section 10 of the Kansas Constitution’s Bill of Rights guarantee criminal defendants the right to a public trial. In Kansas, the criminal defendant is allowed to have “a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.” A criminal defendant’s right to a public trial implies that the “doors of the courtroom be kept open and that the public, or such portion thereof as may be conveniently accommodated, be admitted, subject to the right of the court to exclude objectionable characters.” However, the right to a public trial is not absolute, and there may be certain cases or circumstances that offset the right to a public trial, such as the “defendant’s right to a fair trial or the government’s interest in inhibiting disclosure of sensitive information.”

In *State v. Cox*, the Kansas Supreme Court overturned a defendant’s conviction for child molestation, because the district judge cleared the courtroom when the nurse who examined the child victim was on the stand. The defendant suggested to the district judge that the witness give the photographs to the jury rather than display them in the courtroom, but the judge dismissed this suggestion. The courtroom was cleared while the photographs were displayed, and the public was brought back into the courtroom when the photos were taken down. The Kansas Supreme Court agreed with the defendant’s argument that

1024. *Id.*
1027. KAN. CONST. B of R. §10.
1030. *Id.* at 332–33, 338.
1031. *Id.* at 332–33.
1032. *Id.* at 333.
the district court’s “failure to make adequate findings, balance the competing interests involved, or consider lesser alternatives to closing the courtroom violated [the defendant’s] Sixth Amendment right to a public trial under the United States Constitution.” Because the district judge failed to support the closing of the courtroom doors without discussing the interests at stake, or considering alternatives, the Kansas Supreme Court could not conduct a proper review. Therefore, the court reversed the defendant’s conviction.

2. Trial by Jury

The Sixth Amendment of the United States Constitution guarantees criminal defendants the right to an “impartial jury.” While criminal defendants have the right to an impartial jury, the right to a unanimous jury verdict is based in statute. K.S.A. § 22-3421 codifies a criminal defendant’s right to a unanimous jury verdict: “If any juror disagrees, the jury must be sent out again; but if no disagreement is expressed, and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case.”

The right to trial by an impartial jury provides a fundamental protection for criminal defendants. A criminal defendant is guaranteed the right to a jury trial by a panel of impartial and indifferent jurors. A defendant’s due process rights are violated if the jury is not impartial. A juror must issue a verdict “based upon the evidence developed at the trial of a criminal prosecution, regardless of the heinousness of the crime charged, the apparent guilt of the offender, or the station in life which the offender occupies.” Under K.S.A. § 22-3423, the court may “order a mistrial at any time if prejudicial conduct,

1033. Id.
1034. Id. at 335.
1035. Id.
1036. U.S. CONST. amend. VI.
1040. Id.
1041. Id. (quoting State v. Cady, 811 P.2d 1130, 1139 (Kan. 1991)).
inside or outside the courtroom, makes it impossible to proceed without injustice to either party. However, the party claiming juror misconduct must show that the juror’s error substantially prejudiced the criminal defendant’s rights.

a. Waiver of Right to Jury

Both the United States Constitution and the Kansas Constitution guarantee a criminal defendant the right to a jury trial under the Sixth Amendment. Kansas statutes codify this right under K.S.A. § 22-3403 by requiring all felony cases be tried before a jury, unless the defendant and the prosecutor, with the court’s consent, submit the trial to the court.

A defendant may waive his right to a jury trial. The court and State must agree to the waiver. Further, “[t]he waiver of the right to a jury trial should be ‘strictly construed to afford a defendant every possible opportunity to receive a fair and impartial trial by jury.’”

The court must advise the defendant of his or her right to a jury. This provides a safeguard against an involuntary waiver. The defendant must then personally waive that right, either in writing or in open court. The test for the validity of the waiver is whether it was made voluntarily “by a defendant who knew and understood what he or she was doing.” Defendants do not necessarily fully understand the terms “jury trial” and “trial to the court” and their consequences because they are terms of art. To determine whether a defendant has waived...

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1043. Id.
1044. U.S. CONST. AMEND. VI; KAN. CONST. B. OF R. §§ 5, 10.
1049. Id.
1050. Raikes, 313 P.3d at 97–98.
1052. Id. at *5 (quoting State v. Beaman, 286 P.3d 876 (Kan. 2012)).
his right, the court looks at the particular facts and circumstances of the case. 1054 A waiver will not be presumed from a silent record. 1055

In *State v. Harris*, the defendant was charged with possession of methamphetamine and drug paraphernalia. 1056 Following a guilty verdict after bench trial, the defendant appealed, alleging that the “district court erred in conducting a bench trial because Harris never properly waived his right to a jury trial.” 1057 After the defendant’s preliminary hearing, the trial court informed Harris that he was entitled to a trial but never directly advised that he was entitled to a trial by jury. 1058 Later, prior to the start of the bench trial, the court asked the defendant if it was his “desire to withdraw your jury trial request and try it to the court,” to which the defendant replied “[y]es.” 1059 Despite this colloquy, the Court of Appeals reversed Harris’ conviction because the trial court did not specifically inform the defendant “that he has a right to a jury trial as opposed to a bench trial.” 1060

In *State v. Raikes*, the defendant was charged with multiple crimes, including driving under the influence, possession or control of a hallucinogenic drug with a prior conviction, and possession or control of depressants. 1061 Raikes entered into a plea deal with the State, agreeing to plead no contest to the DUI charge and participate in the drug court program in exchange for dismissal of the remaining charges. 1062 The written agreement included a waiver of his right to a jury trial, which Raikes signed. 1063 Raikes was advised that failing to complete the program would result in a trial; however, he was not told whether that would be a bench trial or a jury trial. 1064 Raikes eventually failed to

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1057. *Id.*
1058. *Id.* at *3, *6.
1059. *Id.* at *3.
1060. *Id.* at *6, *9.
1062. *Id.*
1063. *Id.*
1064. *Id.* at 96.
complete the program and was told the case was docketed for a bench trial. During trial, Raikes did not raise an objection about the lack of a jury trial and was sentenced for possession or control of a hallucinogenic drug with a prior conviction. On appeal, Raikes argued that he did not waive his right to a jury trial on the drug charge because “he was never personally advised by the court of his right to a jury trial, and he did not waive his right in open court or in writing.”

The Kansas Court of Appeals held that Raikes did have a right to trial by jury on his felony drug charge. Although Raikes waived his rights in the written plea agreement, that was not enough because the “waiver on its face only addressed the DUI charge.” The court should not have presumed the defendant waived his jury trial right from his silence at the bench trial. The judge needed to explain to Raikes the right he was waiving.

In State v. Beaman, the Kansas Supreme Court decided that although the district court did not specifically advise the defendant of the right to trial by jury, the district court did explain why he would be “better off” with a jury. The Kansas Supreme Court decided that the discussion about the nature and extent of the right to a jury was enough to make the waiver valid. Conversely, in State v. Cervantes-Cano, the district court did not even have a discussion to ensure the defendant understood the nature and extent of the right to a jury, let alone specifically advise the defendant of his right. The Kansas Supreme Court clarified Beaman by emphasizing the need for a clear and direct explanation of the right to a jury trial, particularly to defendants who do not speak English and are relying on an interpreter.

1065. Id.
1066. Id. at 95–96.
1067. Id. at 97–98.
1068. Id.
1069. Id.
1070. Id.
1072. Beaman, 286 P.3d at 884.
1074. Id. at *9–10.
b. Jury Selection

i. Generally

Jury selection, or voir dire, allows parties to select jurors “who are competent and without bias, prejudice, or partiality.”1075 The trial court has broad discretion to direct the nature and scope of the voir dire examination.1076 But the exercise of this discretion is more limited in the state courts than federal courts, mainly due to the state’s focus on counsel’s right to conduct voir dire.1077 During voir dire, each party may challenge any prospective juror for cause when the juror’s “state of mind with reference to the case or any of the parties is such that the court determines there is doubt that he [or she] can act impartially and without prejudice to the substantial rights of any party” or when any of the statutory definitions1078 of “cause” are met.1079 Challenges for cause are tried by the trial court and the court’s ruling will only be overturned if it is clearly erroneous or an abuse of discretion.1080

State1081 and federal courts must implement a system that randomly selects jurors that fairly represent the community.1082 If a defendant believes she has not been provided with a jury pool that fairly represents her community, she can bring a Sixth Amendment fair cross-section violation claim. To do this, a defendant must show:

“(1) that the group alleged to be excluded is a ‘distinctive’ group in

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1079. Carr, 331 P.3d at 626 (quoting Id. §22-3410(2)).
1082. United States v. Williams, 06-20047-04-CM, 2013 WL 988089, at *3 (D. Kan. Mar. 12, 2013). A common way federal courts satisfy the “fair cross section” requirement is to use voter registration lists. Id. However, if the registered voter list is not a fair cross section of the community, it is vulnerable to a challenge by defendants. Id.
the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.”

ii. Venue

In addition to fair cross-section claims, a defendant may be entitled to a venue change in order to ensure an impartial trial. Kansas law allows a defendant the opportunity to change her trial venue “to prevent a local community’s hostility or preconceived opinion on a defendant’s guilt from hijacking his or her criminal trial . . .” A change of venue may be granted under two circumstances: presumed prejudice and actual prejudice.

Presumed prejudice occurs when the pretrial publicity is “so pervasive and prejudicial that we cannot expect to find an unbiased jury pool in the community[,]” in such cases a change of venue can be granted even before voir dire is conducted. To determine whether presumed prejudice exists, the court applies a seven-factor test called the Skilling factors. The seven Skilling factors are:

“(1) media interference with courtroom proceedings; (2) the magnitude and tone of the coverage; (3) the size and characteristics of the community in which the crime occurred; (4) the amount of time that elapsed between the crime and the trial; (5) the jury’s verdict; (6) the impact of the crime on the community; and (7) the effect, if any, of a codefendant’s publicized decision to plead guilty.”

In 2014, the Kansas Supreme Court clarified that a ruling on presumed prejudice should be reviewed using a mixed standard. The court explained that “[t]he factors enumerated by the United States Supreme Court in Skilling require fact findings, whether explicit or necessarily implied, that [] must [be] review[ed] for support by

1083. United States v. Kamahele, 748 F.3d 984, 1023 (10th Cir. 2014) (quoting Duren v. Missouri, 439 U.S. 357, 364 (1979)).
1085. Id.; see also KAN. STAT. ANN. § 22-2616(1) (2007).
1086. Carr, 331 P.3d at 596.
1087. Id. (quoting Goss v. Nelson, 439 F.3d 621, 628 (10th Cir. 2006)).
1088. Id. at 598.
1089. Id. at 598–99 (citing Skilling v. United States, 561 U.S. 358, 381–85 (2010)).
1090. Id. at 599.
substantial competent evidence in the record."\textsuperscript{1091} If substantial competent evidence exists, the court defers on the fact-finding.\textsuperscript{1092} “However, over-all weighing of the factors calls for a conclusion of law, and we must review the conclusion of law under a de novo standard.”\textsuperscript{1093}

The second circumstance that gives rise to a venue change is actual prejudice. Actual prejudice occurs when “the effect of pretrial publicity manifest at jury selection is so substantial as to taint the entire jury pool.”\textsuperscript{1094} In these cases, “the voir dire testimony and the record of publicity [must] reveal the kind of wave of public passion that would have made a fair trial unlikely by the jury that was impaneled as a whole.”\textsuperscript{1095} To determine whether this “wave of public passion” exists the court must look to media coverage and “the substance of the juror’s statements at voir dire . . . .”\textsuperscript{1096} On appeal, the trial court’s actual prejudice decision is reviewed for abuse of discretion.\textsuperscript{1097}

\textbf{iii. Peremptory Challenges}

Each party is entitled to at least three peremptory challenges, with defendants facing more severe charges being allowed up to twelve challenges depending on the type and severity of the charge.\textsuperscript{1098} The use of peremptory challenges is restricted based on the presence of multiple defendants and the use of alternate jurors.\textsuperscript{1099} Multiple defendants are usually considered one party when making a challenge. However, if a good faith controversy exists between the parties, the court may allow each party to exercise her own challenges.\textsuperscript{1100} And each party is given one peremptory challenge for alternate jurors.\textsuperscript{1101} Notable, “peremptory

\begin{flushleft}
\textsuperscript{1091} Id.  \\
\textsuperscript{1092} Id.  \\
\textsuperscript{1093} Id.  \\
\textsuperscript{1094} Id. at 596 (quoting Goss v. Nelson, 439 F.3d 621, 628 (10th Cir. 2006)).  \\
\textsuperscript{1095} Id. (quoting House v. Hatch, 527 F.3d 1010, 1023–24 (10th Cir. 2008)).  \\
\textsuperscript{1096} Id. at 605 (quoting Foley v. Parker, 488 F.3d 377, 387 (6th Cir. 2007)).  \\
\textsuperscript{1097} Id.  \\
\textsuperscript{1098} KAN. STAT. ANN. § 22-3412 (Supp. 2014).  \\
\textsuperscript{1099} KAN. STAT. ANN. §§ 60-247–48 (Supp. 2014).  \\
\textsuperscript{1100} Id. §60-247(a)(2).  \\
\textsuperscript{1101} Id. §60-248(b).  \\
\end{flushleft}
challenges must be exercised in a manner that will not communicate to the challenged juror” which party is bringing the challenge.\textsuperscript{1102} Permissible challenges include those based on generalizations, impressions, or irrationalities.\textsuperscript{1103}

Although parties may strategically use their peremptory challenges in a variety of ways, jurors have an equal protection right to serve in the judicial process without racial discrimination.\textsuperscript{1104} Defendants may challenge the State’s use of peremptory challenges as racial discrimination under a \textit{Batson} challenge.\textsuperscript{1105} \textit{Batson} challenges are usually brought when a defendant believes the State is systematically removing a certain group from the jury pool.\textsuperscript{1106} Historically, \textit{Batson} challenges have been based on racial discrimination, although gender and religious discrimination challenges have been raised as well. Prosecutors, in an effort to thwart a defendant’s discrimination, may utilize \textit{Batson} challenges as well.\textsuperscript{1107}

A \textit{Batson} challenge has three components. First, the moving party must make a prima facie showing that the peremptory challenges were made because of race.\textsuperscript{1108} Next, if the prima facie burden is met, the non-moving party must provide a facially valid non-discriminatory reason for the challenge, though the reason does not have to be persuasive or plausible.\textsuperscript{1109} Finally, the trial court judge determines whether the moving party “has carried its burden of proving purposeful discrimination,” based in large part on the judge’s own credibility determinations.\textsuperscript{1110} If, after the court has conducted its \textit{Batson} analysis, the moving party believes the court’s analysis was incorrect, she must object to it in order to preserve the issue for appeal.\textsuperscript{1111}

\textsuperscript{1102} Id. §60-247(a)(2).
\textsuperscript{1104} See State v. Carr, 331 P.3d 544, 634 (Kan. 2014) (discussing nature and purpose of a \textit{Batson} challenge).
\textsuperscript{1105} Id.
\textsuperscript{1106} Gann, 308 P.3d 31.
\textsuperscript{1107} Carr, 331 P.3d at 634.
\textsuperscript{1108} Id. at 634.
\textsuperscript{1109} Id.
\textsuperscript{1110} Id. Examples of credibility determinations include how the challenged strike aligns with the non-moving party’s other exclusion or inclusion of jurors. State v. Gann, 308 P.3d 31 (Kan. Ct. App. 2013).
\textsuperscript{1111} State v. Villa-Vasquez, 310 P.3d 426, 436 (Kan. Ct. App. 2013). In \textit{Villa-Vasquez}, the Kansas Court of Appeals affirmed the denial of a \textit{Batson} challenge. Id. Villa-Vasquez claimed the State used its peremptory challenges to remove the only two Hispanic potential jurors. Id. at 435. The court found that the State offered racially neutral reasons for the preemptory strikes, including
In the well-publicized case of *State v. Carr*, the Kansas Supreme Court reversed the lower court’s ruling on a “reverse” *Batson* challenge. In *Carr*, the defendants used their final peremptory strike in an attempt to remove the only remaining African American juror. The State brought a *Batson* challenge, arguing only that: “[T]he defense was striking ‘one of the remaining black males that we have.’” The defense responded that its reasons for striking the juror were his strong pro-death penalty stance and weakness on questions regarding the impact of mitigating factors in capital sentencing. In fact, the juror was asked why he supported the death penalty and responded sarcastically, “Why not?” The trial court did not ask for any argument from the State and ruled the strike invalid—neglecting the three steps of *Batson* challenge analysis. The Kansas Supreme Court ruled that the trial court erred in its analysis but that the error was made in good faith and the court reviewed it only for harmlessness. The error was ruled harmless and did not require reversal of all charges.

c. Jury Misconduct

Criminal defendants have a constitutional right to an impartial, competent, and unimpaired jury. The judicial system highly regards the integrity of jury proceedings and works to keep the jury free from outside unauthorized intrusions. Impartial jurors are “the cornerstone of our system of justice and central to the Sixth Amendment’s promise of one juror’s non-responsiveness to the questions and concern over the other juror’s night-shift work schedule. *Id.* at 435–36.

1113. *Id.* at 633.
1114. *Id.*
1115. *Id.* at 633–34.
1116. *Id.* at 633.
1117. *Id.* at 633, 635.
1118. *Id.* at 635, 641.
1119. *Id.* An interesting side note: the challenged juror went on to be elected presiding juror. *Id.* at 634.
1120. United States v. McKeighan, 685 F.3d 956, 973 (10th Cir. 2012).
1121. Stouffer v. Trammell, 738 F.3d 1205, 1213 (10th Cir. 2013).
a fair trial . . . .” 1122 When the integrity of the jury’s proceedings is violated, juror misconduct occurs and the defendant’s right to a fair trial is violated. Juror misconduct includes communications with jurors from outsiders, witness, bailiffs, or judges, as well as unauthorized behavior, such as looking at premises or reading articles about the case. 1123

Despite the courts’ best efforts, it is “virtually impossible” to shield jurors from all outside factors. 1124 When a defendant believes juror misconduct has occurred, she must first prove that misconduct did in fact occur 1125 and that the misconduct substantially prejudiced her right to a fair trial. 1126 If the court receives credible evidence of jury misconduct, it has a duty to mitigate. 1127

A common juror misconduct allegation is the “inattentive juror”—when a juror sleeps through portions of the trial. 1128 In the recent case of State v. Armstrong, the Kansas Supreme Court reaffirmed that “juror inattentiveness, if sufficiently severe, can[] serve as a basis for a mistrial.” 1129 There, defense counsel believed he saw a juror dose off during a fire and tool mark expert’s testimony. 1130 However, the judge took action and the court held that, though some low-level of misconduct had occurred, the juror’s momentary inattentiveness did not result in substantial prejudice to the defendant. 1131

More troubling are the instances of juror misconduct that occur once the jury has begun deliberating. In State v. Smith-Parker, the presiding juror asked to remove N.B., a fellow juror, stating that N.B. could not understand English well enough to comprehend the jury instructions. 1132 After the defendant was convicted, N.B. wrote a letter explaining that the

1122. Id. (quoting United States v. Dutkel, 192 F.3d 893, 894 (9th Cir. 1999)).
1125. In State v. Salazar-Moreno, the defendant’s wife overheard a juror talking on his phone, making comments about Mexican people—prompting the defendant to allege juror misconduct. 2013 WL 5925894, at *4. The trial court, however, found that this was not juror misconduct but a bias the juror had held before the trial. Id. Even so, the trial judge dismissed the juror and ordered the remaining jurors to ignore anything they may have overheard. Id. at *6.
1127. See id. at 1076 (explaining that a mistrial was not warranted in a case where the judge took appropriate steps to remedy the alleged juror misconduct during trial); Stouffer, 738 F.3d at 1213.
1128. Armstrong, 324 P.3d at 1075–76.
1129. Id. at 1075.
1130. Id. at 1074.
1131. Id. at 1075–76.
jurors had sought his dismissal for reasons other than his English skills: “In that remarkably literate document, N.B. asserted that his fellow jurors had sought his dismissal because of his leanings toward the defense...” The Kansas Supreme Court ruled in favor of defendant, requiring the trial court to recall the jury to determine whether N.B.’s assertions were in fact true, thus constituting prejudicial juror misconduct.  

3. Right To Confront Witnesses – Cross Examination

a. Generally

The Kansas Bill of Rights gives defendants the right to confront witnesses face-to-face. Similarly, the Confrontation Clause of the United States Constitution, found in the Sixth Amendment, guarantees criminal defendants the right to confront witnesses testifying against them. The primary purpose of the state and federal confrontation clauses is to give a defendant the opportunity to cross-examine the State’s witnesses and attack their credibility.

Per Crawford v. Washington, “testimonial hearsay is inadmissible unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.” Testimonial statements include prior testimony at hearings, trials, and police interrogations; for other statements, the court looks to several factors to evaluate whether they are testimonial. In Kansas, testimonial statements made by an

1133. Id. at 508.
1134. Id.
1135. KAN. CONST. B. of R. § 10.
1136. U.S. CONST. amend. VI.

“(1) Would an objective witness reasonably believe such a statement would later be available for use in the prosecution of a crime? (2) Was the statement made to a law enforcement officer or to another government official? (3) Was proof of facts potentially relevant to a later prosecution of a
absent declarant are admissible under the doctrines of forfeiture and wrongdoing, even when the defendant has not had the opportunity to cross-examine the declarant.

Furthermore, a defendant cannot cry foul when she has the opportunity to cross-examine a witness at trial regarding an admitted prior statement by that witness but fails to cross-examine the witness about said statement—the defendant has still been afforded the opportunity to confront the witness.

In *State v. Gleason*, the Kansas Supreme Court clarified the definition of an “unavailable witness” for *Crawford* challenge purposes. In *Gleason*, the defendant argued that a witness who is present in court but refuses to testify is not unavailable under Kansas case or statutory law. The court disagreed, holding that a witness who refuses to testify may properly be deemed unavailable by the trial court. The defendant went on to argue that Kansas should adopt a “good faith effort” requirement before deeming a witness unavailable. Though the supreme court compared the facts of *Gleason* to a “good faith effort” case from another jurisdiction, it did not expressly adopt the requirement. Instead, the court found that the prosecution had made reasonable effort under the circumstances to compel the witness to testify and upheld the lower court’s ruling that the witness was in fact unavailable.
4. Right To Testify And Present A Defense

A criminal defendant has a constitutional right to testify on her own behalf. However, a defendant must assert her intention to avail herself of the right to testify lest she lose it. The trial court does not have to address a silent defendant and ask whether she knowingly and intelligently waives the right to testify; her lack of testimony is sufficient to waive the right.

In State v. Blomdahl, the State asked that the defense be precluded from making any statements or questioning witnesses about the defendant’s disabilities. The defendant therefore could not give any testimony about his own mental illnesses and was only allowed to testify about the common sense of an ordinary person compared to the common sense of someone who had endured a traumatic event. The Kansas Court of Appeals held that the defendant was denied the opportunity to present a defense. Because this error denied Blomdahl a fair trial, the court found the error was not harmless and reversed Blomdahl’s conviction.

5. Right to Counsel

a. Invocation of the Right to Counsel

The Sixth Amendment to the Constitution to the United States Constitution guarantees criminal defendants assistance of counsel for his or her defense, made applicable to state proceedings by the Fourteenth Amendment to the United States Constitution. The Supreme Court of

1151. E.g., State v. Breeden, 304 P.3d 660, 672–73 (Kan. 2013); id.
1153. Id.
1154. Id.
1155. Id. at *6–*7.
1156. State v. Coones, 339 P.3d 375, 383 (Kan. 2014). The text of the Sixth Amendment is: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an
the United States has held that this right includes a right to effective representation. The right to counsel attaches “when guilt is adjudicated, eligibility for imprisonment is established, and a prison sentence is determined.” In addition to the state and federal constitutional guarantees, K.S.A. 22-4503 codifies the right to assistance of counsel.

While undergoing questioning by government agents, a person must plainly and directly invoke the right to counsel. When this request is made, all questioning must stop to protect the defendant’s Miranda rights. However, a statement that merely “might be invoking the right to counsel” is not enough.

b. Personal Choice

i. Right to Counsel of Choice

The Supreme Court has held that if a defendant has adequate court-appointed representation, then the defendant “without the means to hire counsel” has no right to appointed counsel of choice. Therefore, defendants do not have an absolute right to counsel of choice because it can be limited by the defendant’s financial ability. For instance, if a

impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence” (emphasis added). U.S. CONST. amend. VI.

1157. Frost v. Pryor, 749 F.3d 1212, 1224 (10th Cir. 2014).
1159. See KAN. STAT. ANN. 22-4503(a) (West 2012) (“A defendant charged by the state of Kansas in a complaint, information or indictment with any felony is entitled to have the assistance of counsel at every stage of the proceedings against such defendant and a defendant in an extradition proceeding, or a habeas corpus proceeding . . . is entitled to have assistance of counsel at such proceeding. A person subject to an order or commitment . . . shall be entitled to the assistance of counsel at every stage of a habeas corpus proceeding brought by such person and the provisions of this section relating to defendants shall be applicable to such persons.”).
1164. Kaley v. United States, 134 S. Ct. 1090, 1096 (2014). See also United States v. Knittel, 562 Fed. App’x 630, 634 (10th Cir. 2014) (quoting United States v. Weninger, 624 F.2d 163, 166 (10th Cir. 1980)) (“T[he right to assistance of counsel does not imply the absolute right to counsel of one’s choice.”).
defendant uses funds he has stolen from a bank to pay his attorney of choice, then the government does not violate the Sixth Amendment if it seizes the robbery proceeds, thus forbidding the defendant from using crime proceeds to finance his defense.1165 Further, defendants do not have a “right to have counsel follow his instructions to the letter.”1166 Thus, the right to counsel is a right to an effective advocate, not necessarily the representation defendant prefers.1167

ii. Right to Appoint New Counsel

While the defendant has a right to effective assistance of counsel, the defendant is not guaranteed the right to choose which attorney will be appointed to represent the defendant.1168 Accordingly, if a defendant decides to waive assistance of counsel and to proceed pro se (or to self-represent), he has no absolute right to revoke that waiver and demand another appointed counsel.1169 To obtain new counsel, a “defendant must show good cause, such as a conflict of interest, a complete breakdown of communication or an irreconcilable conflict which leads to an apparently unjust verdict.”1170 In United States v. Behrena, the defendant expressed his concern about his attorney’s lack of preparedness on the opening day of trial because the attorney had not reviewed discovery materials, prepared a satisfactory witness list, or identified expert witnesses.1171 After jury selection, the defendant asserted his right to proceed without counsel; the district court confirmed that the defendant’s decision was voluntary, timely, knowing, and intelligent.1172 The appellate court determined that the defendant was not entitled to substitute counsel because “counsel’s refusal to structure a defense precisely as the

1165. Id.
1167. See id.
1171. Id. at 454.
1172. Id. at 455.
defendant directs is not good cause for substitution of counsel.”

The district court, in its sound discretion, is responsible for the
decision to appoint counsel. The right to appointed counsel “extends
to the defendant’s first appeal as of right, and no further.” However,
the district court may decline to appoint counsel when the legal issues of
the defendant’s case are not legally or factually complex, and “when the
merits do not appear colorable.” A district judge’s refusal to appoint
new counsel is reviewed by appellate courts under an abuse of discretion
standard.

In the Tenth Circuit, this standard defines abuse of
discretion as “when [a district court] renders a judgment that is arbitrary,
capricious, whimsical, or manifestly unreasonable.” The Supreme
Court of Kansas has defined an “abuse of discretion if the action (1) is
arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3)
is based on an error of fact.” Generally, as long as the court has a
reasonable belief that the attorney can still give the defendant reasonable
aid in the fair present of a defense, the district court’s refusal to appoint
new counsel is justified.

c. Right to Counsel in Probation Hearings

Defendants have a right to counsel when the court adjudicates guilt,
establishes eligibility for imprisonment, and determines a prison
sentence. In Kansas, a suspended sentence – probation – may
constitute a term of imprisonment, giving defendants the constitutional
right to counsel. K.S.A. 22-3716(b) codifies this right to give
defendants the right to be represented by counsel in probation revocation
proceedings.

1173. Id. at 456.
1175. Id.
1176. Id.
1177. Id.
1178. Id. at 460–61 (quoting United States v. Damato, 672 F.3d 832, 838 (10th Cir. 2013)).
1182. Id. at 121.
1183. KAN. STAT. ANN. 22-3716(b) (2013).
d. Waiver of Right to Counsel

ii. Right to Proceed Pro Se – Self-Representation and Hybrid Representation

A defendant who “knowingly and intelligently” waives his right to counsel is allowed to voluntarily do so, even if it is a detrimental decision.\footnote{1184 United States v. Knittel, 562 Fed. App’x 630, 634 (10th Cir. 2014). See also United States v. Behrens, 551 Fed. App’x 452, 456 (10th Cir. 2014) (“A trial court must be satisfied of three factors before allowing a criminal defendant to exercise his right to proceed pro se: the defendant must voluntarily assert his right to represent himself; the waiver must be knowing and intelligent; and the waiver must be timely.”).} Courts interpret this rule to mean that “a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation.”\footnote{1185 Knittel, 562 Fed. App’x at 634 (quoting Faretta v. California, 422 U.S. 806, 835 (1975)).} Rather, the defendant must be made aware of the disadvantages of self-representation.\footnote{1186 Id.} Additionally, the defendant must understand the significance of his decision, which must be “uncoerced.”\footnote{1187 Thornton v. Jones, 542 Fed. App’x 702, 704 (10th Cir. 2013).} Appellate courts review de novo whether a waiver of counsel complies with the Sixth Amendment, so the district court’s findings of fact are reviewed for clear error.\footnote{1188 United States v. Ontiveros, 550 Fed. App’x 624, 630 (10th Cir. 2013).}

In United States v. Knittel, the defendant argued that his court-appointed counsel was ineffective and that the trial court should have “substituted” counsel for him.\footnote{1189 United States v. Knittel, 562 Fed. App’x 630, 633 (10th Cir. 2014).} He also argued that the trial court should have inquired as to whether his waiver of counsel at sentencing was knowing and intelligent.\footnote{1190 Id.} The district court noted that the defendant, on several occasions of court appearances, repeatedly refused assistance of counsel.\footnote{1191 Id.} In addition, the court cautioned the defendant against proceeding pro se; however, the defendant said he was “done with” the court-appointed counsel and did not “want him anywhere around” him.\footnote{1192 Id.} The appellate court held that the record indicated that
the trial court did not deny the defendant his right to counsel.\textsuperscript{1193}

In addition to self-representation, a defendant may be able to use hybrid representation during trial—"partly by himself and partly by his attorney."\textsuperscript{1194} However, defendants do not have a constitutional right to hybrid representation itself.\textsuperscript{1195} In \textit{United States v. Jenkins}, where a defendant with mental problems requested hybrid representation during trial, the appellate court held that the district court did not abuse its discretion in granting the request.\textsuperscript{1196} The appellate court’s rationale was that the record indicated a “meticulous and exhaustive discussion,” during which the defendant gave lucid answers to inquiries from the bench.\textsuperscript{1197}

e. Effective Assistance of Counsel

i. Generally

The right to assistance of counsel includes the right to \textit{effective} assistance of counsel.\textsuperscript{1198} Because counsel can deprive a defendant of effective assistance, the “adversarial process protected by the Sixth Amendment” requires that the defendant have counsel who acts in the role of advocate.\textsuperscript{1199} Effective assistance includes more than the lawyer’s mere presence; it requires that the lawyer is loyal to the client and free from conflicts of interest:\textsuperscript{1200} “The Sixth Amendment right to counsel includes the right to conflict-free counsel and extends to postconviction proceedings in which the State is represented by counsel.”\textsuperscript{1201} If the district court is aware of a conflict of interest between an attorney and a defendant and fails to inquire further, there is an abuse of discretion.\textsuperscript{1202} Accordingly, upon appellate review, the defendant’s convictions will be be reversed, and the matter will likely be remanded for a new trial where

\textsuperscript{1193} \textit{Id.} at 634.
\textsuperscript{1194} See \textit{United States v. Jenkins}, 540 Fed. App’x 893, 897 (10th Cir. 2014).
\textsuperscript{1195} \textit{Id.} at 897–98.
\textsuperscript{1196} \textit{Id.} at 899.
\textsuperscript{1197} \textit{Id.}
\textsuperscript{1199} \textit{Id.}
\textsuperscript{1200} \textit{State v. Cheatham}, 292 P.3d 318, 327 (Kan. 2013).
\textsuperscript{1202} \textit{Id.}
a conflict-free counsel would be appointed.\textsuperscript{1203}

Kansas courts apply the \textit{Strickland} standard to ineffective assistance of counsel claims.\textsuperscript{1204} The \textit{Strickland} test has two prongs.\textsuperscript{1205} First, the defendant must establish counsel’s performance was deficient and fell below an objective standard of reasonableness considering all the circumstances.\textsuperscript{1206} Here, strategic choices—such as selection of an expert witness—made by counsel are “virtually unchallengeable”; however, “counsel has a duty to make reasonable investigations.”\textsuperscript{1207} Courts evaluate the defense’s investigation based upon “counsel’s perspective at the time investigative decisions are made.”\textsuperscript{1208} Second, the defendant must establish counsel’s performance prejudiced the defendant to the extent that there is a reasonable probability that the outcome would have been different but for counsel’s performance.\textsuperscript{1209} A reasonable possibility is a “probability sufficient to undermine confidence in the outcome.”\textsuperscript{1210} Further, this “likelihood of a different result must be substantial.”\textsuperscript{1211} Courts strongly presume that counsel’s conduct is reasonable, giving high deference to counsel’s performance.\textsuperscript{1212} However, the Kansas Supreme Court “has not been hesitant to reverse convictions upon a finding that counsel was ineffective.”\textsuperscript{1213}

A defendant’s claim for ineffective assistance of counsel on direct appeal is generally disfavored in the Tenth Circuit, with the claim being

\textsuperscript{1203} State v. Stovall, 312 P.3d 1271, 1282 (Kan. 2013).
\textsuperscript{1204} See State v. Cheatham, 292 P.3d 318, 328 (Kan. 2013) (referring to \textit{Strickland} as the “touchstone case”).
\textsuperscript{1205} Heard v. Addison, 728 F.3d 1170, 1175–76 (10th Cir. 2013). \textit{See also} State v. Coones, 339 P.3d 375, 383 (Kan. 2014) (“To prove he received ineffective assistance of counsel [the defendant] must demonstrate: (1) his counsel’s performance was deficient; and (2) this deficient performance was prejudicial.”).
\textsuperscript{1206} Hinton v. Alabama, 134 S. Ct. 1081, 1088 (2014).
\textsuperscript{1207} \textit{Id} (quoting \textit{Strickland} v. Washington, 466 U.S. 668, 690–91 (1984)).
\textsuperscript{1208} United States v. Howell, 573 Fed. App’x 795, 798 (10th Cir. 2014) (quoting Rompilla v. Beard, 545 U.S. 374, 381 (2005)).
\textsuperscript{1209} \textit{Id} at 1089.
\textsuperscript{1210} State v. Burnett, 329 P.3d 1169, 1192 (Kan. 2014).
\textsuperscript{1211} Frost v. Pryor, 749 F.3d 1212, 1224 (10th Cir. 2014) (quoting Harrington v. Richter, 131 S. Ct. 770, 792 (2011)).
\textsuperscript{1212} \textit{See Burnett}, 329 P.3d at 1192.
“presumptively dismissible.” This ensures that “a factual record enabling effective appellate review may be developed in the district court.” In United States v. Donaldson, the Tenth Circuit dismissed defendant’s allegations of ineffective assistance of counsel without prejudice because there was not a sufficient factual record from the district court to support the allegations.

ii. Appellate Counsel

To bring a claim for ineffective assistance of appellate counsel, the defendant must meet a modified Strickland standard. The first prong is the same as the trial court standard: defendant must show the counsel’s performance was deficient in that it fell below an objective standard of reasonableness. The second prong is slightly different: the defendant must show he was prejudiced to the extent there is a reasonable probability the appeal would have been successful but for counsel’s deficient performance.

The Supreme Court of the United States has not held that “a statutory right to counsel in itself establishes a constitutional right to counsel for discretionary appeals.” Therefore, a criminal defendant “cannot generally bring ineffective-assistance-of-counsel claims alleging a failure to pursue an issue in a petition for certiorari.” In addition, a defendant’s right to counsel expires when the statute of limitations has run for filing a direct appeal.

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

Because ineffective assistance of counsel claims involve mixed questions of law and fact, appellate courts review the factual findings

1215. Id. (quoting United States v. Hamilton, 510 F.3d 1209, 1213 (10th Cir. 2007)).
1216. Id. at 650–51.
1218. Id.
1219. Id.
1220. United States v. Howell, 573 Fed. App’x 795, 801 (10th Cir. 2014). See also Richardson v. Ploughe, 577 Fed. App’x 771, 775 (10th Cir. 2014) (noting that the Supreme Court of the United States has held that “there is no right to counsel during discretionary appeals”).
1221. Id.
to determine whether they are supported by substantial evidence and whether they sufficiently support the district court’s legal conclusions.\textsuperscript{1224} Appellate courts then review the legal conclusions without any required deference to the district court.\textsuperscript{1225} Accordingly, in the Tenth Circuit, the district court’s factual findings are reviewed “only for clear error.”\textsuperscript{1226}

The appellate court will find the district court abused its discretion if its decision is unsupported by substantial competence evidence, is guided by an erroneous legal conclusion, or is arbitrary, fanciful, or unreasonable.\textsuperscript{1227}

\textbf{C. Evidentiary Issues}

1. Prior Actions by the Defendant

a. Section 60-455 Generally

Section 60-455 of the Kansas Statutes governs the admissibility of evidence of prior acts by a criminal defendant.\textsuperscript{1228} Subsection (a) establishes the general rule that evidence of prior crimes or civil wrongs is “inadmissible to prove [a] person’s disposition to commit crime.”\textsuperscript{1229} Subsection (b), however, provides that such evidence is admissible if offered for another relevant purpose.\textsuperscript{1230} If, for example, the purpose of the evidence is to establish “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident,” it is admissible.\textsuperscript{1231} Moreover, subsection (c) allows the evidence to be admitted to prove the method used by the defendant when the method used in the prior act is “so similar . . . that it is reasonable to conclude the

\begin{itemize}
  \item \textsuperscript{1224} State v. Coones, 339 P.3d 375, 382 (Kan. 2014).
  \item \textsuperscript{1225} Id.
  \item \textsuperscript{1226} United States v. Howell, 573 Fed. App’x 795, 798 (10th Cir. 2014).
  \item \textsuperscript{1227} State v. Stovall, 312 P.3d 1271, 1277–78 (Kan. 2013).
  \item \textsuperscript{1228} KAN. STAT. ANN. § 60-455 (West 2012).
  \item \textsuperscript{1229} Id. § 60-455(a) (West 2012).
  \item \textsuperscript{1230} Id. § 60-455(b) (West 2012).
  \item \textsuperscript{1231} Id. § 60-455(b) (West 2012).
\end{itemize}
same individual committed both acts.”1232 Finally when a criminal defendant is charged with a sexual offense, subsection (d) further modifies the general rule by allowing evidence of prior sexual misconduct to be admitted on any matter “to which it is relevant and probative.”1233

A multistep process is used by a district court to admit K.S.A. 60-455 evidence.1234 First, the district court “determines whether the evidence is relevant to prove a material fact, including deciding whether the proffered material fact is actually in dispute.”1235 Appellate courts review these conclusions of the district court de novo.1236 Second, the district court “considers whether the probative value of the evidence outweighs its potentially prejudicial effect.”1237 Appellate courts review this conclusion for abuse of discretion.1238

On appellate review, courts apply a two-step process to evaluate a trial court’s decision to admit K.S.A. 60-455 evidence.1239 First, the appellate court determines the relevance of the evidence; in other words, the court determines if the evidence is material—“the fact has a legitimate and effective bearing on the decision of the case and is in dispute”—and probative—“has tendency in reason to prove the fact.”1240 Second, if the evidence is relevant, the appellate court applies the statutory provisions regarding evidence to the case.1241

b. Section 60-455(d) Admissibility of Prior Sexual Misconduct

In two cases in 2013, the Supreme Court of Kansas clarified the extent to which subsection (d) of K.S.A. 60-455 modifies the general rule that evidence of prior acts are inadmissible to prove propensity.1242 In State v. Prine, the Supreme Court of Kansas held that if “evidence is of ‘another act or offense of sexual misconduct’ and is relevant to propensity of ‘any matter,’ it is admissible, as long as the district judge is...
satisfied that the probative value of the evidence outweighs its potential for undue prejudice.”

In *State v. Spear*, the Supreme Court of Kansas noted that in the context of sex crime prosecutions, K.S.A. 60-455(d) “explicitly allows evidence of other acts or offenses of sexual misconduct to show a propensity to commit such an act or crime . . . .”

The Kansas Supreme Court in *State v. Remmert* used the approach of *Prine* and *Spear*. In that case, the district court admitted trial evidence that the defendant, who was convicted of aggravated criminal sodomy, was previously charged with aggravated incest of his stepdaughter and then entered into a diversion agreement regarding the charge. The defendant argued that evidence of prior crimes is inadmissible to prove propensity. Relying on its holdings in *Prine* and *Spear*, the Kansas Supreme Court found that the defendant’s prior diversion agreement was admissible under K.S.A. 60-455(d) “to show that he had the propensity to sexually abuse a child—an issue that was relevant to determining [his] guilt in this case.”

Similarly, in *State v. Dean*, the Supreme Court of Kansas held that the district court properly admitted the defendant’s prior conviction of indecent liberties with a child, its factual basis, and two evidentiary videos “focusing on young girls’ knees and genital regions and [the defendant] cuddling with a young girl.”

The approach of *Prine* and *Spear* has changed the calculus for K.S.A. 60-455(d). When a criminal defendant is charged with a sexual offense, evidence of prior sexual misconduct is admissible under subsection (d) on any matter “to which it is relevant and probative.”

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1246. *Id.* at 156.
1247. *Id.* at 159.
1248. *Id.*
1249. *Id.* at 160.
1252. KAN. STAT. ANN. § 60-455(d) (West 2012).
legislature intended “to relax the prohibition on evidence of other sexual misconduct to show propensity.” Indeed, the jury may consider the evidence of prior sexual misconduct for propensity so long as it is relevant.

2. Defendant’s Silence

Consistent with the United States Supreme Court’s holding in *Doyle v. Ohio*, evidence of a defendant’s silence after an arrest is inadmissible in Kansas. Pursuant to the *Miranda* requirement, a defendant must be warned that he has the right to remain silent and anything he says can and will be held against him in a court of law. As the Kansas Supreme Court explained: “the corollary is that if a duly warned person does exercise the right to remain silent, then anything that person did not say, i.e., the person’s silence, cannot and will not be used against them in a court of law.” However, in *State v. Reed*, the Kansas Supreme Court held that “a prosecutor’s reference to a defendant’s prearrest silence is not a violation of *Doyle v. Ohio*.” A prosecutor may also comment on post-arrest silence at trial so long as “a prosecutor [does not] cross the ‘fine line’ between impeaching a witness and inviting the jury to infer guilt from silence.” Commenting on silence to impeach a defendant who falsely claims that he or she was cooperative during interrogation is thus generally permitted.

3. Evidence Implicating Third Parties

Although Kansas has historically followed different rules of admissibility for evidence that implicates a third party, the Kansas Supreme Court rejected the vague distinction between direct and

1254. *Prine*, 303 P.3d at 674.
1255. *426 U.S. 610, 611 (1976).*
1258. *Id.; see also State v. Tully*, 262 P.3d 314, 324 (Kan. 2011) (“*Doyle* and its progeny . . . stand for the principle that a defendant’s silence induced by government action cannot be used to impeach his credibility.”) (quoting *State v. Massy*, 795 P.2d 344 (Kan. 1990)).
1259. *332 P.3d 172, 176 (Kan. 2014).*
1261. *Id.*
circumstantial evidence. Instead, evidence that implicates a third party is admissible if it “effectively connect[s] the third party to the crime charged” given the “totality of facts and circumstances in a given case.”

Third party evidence of motive to commit the crime is generally inadmissible, although it may be considered with other relevant third party evidence connecting the party to the crime. Otherwise, evidence implicating a third party is irrelevant and inadmissible.

4. Eyewitness Identification

a. Admissibility

Eyewitness identification is admissible if, first, the police procedure used to obtain the identification was not “unnecessarily suggestive.” Second, if the procedure was proper, the court must consider whether there was a substantial likelihood of misidentification under the totality of the circumstances.

A police procedure is unnecessarily suggestive if it highlights information about a certain individual or otherwise leads a witness to identify that individual. Although Kansas courts have previously used the words “impermissibly,” “unduly,” and “unnecessarily” interchangeably to describe the suggestive behavior of police, the Kansas Supreme Court in State v. Cruz stressed the importance of the word “unnecessarily” in the first step of the analysis. The court noted that the circumstances may necessitate a more suggestive procedure by

1262. State v. Inkelaar, 264 P.3d 81, 99 (Kan. 2011) (citing State v. Marsh, 548 U.S. 163 (Kan. 2011)) (rejecting the distinction based on whether the State’s case is based on direct or circumstantial evidence).
1267. Id.
1269. Id.
For example, while “the practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned,” the Kansas Court of Appeals has found that it was justified by exigent circumstances.\textsuperscript{1271}

To determine whether there was a substantial likelihood of misidentification under the totality of the circumstances, the court must consider the eight factors discussed in \textit{State v. Corbett}: (1) the witness’s opportunity to view the criminal at the time of the crime; (2) the witness’s degree of attention; (3) the accuracy of the witness’s prior description; (4) the level of certainty demonstrated by the witness at the confrontation; (5) the length of time between the crime and the confrontation; (6) the witness’s capacity to observe the event; (7) the spontaneity and consistency of the witness’s identification and the susceptibility to suggestion; and (8) the nature of the event being observed and the likelihood that the witness would perceive, remember, and relate it correctly.\textsuperscript{1272} Despite some earlier confusion as to the importance of one of the factors (level of certainty of the witness), all eight factors are valid in determining the likelihood of misidentification.\textsuperscript{1273}

\textbf{b. Jury Instructions}

Although all the \textit{Corbett} factors are valid considerations for admissibility, not all should be included in the instructions to the jury.\textsuperscript{1274} When evaluating the reliability of the witness’s identification, jurors should not be instructed to consider the witness’s level of certainty when the identification was made.\textsuperscript{1275} Such an instruction suggests that jurors should give more weight to a confident witness, despite a lack of evidence that confidence and accuracy are correlated.\textsuperscript{1276}

\textbf{c. Witness Psychological Examination}

In Kansas, a criminal defendant is entitled to a psychological

\textsuperscript{1270} \textit{Id.}
\textsuperscript{1272} \textit{Corbett}, 130 P.3d at 1190.
\textsuperscript{1273} \textit{State v. Mitchell}, 275 P.3d 905, 911 (Kan. 2012).
\textsuperscript{1274} \textit{Id.} at 912–13.
\textsuperscript{1276} \textit{Mitchell}, 275 P.3d at 912–14.
examination of the complaining witness if there are compelling circumstances that justify the examination.\textsuperscript{1277} To determine whether such compelling circumstances exist, Kansas courts consider the totality of the circumstances and the following non-exclusive list of factors: 1) whether the complaining witness’s version of the facts can be corroborated; 2) whether the witness demonstrates mental instability; 3) whether the witness demonstrates a lack of veracity; 4) whether the witness has made similar charges against others that are proven to be false; 5) whether the defendant’s motion for a psychological examination appears to be a fishing expedition; and 6) whether the witness has an unusual response when asked what it means to be truthful.\textsuperscript{1278} The district court has the discretion to permit or deny a psychological evaluation.\textsuperscript{1279}

5. Cross-Examination

A criminal defendant, under the Sixth Amendment Confrontation Clause, has a right to confront a witness who testifies against him.\textsuperscript{1280} This right is satisfied by the opportunity to cross-examine the witness.\textsuperscript{1281} However, the Confrontation Clause does not guarantee the defendant the right to cross-examine the witness to whatever extent he might wish.\textsuperscript{1282} Indeed, the trial judge has discretion to impose reasonable limits upon cross-examination “based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’s safety, or interrogation that is repetitive or only marginally relevant.”\textsuperscript{1283}

In \textit{Crawford v. Washington},\textsuperscript{1284} the Supreme Court explained that

\begin{itemize}
  \item \textsuperscript{1278} Berriozabal, 243 P.3d at 363; State v. Sprung, 277 P.3d 1100, 1110 (Kan. 2012) (citing Berriozabal, 243 P.3d at 363; Price, 61 P.3d at 681–82; Gregg, 602 P.2d at 85).
  \item \textsuperscript{1279} State v. Billings, 338 P.3d 23 (Kan. Ct. App. 2014).
  \item \textsuperscript{1280} U.S. CONST. amend. VI.
  \item \textsuperscript{1281} State v. Latunrner, 218 P.3d 23, 26 (Kan. 2009).
  \item \textsuperscript{1282} Delaware v. Van Arsdall, 106 S.Ct. 1431, 1435 (1986).
  \item \textsuperscript{1284} 541 U.S. 36 (2003).
\end{itemize}
certain out-of-court or hearsay statements, if admitted at trial, violate the defendant’s Sixth Amendment right to confront the witness.\textsuperscript{1285} However, such statements do not violate the Confrontation Clause if the State shows that the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.\textsuperscript{1286} The Ninth Circuit did discuss, however, the “forfeiture exception” to the Confrontation Clause, in which “the defendant is responsible for the witness being unavailable.”\textsuperscript{1287} In an issue of first impression, the Ninth Circuit found that the “preponderance of the evidence” standard applies to the forfeiture exception to the Confrontation Clause.\textsuperscript{1288}

Moreover, to implicate the defendant’s Sixth Amendment rights, the statement must be testimonial.\textsuperscript{1289} The Kansas Supreme Court recently considered whether a certificate of calibration for an Intoxilyzer machine is testimonial hearsay and therefore subject to Crawford.\textsuperscript{1290} Relying on Supreme Court cases applying Crawford,\textsuperscript{1291} the Kansas Supreme Court concluded that a certificate of calibration is not testimonial because it “is not created for the purpose of prosecuting any particular defendant, but rather it is designed for use in criminal prosecutions generally.”\textsuperscript{1292} Thus, in that case, the certificate did not violate the Confrontation Clause because it was not testimonial.\textsuperscript{1293} However, in the same context of scientific evidence, the United States Supreme Court has held that the Confrontation Clause “does not permit the prosecution to introduce a forensic laboratory report containing a testimonial statement by an analyst, certifying to the results of a blood alcohol concentration test he performed, through the in-court testimony of another scientist ‘who did not sign the certification or perform or observe the test reported in the certification.’”\textsuperscript{1294}

\begin{thebibliography}{99}
\bibitem{1285} Crawford, 541 U.S. at 68.
\bibitem{1286} Id.
\bibitem{1287} Id.
\bibitem{1288} Id.
\bibitem{1290} State v. Johnson, 301 P.3d 287, 298 (Kan. 2013); Benson, 287 P.3d at 932.
\bibitem{1291} See Benson, 287 P.3d at 930–32 (discussing Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) and Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011)).
\bibitem{1292} Benson, 287 P.3d at 931; see also Johnson, 301 P.3d at 298–99 (“[The certificate was] no created for the purpose of prosecuting any specific defendant or for the purpose of establishing the elements of any specified criminal offense.”).
\bibitem{1293} Id.
\end{thebibliography}
6. Proof Beyond a Reasonable Doubt

The state has the burden of proving the defendant’s guilt beyond a reasonable doubt.\textsuperscript{1295} To meet that burden, the State must prove each element of the crime charged beyond a reasonable doubt.\textsuperscript{1296} The Kansas Supreme Court has consistently held that jury instructions defining the meaning of reasonable doubt are not necessary because the term is sufficiently clear.\textsuperscript{1297} However, inclusion of such an instruction is not necessarily reversible error.\textsuperscript{1298}

D. Actions by Different Players During a Trial

1. Prosecutors

a. Prosecutorial Discretion/Selective Prosecution

Generally, a prosecutor has discretion to charge any offense for which he has probable cause if he believes he can meet the burden of proof.\textsuperscript{1299} The prosecutor’s decision to charge, however, is subject to constitutional restrictions and cannot be based on impermissible factors such as race, sex, religion, or exercise of statutory or constitutional right.\textsuperscript{1300} A defendant seeking to show that the prosecutor’s decision to charge was based on an impermissible factor—or selective or discriminatory prosecution—must show that those that are similarly situated are not generally prosecuted for the conduct for which the

\textsuperscript{1296} Id. (citing State v. Hall, 14 P.3d 404 (Kan. 2000)).
\textsuperscript{1298} See id. (noting that it is strongly recommended that a trial judge use the PIK instructions as written; however, “modifications can be made ‘[i]f the particular facts in a given case require modification’) (citation omitted).
\textsuperscript{1299} United States v. Bradshaw, 580 F.3d 1129, 1135 (10th Cir. 2009).
\textsuperscript{1300} United States v. Curtis, 344 F.3d 1057, 1064 (10th Cir. 2003) (quoting United States v. Andersen, 940 F.2d 593 (10th Cir. 1991)). \textit{See also} United States v. Walker, 576 F. App’x 725, 728 (10th Cir. 2014) (“Whether to prosecute and what charge to file or bring before a grand jury are decisions that generally rest in the prosecutor’s discretion.”).
defendant is being prosecuted. In addition, the defendant must show that he has been intentionally and purposefully singled out.

i. Prosecutorial Misconduct

If a defendant claims that a prosecutor has committed misconduct, the defendant must first show that the prosecutor’s comments went beyond the wide latitude that prosecutors are afforded in discussing the evidence. If the comments were improper, the court must determine whether the comments prejudiced the jury and denied the defendant a fair trial. Kansas courts consider the following factors to determine if the improper comments denied the defendant a fair trial: (1) whether the comments were “gross and flagrant”; (2) whether they were motivated by “prosecutorial ill will”; and (3) whether the evidence in the case was so “direct and overwhelming” that the misconduct would have had little effect on the jurors. The Kansas Supreme Court has noted that no single factor controls the outcome.

When prosecutorial misconduct has occurred, Kansas courts will not uphold a conviction unless the prosecutor shows that the misconduct was harmless. To show that the misconduct was harmless, the prosecutor must show beyond a reasonable doubt that the misconduct, in light of the entire record, did not affect the verdict. The Kansas Supreme Court has noted that “[t]he State bears a higher burden to demonstrate harmless error when the error is of constitutional magnitude.” Moreover, “the state bears the burden of demonstrating harmlessness under both the constitutional and statutory standards; if the state meets the higher constitutional harmless error standard, however, the state necessarily meets the lower statutory standard.”

1302. Id. (citing State ex rel. Murray v. Palmgren, 646 P.2d 1091 (Kan. 1982)).
1304. Id.
1305. Id.
1306. Id.
1307. Id.
1308. Id. (citing Chapman v. California 386 U.S. 18 (1967); State v. Ward, 256 P.3d 801, 820 (Kan. 2011)).
1309. Id. (citing State v. Bridges, 306 P.3d 244 (Kan. 2013)).
ii. Undue Influence

“When assessing the voluntariness of a defendant’s statement to government agents, the ultimate issue is whether the statements reflect the product of a free and independent will.”\textsuperscript{1311} In assessing the voluntariness of a defendant’s statements, a court will look at the totality of the circumstances surrounding the making of the statements, including: (1) the accused’s mental condition, (2) the duration and manner of the interrogation, (3) the ability of the accused on request to communicate 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.\textsuperscript{1312}

A defendant has a right to have a fair trial, and an “essential ingredient” of a fair trial is the right to present a defense.\textsuperscript{1313} Within a defendant’s right to present a defense is the right to present the testimony of witnesses.\textsuperscript{1314} A prosecutor cannot substantially interfere with a defense witness’s decision to testify or the defendant is deprived of his right to a fair trial.\textsuperscript{1315} A prosecutor substantially interferes if he “actively discourages a witness from testifying through threats of prosecution, intimidation, or coercive badgering.”\textsuperscript{1316}

2. Trial Judges

Trial court judges are allowed broad discretion in trial proceedings and, generally, errors made by the trial court judge will not be grounds for modifying a judgment unless it affects a substantial right of a party.\textsuperscript{1317} As the Kansas Supreme Court has explained: “[The court] determine[s] if there is a reasonable probability that the error did or will

\textsuperscript{1312} Id.
\textsuperscript{1313} U.S. v. Pablo, 696 F.3d 1280, 1295 (10th Cir. 2012).
\textsuperscript{1314} Id. (“A witness may freely invoke his privilege against self incrimination even at the expense of the defendant’s right to present a defense.”).
\textsuperscript{1315} Id.
\textsuperscript{1316} U.S. v. Serrano, 406 F.3d 1208, 1216 (10th Cir. 2005).
\textsuperscript{1317} KAN. STAT. ANN. § 60-261 (West 2010).
affect the outcome of the trial in light of the entire record.”

a. Admissibility of Evidence

If evidence is relevant, rules governing the admission or exclusion of evidence are often subject to the trial court’s discretion, although some may be applied as a matter of law. A trial court abuses its discretion if (1) “no reasonable person would have taken the view adopted by the trial court”; (2) the discretion is guided by an error of law; or (3) there is not competent evidence to support the factual finding on which the discretion is based. In addition, the party seeking to admit the evidence must provide the trial judge with a specific basis for the admission so the judge can consider the argument and avoid reversible error.

b. Jury Instructions

A trial judge must instruct the jury on the law, including every essential element of the charge. Parties may suggest instructions that they wish to go to the jury, although the trial judge is not bound by their proposals. However, “if an instruction is legally appropriate and factually supported, a [trial judge] errs in refusing to grant a party’s request to give the instruction.” Still, a trial judge’s failure to give an appropriate instruction is not always reversible error. In other words, the failure to give an appropriate instruction may be harmless error if it does not affect a substantial right of the defendant.

1322. State v. Richardson, 224 P.3d 553, 558 (Kan. 2010).
1323. See State v. Plummer, 283 P.3d 202, 207 (Kan. 2012) (explaining that a trial judge does not err in refusing to include a lesser offense requested by the defendant, but that the evidence should be viewed in the light most favorable to the defendant).
1324. Id. at 208.
1325. Id.
1326. Id.
c. *Allen* Instructions

Trial judges may give additional jury instructions that encourage the jury to agree on a verdict, and to avoid a mistrial. These instructions, also known as Deadlocked Jury instructions, are commonly called *Allen* instructions—named after the Supreme Court case that first addressed their validity. An *Allen* instruction usually consists of a statement similar to “another trial would be a burden on both sides,” which Kansas courts have held to constitute error due to its “confusing” and “misleading” nature. The Kansas Supreme Court has generally shown disapproval for *Allen*-type instructions that come after the jury deliberations are in progress, because instructions cannot encourage the jury to compromise the integrity of the verdict. “In considering whether to give this instruction, the trial court should be mindful not only of the wording of the instruction but also of the timing of the instruction. If given at all, the Committee recommends this instruction be given before the jury begins its deliberations.” However, the recent trend in Kansas courts it to find an instruction containing *Allen*-type language erroneous.

E. Potential Trial Actions

1. Motion for Acquittal

Under section 22-3419(1) of the Kansas statutes, if the evidence is insufficient to sustain the crime charged, the court must enter a judgment of acquittal. The court may do so on motion by the defendant or on

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1330. State v. Boyd, 481 P.2d 1015, 1019 (Kan. 1971); see also Makthepharak, 78 P.3d at 417 (collecting cases).
its own motion\textsuperscript{1335}; however, the “decision to grant a motion for judgment of acquittal is not discretionary,”\textsuperscript{1336} and a trial judge cannot substitute his judgment for the jurors’.\textsuperscript{1337} Instead, the judge should review all the evidence in the light most favorable to the prosecution.\textsuperscript{1338} When viewed in that light, if no rational fact finder could find the defendant guilty beyond a reasonable doubt, judgment of acquittal is warranted.\textsuperscript{1339}

2. Questions from the Jury

After the case is submitted to the jury, the jurors must be kept together under charge of a duly sworn officer until they agree on the verdict.\textsuperscript{1340} The court, however, may allow them to separate at its discretion.\textsuperscript{1341} If allowed to separate, the jury must be warned that it is its duty not to communicate with anyone about the subject of the trial.\textsuperscript{1342} While in deliberations, the officer shall not allow any communications to be made to the jurors unless ordered by the court, and only the jury may be present in the room during deliberations.\textsuperscript{1343} If the jurors wish to be informed on the law or evidence from the case, they may request it from the court.\textsuperscript{1344} The information must then be read or exhibited in the presence of the defendant “unless he voluntarily absents himself, and his counsel and after notice to the prosecuting attorney.”\textsuperscript{1345}

In State v. Burns,\textsuperscript{1346} the Kansas Supreme Court suggested that even if the defendant has not waived the right to be present, it is not necessary to answer the question in open court.\textsuperscript{1347} However, the court corrected this statement in State v. King.\textsuperscript{1348} The court concluded that section 22-3420(3) of the Kansas statutes “plainly mandates” that the question shall

\begin{itemize}
\item \textsuperscript{1335} KAN. STAT. ANN. § 22-3419(1) (West 2013).
\item \textsuperscript{1336} Dinh Loc Ta, 290 P.3d at 657 (citing State v. Murdock, 187 P.3d 1267 (Kan. 2008)).
\item \textsuperscript{1337} Id.
\item \textsuperscript{1338} Id.
\item \textsuperscript{1339} State v. Finch, 244 P.3d 673, 678 (Kan. 2011).
\item \textsuperscript{1340} KAN. STAT. ANN. § 22-3420(1) (West 2013).
\item \textsuperscript{1341} Id.
\item \textsuperscript{1342} Id. § 22-3420(2).
\item \textsuperscript{1343} Id. § 22-3420(1).
\item \textsuperscript{1344} Id. § 22-3420(3).
\item \textsuperscript{1345} Id.
\item \textsuperscript{1346} State v. Burns, 287 P.3d 261, 268 (Kan. 2012).
\item \textsuperscript{1347} 305 P.3d 641 (Kan. 2013).
\item \textsuperscript{1348} King, 305 P.3d, at 652.
\end{itemize}
be answered in the presence of the defendant.\textsuperscript{1349} Moreover, the court rejected the contention that questions of law or evidence are treated differently under the statute.\textsuperscript{1350} The court concluded: “any question from the jury concerning the law or evidence pertaining to the case must be answered in open court in the defendant’s presence unless the defendant is voluntarily absent.”\textsuperscript{1351}

When there is a violation of section 22-3420(3), the harmless error analysis should be applied.\textsuperscript{1352} Moreover, the more rigorous standard, the federal constitutional harmless error standard, may apply if the acts or omissions violating section 22-3420(3) also violate the defendant’s Sixth Amendment right to be present at every critical stage of his or her trial.\textsuperscript{1353}

3. Mistrial

Section 22-3423 of the Kansas statutes allows a district court to order a mistrial for numerous reasons.\textsuperscript{1354} Appropriate reasons for a mistrial include: inevitable reversal because of a legal defect, prejudicial conduct that will result in injustice, a hung jury, false statements of jurors during
\textit{voir dire}, and pending determination of the defendant’s competency.\textsuperscript{1355} A district court’s ruling on a mistrial is reviewed by appellate courts for abuse of discretion.\textsuperscript{1356}

In \textit{State v. Harris},\textsuperscript{1357} the Kansas Supreme Court considered whether a mistrial was appropriate due to prejudicial conduct.\textsuperscript{1358} The court noted that section 22-3423 creates a two-step process; first, the court must determine whether the proceeding suffered a “fundamental failure.”\textsuperscript{1359}

\textsuperscript{1349} \textit{Id.}
\textsuperscript{1350} \textit{Id.}
\textsuperscript{1351} \textit{Id.; see also State v. Verser, 326 P.3d 1046, 1054–55 (Kan. 2014).}
\textsuperscript{1352} \textit{Id.}
\textsuperscript{1353} \textit{State v. Herbel, 299 P.3d 292, 300 (Kan. 2013).}
\textsuperscript{1354} \textit{KAN. STAT. ANN. § 22-3423 (West 2013).}
\textsuperscript{1355} \textit{Id. § 22-3423(1).}
\textsuperscript{1356} \textit{State v. Harris, 306 P.3d 282, 290 (Kan. 2013).}
\textsuperscript{1357} \textit{Id.}
\textsuperscript{1358} \textit{Id.}
\textsuperscript{1359} \textit{Id.}
Then, if it has, the court must consider whether it is possible to continue without an injustice. Consistent with the abuse of discretion standard, an appellate court reviewing a ruling a mistrial must divide the inquiry into two parts: “(1) Did the district court abuse its discretion when deciding if there was a fundamental failure in the proceeding? and (2) Did the district court abuse its discretion when deciding whether the conduct caused prejudice that could not be cured or mitigated through jury admonition or instruction, resulting in injustice?”

VI. SENTENCING

A. Federal Sentencing

The Federal Sentencing Guidelines, originally made effective in 1987, sought to inject honesty, uniformity, and proportionality into the federal sentencing system, in light of the four major goals of criminal punishment: “deterrence, incapacitation, just punishment, and rehabilitation.” The guidelines apply to more than 90 percent of felony and Class A misdemeanor cases tried in federal courts. The drafters of the guidelines used extensive empirical data to prescribe narrow guidelines for sentencing, while also aiming to avoid undue complexity. The guidelines’ most important function is to prescribe categories based on the nature of the offense and the nature of the offender, the intersection of which results in a sentencing range. A sentencing court may depart from the guidelines only where it finds “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” Although the Sentencing Commission expects departures to occur infrequently, it notes that when courts do so a number of times, this may signal to the Commission that it needs to revise the ever-evolving guidelines. The list of grounds for departure

1360. Id.
1361. Id.
1363. Id. § 1A1.1.
1364. Id. § 1A1.5.
1365. Id. § 1A1.3.
1366. Id.
1367. Id. § 1A1.4(b) (quoting 18 U.S.C. § 3553(b) (2010)).
1368. Id.
laid out in the guidelines is non-exclusive.\textsuperscript{1369} An \textit{ex post facto} violation occurs where a defendant is sentenced under guidelines made effective \textit{after} the events constituting the basis for the crime, even where the guidelines become effective before sentencing.\textsuperscript{1370} A court should impose the “Guidelines ‘in effect on the date the defendant is sentenced.’”\textsuperscript{1371}

\textbf{B. Kansas Sentencing}

\textbf{1. Sentencing Determination}

Kansas felonies are divided into those covered by the sentencing grids and those that are not covered by the grids—the latter are colloquially known as “off-grid” felonies.\textsuperscript{1372} There are no presumptive sentences for off-grid felonies, and subject to certain exceptions, such as the potential for the death penalty in the case of capital murder,\textsuperscript{1373} they result in life imprisonment.\textsuperscript{1374} Off-grid felonies include first degree murder,\textsuperscript{1375} terrorism,\textsuperscript{1376} illegal use of weapons of mass destruction,\textsuperscript{1377} treason,\textsuperscript{1378} and a host of crimes where the offender is at least eighteen years old and the victim is younger than fourteen,\textsuperscript{1379} including human trafficking,\textsuperscript{1380} rape,\textsuperscript{1381} and indecent liberties with a child.\textsuperscript{1382}

For those crimes that are not off-grid felonies, Kansas utilizes sentencing guidelines similar to those used by federal courts. These guidelines base sentences on two factors: the criminal history of the

\textsuperscript{1369} Id.
\textsuperscript{1371} Id.
\textsuperscript{1372} See KAN. STAT. ANN. § 21-6806(c), (d) (2014).
\textsuperscript{1373} See id. § 21-6617.
\textsuperscript{1374} \textit{Id.} § 21-6806(c), (d).
\textsuperscript{1375} See id. § 21-5402.
\textsuperscript{1376} See id. § 21-5421.
\textsuperscript{1377} See id. § 21-5422.
\textsuperscript{1378} See id. § 21-5901.
\textsuperscript{1379} See id. § 21-6806(d).
\textsuperscript{1380} See id. § 21-5426.
\textsuperscript{1381} See id. § 21-5503.
\textsuperscript{1382} See id. § 21-5506.
defendant and the severity of the crime. Drug crimes and nondrug crimes have separate sentencing ranges and grids. To determine the presumptive sentence, the sentencing judge decides the applicable criminal history “score,” defines the applicable crime severity, and then finds the box at the intersection of those two factors, which gives the presumptive sentence. Although the sentencing judge has discretion to prescribe a sentence anywhere within the presumptive range, it is recommended that the sentencing judge start in the middle of the range and make upward or downward adjustments based on aggravating and mitigating factors insufficient to warrant a departure from the presumptive range.

A sentencing judge may only depart from the presumptive range if he finds “substantial and compelling reasons” for a departure, and he must state such reasons on the record. Additionally, a jury must prove any fact that leads to an upward departure, other than a prior conviction, beyond a reasonable doubt. The list of aggravating and mitigating circumstances potentially warranting an upward or downward departure is nonexclusive. For example, a victim’s request before the court for leniency can in itself be sufficient for a downward departure—even though it is not listed as mitigating factor under section 21-6815(c)(1)—provided that the request is substantial. Similarly, a defendant’s future potential can be sufficient for downward departure. Departures from the presumptive range are appealable.

a. Criminal History

A defendant’s criminal history classification is located on the horizontal axis of the sentencing grid. For nondrug and drug crimes, the criminal history categories range from “A” (most extensive history—3+ Person Felonies) to “I” (least extensive history—1 Misdemeanor or

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1383. See id. §§ 21-6804(c) (nondrug crimes), -6805(d) (drug crimes).
1384. Id. § 21-6804(a), -6805(a).
1385. See id. §§ 21-6804, -6805.
1386. Id. §§ 21-6804(e)(1), 21-6805(c)(1).
1387. Id. § 21-6815(a).
1388. Id. § 21-6815(b).
1389. See Id. § 21-6815(c)(1), (2).
1392. See infra notes 78–84 and accompanying discussion.
1393. See KAN. STAT. ANN. §§ 21-6804(a), (c), 21-6805(a) (2014).
The criminal history is based on prior convictions, which include, amongst other types of convictions, person and nonperson felony adult and juvenile convictions and adjudications, person misdemeanor adult convictions, and nonperson Class A misdemeanor adult convictions. For purposes of determining criminal history, “three prior adult convictions or juvenile adjudications” for certain person misdemeanors are equal to “one adult conviction or one juvenile adjudication of a person felony.” If the offender does not admit his criminal history in open court, then it must be proven by a preponderance of the evidence at the sentencing hearing. Although lack of criminal history is not an enumerated mitigating factor under the general list of mitigating circumstances, lack of criminal history itself can serve as a mitigating factor justifying a downward departure from a mandatory twenty-five or forty-year sentence under Jessica’s Law; however, a court denying a departure regarding Jessica’s Law despite clear lack of criminal history does not abuse its discretion.

Following conviction, the sentencing court orders the court services officer to prepare the presentence investigation report as soon as possible. This report’s contents are limited to certain enumerated matters, including all prior adult convictions and juvenile adjudications that bear on the defendant’s criminal history. If the “proposed grid block classification” calls for presumptive imprisonment, then the report must also contain this presumptive range of

1394. Id.
1395. Id. § 21-6810(a). See also id. § 21-6803(c) (defining “criminal history” as “an offender’s criminal record of adult felony, class A misdemeanor, class B person misdemeanor or select misdemeanor convictions and comparable juvenile adjudications at the time such offender is sentenced”).
1396. Id. § 21-6811(a).
1397. Id. § 21-6814(a).
1398. See id. § 21-6815(c)(1).
1399. See id. § 21-6627(d)(2)(A).
1401. KAN. STAT. ANN. § 21-6813(a) (2014).
1402. Id. § 21-6813(b) (“Each presentence report . . . shall be limited to the following information . . . .”) (emphasis added).
1403. Id. § 21-6813(b)(5).
imprisonment. If the defendant challenges any aspect of the report before the court has established the defendant’s criminal history, then the State bears the burden of proving its criminal history worksheet; if the defendant challenges the criminal history worksheet after it is established by the court, he bears the burden of showing the disputed portion by a preponderance of the evidence. The presentence report can also be used when the sentencing court is considering aggravating or mitigating circumstances. However, mere notation of criminal charges in the presentence report is insufficient in itself to find that a crime is sexually motivated, an aggravating circumstance. Additionally, a court may find grounds for remand for determination for withdrawal if a defendant can show he relied, in good faith, on the exclusion of a prior crime when entering into a plea agreement only to find a higher criminal history score in the presentence report.

b. Hard 40/50 Sentences

Kansas Law also provides for sentences of minimum lengths for certain off-grid felonies, colloquially known as “hard 50” (or hard 25 or hard 40) sentences. The sentences are known as such because a defendant is not eligible for parole until after the mandatory minimum term. For instance, a defendant convicted of rape or another sex crime involving a victim younger than 14 receives a mandatory

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1404. *Id.* § 21-6813(b)(7).
1405. *Id.* § 21-6814(c).
1406. *Id.* § 21-6815(d)(2).
1408. State v. Garcia, 283 P.3d 165, 167, 172 (Kan. 2012). The *Garcia* court remanded for determination of whether defendant could withdraw his plea because it was unsure whether the trial court applied the correct standard, which requires analysis under section 22-3210(b) and the 3 *Edgar* factors. *Id.* at 172. See also *State v. Jackson*, 297 Kan. 110, 116 (2014) (Rosen, J., concurring) (“[T]he cause of the confusion that resulted in this appeal—the lack of an accurate criminal history determination prior to the entry of the plea—and the necessity to vacate the sentence and remand for resentencing were completely avoidable. . . . Consistent with Kansas law and the heightened constitutional protections demanded in criminal proceedings, we should require a predetermined, accurate criminal history which is to be used at any subsequent sentencing hearing to be part of plea agreements.”); *State v. Fritz*, 299 Kan. 153, 154 (2014) (citing *State v. Aguilar*, 290 Kan. 506, 511 (2010)) (“In determining whether a defendant has shown good cause to withdraw a plea, a district court should consider three factors, sometimes called the *Edgar* factors . . . (1) whether the defendant was represented by competent counsel; (2) whether the defendant was misled, coerced, mistreated, or unfairly taken advantage of; and (3) whether the plea was fairly and understandably made.”).
minimum sentence of 25 years, a defendant receives a mandatory minimum term of 40 years for his second offense. A defendant convicted of first degree, premeditated murder for acts committed before July 1, 1999 receives a “hard 40”; a defendant convicted of the same crime after that date receives a “hard 50.” To receive a mandatory minimum term, all aggravating factors—which must be listed on the record—must not be outweighed by any existing mitigating circumstances. Previously, the sentencing judge could perform this analysis. The judge may only issue a downward departure from the prescribed “hard” sentence if he finds “substantial and compelling reasons” after reviewing mitigating circumstances, and he must record such reasons on the record.

In Alleyne v. United States, the Supreme Court sent waves across the criminal justice system when it ruled that “[b]ecause mandatory minimum sentences increase the penalty for a crime, any fact that increases the mandatory minimum is an ‘element’ that must be submitted to the jury.” This finding flowed from an underlying belief that an aggravating factor “constitutes an element of a separate” offense that, under the Sixth Amendment, must be submitted to a jury. Thus, as a practical result, sentencing judges are no longer allowed to weigh aggravating factors that affect the imposition of a hard 50 sentence. This decision sent the Kansas legislature scrambling to draft new legislation that would pass constitutional requirement under the new Alleyne standard. Less than three months after the Alleyne decision, in a

1411. Id. § 21-6627(a)(1).
1412. Id. § 21-6627(b)(1).
1413. Id. § 21-6623.
1414. Id. § 21-6620(c)(5–6).
1418. See Alleyne, 133 S. Ct. at 2162; see also Killings, 340 P.3d at 1186.
1419. See Hurst Liviana, Supreme Court ruling threatens to invalidate Kansas hard 50 sentences,
special session, the Kansas Legislature cured the then-defective hard 50 sentence.\footnote{2013 Kan. Sess. Laws 1st Special Session Ch. 1 (H.B. 2002).} The bill amended, amongst other provisions, the right of a judge to find that aggravating circumstances are not outweighed by mitigating circumstances—the jury must now make this determination.\footnote{See KAN. STAT. ANN. § 21-6620(c)(5) (2014).} To impose a hard sentence, the jury must reach a unanimous decision, and must state the aggravating circumstances, which are statutorily-limited,\footnote{Id. § 21-6624.} on the record.\footnote{Id. § 21-6620(c)(5).} In order to assuage fears that certain offenders sentenced under the old hard 50 statute would escape a hard 50 sentence,\footnote{See, e.g., supra note 57.} the Kansas legislature made the amendments retroactive.\footnote{KAN. STAT. ANN. § 21-6620(d), (e) (2014) (providing that the amendment is generally retroactive, that defendants whose convictions and sentences were final before the Alleyne decision have no recourse under the amended version of the law, and that defendants convicted before the amendment but whose sentence was later vacated will be resentenced under the amended version). See also Engelhardt v. Heimgartner, 579 Fed. Appx. 671, 679 (10th Cir. 2015) (upholding the district court’s decision in a habeas corpus action recognizing that because defendant was sentenced under the old version of the hard 50 scheme whereby the judge could find for aggravating factors, there was no constitutional infraction where the sentencing judge did so).}  

c. Aggravating and Mitigating Circumstances

Aggravating and mitigating circumstances present strong grounds for a sentencing judge to impose a sentence anywhere within the presumptive range, although, as noted above, a judge has discretion to sentence anywhere within the presumptive range without such factors.\footnote{See supra note 25 and accompanying text.} Aggravating and mitigating circumstances are necessary to justify either an upward or downward departure, and such circumstances leading to a departure must be specifically stated on the record.\footnote{State v. Sage, No. 111,045, 2014 WL 7152370, at *3 (Kan. Ct. App. Dec. 12 2014) (citing State v. Blackmon, 176 P.3d 160 (Kan. 2008)) (“In reviewing the granting of a departure sentence, we are limited to considering only the articulated reasons for departure stated on the record at sentencing.”).} Failure to do so will prevent the appellate court from considering such circumstances.
The sentencing judge may take into consideration aggravating and mitigating circumstances obtained from a wide variety of sources: (1) evidence from the sentencing proceeding; (2) the presentence investigation report; (3) written briefs and oral arguments from either party; and (4) any other evidence that is “relevant to such aggravating or mitigating circumstances that the court finds trustworthy and reliable.”\(^\text{1429}\) When determining whether one or more aggravating circumstances justify an upward departure, sentencing judges must consider the victim impact statement.\(^\text{1430}\)

d. Consecutive & Concurrent Sentences

When imposing sentences for different crimes on a defendant at the same time, a sentencing court generally has discretion to decide if the sentences should run concurrently or consecutively—the court’s silence generally results in concurrent sentences.\(^\text{1431}\) However, certain exceptions impose mandatory consecutive terms, such as mandatory consecutive sentences where a defendant commits a crime while on probation for a felony.\(^\text{1432}\) Although the sentencing judge has discretion in certain cases to impose consecutive sentences, his choice is limited by certain factors,\(^\text{1433}\) and he should seek proportionality between the sentence on one hand, and harm caused and culpability recognized by the defendant on the other.\(^\text{1434}\)

e. Jail Time Credit

The secretary of corrections has specific authority to draft regulations governing good time calculations and a “good time credit”

\(^{1429}\) KAN. STAT. ANN. § 21-6815(d) (2014).

\(^{1430}\) Id. §§ 21-6815(c)(2) (nondrug crimes), 21-6816(b) (drug crimes).

\(^{1431}\) Id. § 21-6606(a).


\(^{1433}\) See KAN. STAT. ANN. § 21-6819(b) (2014).

\(^{1434}\) Id. § 21-6819(b).
system. Inmates may earn “good time credits” through, for instance, acceptance of past culpability, positive work participation, and receipt of a general education diploma. Good time reduction is, however, limited to either fifteen or twenty percent of the sentence. Two cases recently expanded an inmate’s right to receive a good time credit reduction. In State v. Sult, in a case of first impression, the Kansas Court of Appeals held that an inmate’s court-ordered time spent in a state hospital counted towards the jail time credit because the defendant was “not free to leave.” Similarly, in State v. Hopkins, the Kansas Supreme Court again interpreted the good time credit broadly, ruling that the defendant, who had spent time in a residential drug abuse treatment program for one crime, was entitled to good time credit for a separate crime.

2. Sentence Modification

Both the defendant and the state may appeal the trial court’s decision to depart from the presumptive sentencing range. An appellate court may correct an illegal sentence at any time. Despite this, review of a sentence within the presumptive range or a sentence pursuant to a plea agreement is not possible. However, an appellate court may have jurisdiction to consider a presumptive sentence when it appears that the sentencing judge misunderstood his statutory authority to issue a downward departure.

1435. Id. § 21-6821(a).
1436. Id. § 21-6821(a), (c)(1)(A).
1437. Id. § 21-6821(b)(2)(A) (fifteen percent limit for a crime committed on or after July 1, 1993); 21-6821(b)(2)(B), (C) (twenty percent limit for certain drug crimes committed on or after January 1, 2008) (2014).
1439. 285 P.3d 1021, 1025–26 (Kan. 2012) (finding that former section 21-4614a(a), which provided good time credit for time spent in “residential facility” and “residential services” programs, included the time spent by the defendant in a residential drug abuse treatment program unrelated to the crime being charged). Section 21-4614a(a) has since been repealed. Contra, State v. Lakin, No. 111,060, 2014 WL 5313708, at *5–6 (Kan. Ct. App. Oct. 10, 2014) (noting that time spent under probation and supervision does not fall within the definitions of former section 21–4614(a) because the defendant’s house does not fall within the statutes definitions of facilities).
1440. KAN. STAT. ANN. § 21-6820(a) (2014).
1441. Id. § 22-3504(1).
1442. Id. § 21-6820(c).
departure, the standard of review on appeal is limited to whether the departure was supported by evidence on the record constituting “substantial and compelling reasons for departure.” An appellate court may review a claim alleging that the departure was tainted by partiality, that the court improperly included or excluded a prior conviction or prior adjudication, or that the court erred in classifying the severity of the current or any past crime. Recently, the Kansas Supreme Court backtracked on past precedent when it ruled that appellate courts do have jurisdiction to consider sentencing appeals for off-grid crimes (such as murder) because these off-grid sentences are not really “presumptive sentences” within the meaning of section 21-6820(c) (formerly section 21-4721(c)). As such, the defendant in State v. Ross received the benefit of review where his sentences for felony murder—an off-grid crime—and kidnapping were imposed consecutively.

3. Constitutional Challenges

The Kansas Constitution, like the United States Constitution, bans cruel or unusual punishment. Even if not cruel and unusual, a punishment is unconstitutional if “it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.” Whether a sentence is unconstitutional in its length is controlled by a three-part test first set forth in State v. Freeman: (1) “[t]he nature of the offense and the character of the offender;” (2) punishments imposed in the same jurisdiction for more serious crimes; and (3) punishments imposed in

1445. Id. § 21-6820(c).
1446. State v. Ross, 289 P.3d 76, 85 (Kan. 2012) (explicitly rejecting the contrary holdings in State v. Ware, 938 P.2d 197 (Kan. 1997) and State v. Flores, 999 P.2d 919 (Kan. 2000), which had labeled off-grid crimes as “presumptive sentences” under former section 21-4721); see also State v. Williams, 319 P.3d 528, 534 (Kan. 2014) (“We hold a presumptive prison sentence does not render an appellate court without jurisdiction, under K.S.A. 21-4721(c)(1), to review the imposition of a lifetime post release supervision period.”).
1447. Ross, 289 P.3d at 80.
other jurisdictions for the same crime. In the past year, many defendants have challenged lifetime post release supervision as violating the Kansas Constitution, but each appeal is decided on its own merits. Many defendants sentenced to a hard 25 sentence under Jessica’s Law for rape, aggravated sodomy, indecent liberties with a child, and other sexually-motivated crimes with a minor victim likewise challenged Jessica’s Law as unconstitutional. In a recent constitutional challenge to Jessica’s Law, the Kansas Court of Appeals categorically rejected the argument that Freeman factors two and three weighed against the constitutionality of Jessica’s Law and refused to apply these factors based on Jessica’s Law compliance with these factors other cases. Going forward, this type of analysis, while probably done in the interest of efficiency, may make it less likely that a defendant can challenge the constitutionality of his own sentence; instead, Kansas courts may be content to find that a certain sentencing scheme’s constitutionality in one decision categorically precludes others from bringing the same argument on the facts of their own cases.

VII. POST-TRIAL ISSUES

A. Appeals

Generally, an appellate court only has jurisdiction to consider evidentiary errors where there was a specific objection to the alleged error(s) during the trial. However, in certain scenarios, objection is not necessary for issue preservation, such as in death penalty cases. Although the statute does not expressly require that the objection be

1450. Id. at *5 (quoting State v. Freeman, 574 P.2d 950, 956 (Kan. 1978)).
1455. State v. Carr, 300 Kan. 1, 128 (2014) (citing State v. Cheever, 284 P.3d 1007 (Kan. 2012), cert. granted in part 133 S. Ct. 1460 (2013), vacated and remanded on other grounds 134 S. Ct. 596 (2013)) (“The State asserts that the defendants waived their right to pursue this issue on appeal by failing to object to the judge’s procedure in district court. Although there may be a debatable fact question on this point, because this is a death penalty case, K.S.A. 2013 Supp. 21-6619(b) makes this preservation attack beside the point. The statute requires us to consider all errors asserted on appeal in a death-penalty case.”).
made during the trial, the court in State v. White construed the statute as such, ruling that challenging an evidentiary decision in a motion in limine was insufficient for preservation.  

1. New Trial

The court may grant a defendant’s motion for a new trial “if required in the interest of justice.” However, strict time limitations apply: a defendant must file the motion within two years after final judgment based on newly-discovered evidence, but in all other cases, he must file the motion within fourteen days “after the verdict or finding of guilty.” A trial court’s decision on a defendant’s motion for a new trial is reviewed for an abuse of discretion. Two common grounds for a new trial are often asserted: ineffective assistance of counsel and newly-discovered evidence. The latter requires the defendant to establish: (1) the evidence could not have been produced at trial with reasonable diligence; and (2) presence of the evidence is material and “would be likely to produce a different result upon retrial.” The former requires the defendant to show: (1) counsel was “constitutionally deficient;” and (2) this deficiency prejudiced his defense to the point of denying him a fair trial.

2. Sufficiency of Evidence

In analyzing the sufficiency of evidence, an appellate court determines whether, “viewed in the light most favorable to the

1458. Id. Once submitted, the court must issue a decision on the motion for a new trial within 45 days. Id. § 22-3501(2).
prosecution,” a rational fact finder could have found guilt beyond a reasonable doubt;\footnote{1462} if an alternative means crime is involved, then this standard applies to each of the alternative means presented.\footnote{1463} Generally, in performing a sufficiency analysis, an appellate court will refuse to reweigh the evidence and credibility of witnesses.\footnote{1464} In \textit{State v. Hargrove}, the court ruled that in performing its sufficiency analysis, it may even consider evidence introduced to support a crime for which the defendant was not ultimately convicted.\footnote{1465}

3. Judgment of Acquittal

Acquittal is proper where the evidence is insufficient to obtain a conviction for one or more charged crimes.\footnote{1466} A court may order a judgment of acquittal upon its own motion or that of the defendant, and the court may order acquittal after either side rests its case, before or after the verdict.\footnote{1467} If a guilty verdict is reached, the defendant must file the motion for acquittal within seven days.\footnote{1468} If the motion for acquittal is filed outside the seven-day period, the appellate court lacks jurisdiction to consider the motion.\footnote{1469}

B. Post-Conviction Remedies

1. Habeas Corpus

A prisoner may file a writ of habeas corpus only to allege: (1) his
sentence was contrary to the laws of Kansas or the United States; (2) the court lacked jurisdiction to impose the sentence; or (3) the sentence was in excess of the legal maximum. 1470 If the court grants habeas relief, it may vacate the judgment and discharge or resentenced the prisoner, grant a new trial, or order another type of appropriate correction. 1471 Relief is generally only available within one year of (1) a final order on appeal or termination of appellate jurisdiction or (2) denial of a petition for writ of certiorari to the United States Supreme Court or issuance of the Supreme Court’s final order. 1472. The court may extend the time period “only to prevent manifest injustice.” 1473 Proposed legislation would limit the court’s discretion in finding “manifest injustice” to an analysis of “why the prisoner failed to file the motion within the one-year time limitation,” and it would also add specific provisions for habeas relief in a death sentence case where none currently exist. 1475 Recently, the Kansas Supreme Court backtracked from a previous holding giving a defendant the absolute right to be physically present at his habeas hearing. 1476 The court replaced this absolute right with a list of nonexclusive factors:

(1) whether the prisoner’s physical presence substantially furthers resolution of the issues presented; (2) whether the nature of the hearing requires the prisoner to privately communicate with his or her attorney and whether that communication may be accommodated; (3) whether the technology available to the court (closed circuit television, telephone, internet connection) can reliably connect to the prisoner’s location; (4) transportation costs; (5) personnel availability; (6) security risks; and (7)

1471. Id. § 60-1507(b).
1472. Id. § 60-1507(f).
1473. Id § 60-1507(f)(2).
1475. Id. at 5–6.
the hearing’s expected length. These factors are meant to be more consistent with section 60-1507(b).

2. Post-Conviction DNA Testing

In its current form, section 21-2512 grants a defendant convicted of first-degree murder or rape the right to petition the court for DNA testing, provided that the state possesses the biological material, the biological material is related to the prosecution, and the DNA testing was not previously performed or the test was previously performed with less reliable methods. If the test results are favorable to the defendant, then the court may choose to take one of several actions, including holding a hearing (notwithstanding any independent bar to such hearing), vacating the judgment, or granting a new trial. A greater class of defendants will soon receive the right to petition the court for post-conviction DNA testing under this statute. In State v. Cheeks, the Kansas Supreme Court ruled that this statute is partially unconstitutional because it fails the rational basis test: those convicted of second degree murder are similarly situated to those convicted of first degree, yet do not receive the protection of the statute in its current form. Although proposed legislation would extend the post-conviction DNA testing right to all defendants accused of murder, it also requires that the DNA test “exonerate”—not merely be favorable to—the petitioner in order for the court to order corrective action.

1478. Id. (laying out relevant factors and noting that section 60-1507(b) gives the court the power to decide the motion “without requiring the production of the prisoner at the hearing”).
1479. KAN. STAT. ANN. § 21-2512(a) (2014).
1480. Id. § 21-2512(f)(2).
1482. Id. at 356.
1483. S.B. 40, 85th Leg., at 1 (Kan. 2013) (enacted). The word “exonerate” in this context means “to conclusively establish that the petitioner did not engage in the conduct that is the subject of the petitioner’s conviction.” Id. at 2.