Kansas Law Review Criminal Procedural Survey – 2017 Supplement

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Kansas Law Review Criminal Procedural Survey – 2017 Supplement

I. INTRODUCTION

The 2017 Supplement to the Kansas Law Review Criminal Procedure Survey (the "Supplement") was compiled by staff members and the Note and Comment Editors of the Kansas Law Review. The Supplement is intended to provide a snapshot of the changes in criminal procedure law over the past year. It should be read in conjunction with the 2016 Criminal Procedure Survey, which provides a more detailed review of each area of the law.[1] The Supplement highlights changes in Kansas criminal procedure law using cases from the Kansas Supreme Court and the Kansas Court of Appeals, along with decisions from the Tenth Circuit Court of Appeals and the United States Supreme Court. Changes in Kansas statutes are also summarized. Our goal is that the Supplement will 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

State v. Toliver, 368 P.3d 1117 (Kan. Ct. App.), *review granted* (Oct. 21, 2016)

Full Case Citation: State v. Toliver, 368 P.3d 1117 (Kan. Ct. App.), *review granted*, No. 111,897, 2016 Kan. LEXIS 532 (Oct. 21, 2016).

2016 CPS Section: II.A.2. – Searches and the Fourth Amendment / Scope of the Fourth Amendment / Reasonableness Requirement

Summary:

In *State v. Toliver*, the Kansas Court of Appeals clarified the Fourth Amendment "reasonableness requirement" for searches and seizures as applied to parolees with a diminished expectation of privacy. The defendant, Toliver, asserted that his rights were violated under the Fourth Amendment when his apartment was searched without a warrant or reasonable suspicion of criminal activity.[2] Parolees have a diminished expectation of privacy, and as a result, "may be subjected to suspicionless searches *authorized by state law* as long as such searches are not arbitrary or done for harassment purposes."[3] At the time of the search of Toliver's apartment, K.S.A. § 22-3717(k)(2) allowed for the search of the parolee's person by a parole officer without a search warrant or reasonable suspicion.[4] Thus, the Kansas Legislature had authorized warrantless and suspicionless searches of a parolee's person, but not of their residence or property.[5] Toliver, however, was required to sign a parole agreement not only subjecting his person to suspicionless searches and seizures as authorized by Kansas law, but also to searches of his residence and property.[6] The Kansas Court of Appeals held that the requirements of the

[1] U. Kan. L. Rev., *Kansas Law Review Criminal Procedure Survey 2016*, 64 U. KAN. L. REV. (2016),
[2] State v. Toliver, 368 P.3d 1117, 1119 (Kan. Ct. App.), *review granted*, No. 111,897, 2016 Kan. LEXIS 532 (Kan. Oct. 21, 2016).
[3] *Id.* at 1126 (quoting State v. Bennett, 200 P.3d 455, 462 (Kan. 2009)).
[4] *Id.* at 1122–23 (quoting Kan. Stat. Ann. § 22-3717(k)(2) (Supp. 2014)).
[5] *Id.* at 1126–27.
[6] *Id.* at 1119–20.

parole agreement were not statutorily authorized under a plain reading of the statute and violated the Fourth Amendment.[7]

On May 17, 2016, the Kansas Governor signed Senate Bill 325, which expressly allows a parole officer to search a parolee's residence without a search warrant or reasonable suspicion.[8] The language of K.S.A. § 22-3717(k)(2) was amended from "[p]arolees and persons on postrelease supervision are . . . subject to search or seizure . . ." to "[p]arolees and persons on postrelease supervision are . . . subject to searches of the person and the person's effects, vehicle, residence and property . . . ."[9] The Kansas Supreme Court granted review of *Toliver* on October 21, 2016.[10]

State v. Estrada, No. 113,838, 2016 WL 2774321 (Kan. Ct. App. May 13, 2016)

Full Case Citation: State v. Estrada, 376 P.3d 93, No. 113,838, 2016 WL 2774321 (Kan. Ct. App. May 13, 2016) (unpublished table decision).

2016 CPS Section: II.C.1. – Searches and the Fourth Amendment / Exceptions to the Search Warrant Requirement / Consent

Summary:

In *State v. Estrada*, the Kansas Court of Appeals clarified the consent exception to the warrant requirement by explaining that the court must look to an appropriately broad totality of the circumstances test.[11] Estrada was involved in a fatal automobile accident and a deputy at the crash scene asked Estrada if he was willing to go to the hospital for a blood draw.[12] Estrada agreed to the blood draw.[13] At the hospital, the deputy improperly read Estrada the implied consent form, informing Estrada that he did not have a constitutional right to refuse the blood draw or speak with an attorney and that he faced suspension of his license if he refused to consent.[14] Estrada then consented again.[15]

The district court held that the blood test was inadmissible because the "reading of the advisory, while an innocent mistake, was coercive," making the consent invalid.[16] The State then filed an interlocutory appeal.[17] The Kansas Court of Appeals also found that the deputy's statements were erroneous because they were only applicable under the implied consent law that all parties acknowledged had not been triggered.[18] The court rejected the State's argument for a constrained totality of the circumstances analysis that focused on the valid "initial consent given

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[7] *Id.* at 1127.
[8] S.B. 325, 86th Leg., Reg. Sess. (Kan. 2016).
[9] *Compare* KAN. STAT. ANN. § 22-3717(k)(2) (Supp. 2014), *with* KAN. STAT. ANN. § 22-3717(k)(2) (Supp. 2016).
[10] State v. Toliver, 368 P.3d 1117 (Kan. Ct. App.), *review granted*, No. 111,897, 2016 Kan. LEXIS 532 (Kan. Oct. 21, 2016).
[11] State v. Estrada, 376 P.3d 93, No. 113,838, 2016 WL 2774321, at *7 (Kan. Ct. App. May 13, 2016) (unpublished table decision).
[12] *Id.* at *1.
[13] *Id.*
[14] *Id.* at *2.
[15] *Id.*
[16] *Id.* at *3–4.
[17] *Id.*
[18] *Id.* at *7.

at the crash scene" and ignored the "the circumstances surrounding the second consent at the hospital when determining whether valid consent existed."[19] The court held that when considering the "whole picture" the consent was coerced and the seizure was involuntary.[20]

State v. Cleverly, 385 P.3d 512 (Kan. 2016)

Full Case Citation: State v. Cleverly, 385 P.3d 512 (Kan. 2016).

2016 CPS Sections:

- II.C.1. – Searches and the Fourth Amendment / Exceptions to the Search Warrant Requirement / Consent
- III.B.2. – Seizures / Types of Seizures and Reasonability / Seizure of Persons

Summary:

In *State v. Cleverly*, the Kansas Supreme Court overturned and clarified prior precedent from the Kansas Court of Appeals regarding the transition from a traffic stop to a voluntary encounter. The defendant, Cleverly, challenged his conviction for possession of methamphetamine on the grounds that he was illegally detained after a traffic stop in which he was a passenger, and because he was illegally detained, the evidence obtained from the eventual search of his cigarette package should be excluded due to the taint of the illegal seizure.[21] The court acknowledged that conducting a traffic stop permits the seizure of a passenger in the vehicle[22] and that an involuntary detention may be converted into a voluntary encounter when a detainee consents to a request to answer additional questions.[23] Nevertheless, the Kansas Supreme Court rejected the Kansas Court of Appeals' unprecedented holding that following a lawful traffic stop, a passenger's presence "becomes voluntary or consensual once the *driver* gives consent or voluntarily remains on the scene after the traffic stop concludes."[24] Because Fourth Amendment rights are personal, the court held that a passenger's rights cannot be deemed to be waived, as a matter of law, by the driver's waiver of his own Fourth Amendment rights.[25]

To determine whether an individual's consent was voluntary, Kansas courts look to the totality of the circumstances to determine whether a reasonable person would feel free to decline the officer's request or terminate the encounter, but otherwise chooses to voluntarily extend the encounter.[26] The court emphasized that in reviewing the totality of the circumstances, courts must look to the defendant's individual actions and personal circumstances.[27] Here, the court held that totality of circumstances did not support the State's argument that the defendant's

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[19] *Id.* at *4.
[20] *Id.* at *7–8 (quoting State v. Edgar, 294 P.3d 251, 258 (Kan. 2013)). The court also rejected the State's argument that the good-faith reliance exception should apply. *Id.* at *10.
[21] State v. Cleverly, 385 P.3d 512, 516 (Kan. 2016).
[22] *See id.* at 516.
[23] *Id.* at 518–19 (citing State v. Thompson, 166 P.3d 1015, 1024 (Kan. 2007)).
[24] *Id.* at 519 (emphasis added) (quoting State v. Cleverly, 353 P.3d 472, No. 111,282, 2015 WL 4716231, at *4 (Kan. Ct. App. July 31, 2015) (unpublished table decision)).
[25] *Id.*
[26] *Id.*
[27] *Id.*

presence was voluntary because of the presence of multiple officers, the officer's pat-down search, and the officer's refusal to allow the defendant to use his cell phone.[28]

As a result, the court determined the defendant's detention was unlawful, and therefore, his eventual consent to search his cigarette package was invalid.[29] The court reaffirmed its holding in *State v. Smith*[30] that "a detention that exceeds the scope of or is unrelated to the stop violates the Fourth Amendment."[31] The court rejected the analysis of the Kansas Court of Appeals in *State v. Hill*[32] that suggested *Smith* was outdated because of the Kansas Supreme Court's holding *State v. Morlock*,[33] which acknowledged that an officer may ask questions unrelated to the initial purpose of the stop.[34] The court held that the State's search of the defendant's cigarette package was not analogous to asking additional questions.[35]

2016 CPS Section: II.C.4. – Searches and the Fourth Amendment / Exceptions to the Search Warrant Requirement / Other Circumstances in Which Limited Searches are Allowed Without a Warrant or Probable Cause

Summary:

In *State v. Cleverly*, the Kansas Supreme Court also clarified the search incident to arrest standard by rejecting the theoretical arrest argument.[36] As discussed above, the defendant, Cleverly, challenged his conviction for possession of methamphetamine on the grounds that he was illegally detained after a traffic stop in which he was a passenger, and because he was illegally detained, the evidence obtained from the eventual search of his cigarette package should be excluded due to the taint of the illegal seizure.[37] The State argued that the lower court did not err in admitting the evidence because an objectively reasonable officer could have lawfully arrested the passenger for a seat belt violation, and therefore, the methamphetamine would have been found during a search incident arrest.[38] The court rejected the State's theoretical arrest argument, holding that the search incident to arrest exception applies only "*after* an arrest has been made; it does not apply where there is a possibility that an arrest might occur."[39] In addition, the court held that even if the search incident to arrest exception applied, the State failed to prove that it was reasonable to believe the cigarette package contained evidence that would prove the defendant failed to wear his seatbelt and that the methamphetamine would have been discovered through a standard search incident to arrest.[40]

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[28] *Id.* at 519–22.
[29] *Id.* at 522–23.
[30] State v. Smith, 184 P.3d 890 (Kan. 2008).
[31] *Cleverly*, 385 P.3d at 523 (quoting State v. Spagnola, 289 P.3d 68, 76 (Kan. 2012) (citing *Smith*, 184 P.3d at 902)).
[32] State v. Hill, 371 P.3d 374, No. 113,771, 2016 WL 3031246 (Kan. Ct. App. May 27, 2016) (unpublished table decision).
[33] State v. Morlock, 218 P.3d 801 (Kan. 2009).
[34] *Cleverly*, 385 P.3d at 523.
[35] *Id.*
[36] *Id.*
[37] *Id.* at 516.
[38] *Id.* at 523.
[39] *Id.* (citing Knowles v. Iowa, 525 U.S. 113, 116–17 (1998)).
[40] *Id.*

State v. Hubbard, No. 113,888, 2016 WL 1614177 (Kan. Ct. App. Apr. 22, 2016)

Full Case Citation: State v. Hubbard, 369 P.3d 341, No. 113,888, 2016 WL 1614177 (Kan. Ct. App. Apr. 22, 2016) (unpublished table decision).

2016 CPS Section: II.C.2. – Searches and the Fourth Amendment / Exceptions to the Search Warrant Requirement / Probable Cause Plus Exigent Circumstances

Summary:

In *State v. Hubbard*, the Kansas Court of Appeals extended prior Kansas case law by holding that the odor of marijuana constitutes probable cause for law enforcement officers to make a warrantless entry into a residence for the limited purpose of preventing the destruction of evidence.[41] The defendant, Hubbard, appealed his conviction claiming the district court erred in denying his motion to suppress because the law enforcement officer's warrantless entry into his apartment violated his constitutional rights.[42] The State argued that the warrantless entry into Hubbard's apartment was justified for officer safety and to prevent destruction of the evidence.[43] Additionally, the State argued that the officer's detection of marijuana odor outside the apartment provided probable cause for the issuance of a subsequent search warrant.[44]

The court held that "the strong odor of marijuana emanating from the apartment constituted probable cause for the officers to make a warrantless entry into the apartment-at least for the limited purpose of preventing the destruction of evidence until a search warrant could be obtained."[45] The court clarified that the holding did not extend to a detailed search of the apartment for illicit drugs, including drawers and containers in the apartment.[46] This case extends previous Kansas case law, which held that the odor of marijuana alone is sufficient probable cause to support either the warrantless search of a vehicle or to obtain a search warrant for a residence.[47]

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[41] State v. Hubbard, 369 P.3d 341, No. 113,888, 2016 WL 1614177, at *7 (Kan. Ct. App. Apr. 22, 2016) (unpublished table decision).
[42] *Id.* at *1.
[43] *Id.* at *4.
[44] *Id.*
[45] *Id.* at *7.
[46] *Id.*
[47] *See id.* at *6; *see also* State v. MacDonald, 856 P.2d 116, 120 (Kan. 1993) (holding marijuana odor alone provided sufficient probable cause to support a warrantless search); State v. Stevenson, 321 P.3d 754, 758 (Kan. 2014) (recognizing *MacDonald* established a "bright-line rule"); State v. Riley, 125 P.3d 1089, No. 93,127, 2006 WL 90089, at *3 (Kan. Ct. App. Jan. 13, 2006) (unpublished table decision).

State v. Chapman, 381 P.3d 458 (Kan. 2016)

Full Case Citation: State v. Chapman, 381 P.3d 458 (Kan. 2016).

2016 CPS Section: II.C.4. – Searches and the Fourth Amendment / Exceptions to the Search Warrant Requirement / Other Circumstances in Which Limited Searches are Allowed Without a Warrant or Probable Cause

Summary:

Although an anonymous tip may provide reasonable suspicion for a *Terry* stop, the Kansas Supreme Court recently held that the tip must provide information of criminal activity, not simply suspicious activity.[48] In *State v. Chapman*, law enforcement officers responded to a suspicious character call after someone observed two individuals walking around a house at 2:37 a.m.[49] While responding to the call, law enforcement officers pulled over a vehicle matching the anonymous caller's description of the vehicle that the two suspicious individuals were driving.[50] Chapman filed a motion to dismiss the case or to suppress the evidence obtained from the car stop, claiming there was no reasonable suspicion of criminal activity to support the stop.[51] The Kansas Court of Appeals disagreed and upheld his conviction, holding that under a totality of the circumstances, there was reasonable suspicion of a crime.[52]

On appeal, the Kansas Supreme Court reversed the Kansas Court of Appeals decision, holding that anonymous tips of only suspicious but not criminal activity do not provide reasonable suspicion for law enforcement to stop a car.[53] The Kansas Supreme Court also highlighted other Kansas appellate court decisions involving traffic stops supported in part by anonymous reports, but noted that in those cases the officers were able to corroborate the reports before the stop.[54] The court stopped short of elaborating on the law governing tip reliability, and instead chose to just confirm that it should be evaluated under the totality of the circumstances test.[55]

[48] State v. Chapman, 381 P.3d 458, 463–64 (Kan. 2016).
[49] State v. Chapman, 355 P.3d 721, No. 111,572, 2015 WL 4758607, at *1 (Kan. Ct. App. July 2, 2015) (unpublished table decision), *rev'd*, 381 P.3d 458 (Kan. 2016).
[50] *Id.*
[51] *Id.* at *2.
[52] *Id.* at *4.
[53] *See Chapman*, 381 P.3d at 463–64.
[54] *Id.* at 462–64 (discussing State v. Crawford, 67 P.3d 115 (Kan. 2003) and State v. Green, 345 P.3d 296, No. 111,618, 2015 WL 1514055 (Kan. Ct. App. Mar. 27, 2015) (unpublished table decision)).
[55] *Id.* at 464.

State v. Torres, 386 P.3d 532 (Kan. Ct. App. 2016); State v. Doelz, No. 113,165, 2016 WL 3570515 (Kan. Ct. App. July 1, 2016)

Full Case Citations:

- State v. Torres, 386 P.3d 532 (Kan. Ct. App. 2016).
- State v. Doelz, 376 P.3d 95, No. 113,165, 2016 WL 3570515 (Kan. Ct. App. July 1, 2016) (unpublished table decision).

2016 CPS Section: II.C.4. – Searches and the Fourth Amendment / Exceptions to the Search Warrant Requirement / Other Circumstances in Which Limited Searches are Allowed Without a Warrant or Probable Cause

Summary:

In light of two conflicting opinions issued by the Kansas Court of Appeals in 2016, it remains unclear whether discovery of evidence must be inadvertent to satisfy the plain view doctrine in Kansas. In *State v. Torres*, a published opinion, the court explained that an officer's seizure of evidence is justified by the plain view doctrine if: "(1) the officer's initial intrusion was lawful, (2) *the discovery of the evidence was inadvertent*, and (3) the incriminating character of the evidence was immediately apparent."[56]

Nevertheless, in *State v. Doelz*, an unpublished opinion, the court "note[d] that inadvertency is no longer required" to satisfy the plain view exception and referred to a Kansas Supreme Court case that cited to *Horton v. California*, a United States Supreme Court case, to support this proposition.[57] In *Doelz*, the court held that the incriminating character of a digital scale was immediately apparent because of the officer's beliefs, from training and experience, that digital scales are often used to weigh illegal drugs and the officer's knowledge of the occupants and their travels gave rise to probable cause to believe there was drug paraphernalia in the vehicle.[58] In addition, the court held that the initial intrusion into Doelz's vehicle was lawful, and thus, the seizure and search of the digital scale was justified by the plain view exception.[59]

[56] State v. Torres, 386 P.3d 532, 539 (Kan. Ct. App. 2016) (emphasis added) (citing State v. Ewertz, 305 P.3d 23, 28 (Kan. Ct. App. 2013)).
[57] State v. Doelz, 376 P.3d 95, No. 113,165, 2016 WL 3570515, at *5 (Kan. Ct. App. July 1, 2016) (citing State *ex rel.* Love v. One 1967 Chevrolet El Camino Bearing VIN No. 136807Z141367, 799 P.2d 1043, 1048 (Kan. 1990) (citing Horton v. California, 496 U.S. 128, 130 (1990))) (unpublished table decision).
[58] *Id.* at *5–6.
[59] *Id.* at *6.

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016)

Full Case Citation: Birchfield v. North Dakota, 136 S. Ct. 2160 (2016).

2016 CPS Sections:

- II.C.4. – Searches and the Fourth Amendment / Exceptions to the Search Warrant Requirement / Other Circumstances in Which Limited Searches are Allowed Without a Warrant or Probable Cause
- II.G.3. – Searches and the Fourth Amendment / Technology and Searches / Chemical Drug Tests
- III.B.2. – Seizures / Types of Seizures and Reasonability / Seizure of Persons

Summary:

In *Birchfield v. North Dakota*, the United States Supreme Court held that the Fourth Amendment prohibits warrantless blood tests incident to an arrest for driving under the influence ("DUI"), but permits warrantless breath tests incident to an arrest for DUI.[60] The Court had granted certiorari in three cases[61] to address the constitutionality of implied consent statutes with criminal refusal penalties in DUI cases.[62] Each of the cases consolidated involved law enforcement's request for either a warrantless breath or blood test pursuant to their states' respective implied consent statutes after lawful arrest for alcohol-impaired driving.[63] The Court analyzed the issues under the search incident to arrest exception to the Fourth Amendment's warrant requirement since the blood and breath tests in question were requested following lawful arrests.[64] The Court found that warrantless breath tests for alcohol-impaired driving are reasonable under the search incident to arrest exception because the government's need for such testing significantly outweighs the minimal intrusion of a driver's privacy.[65] Breath testing requires minimal effort making the intrusion almost negligible, the test only measures the driver's blood alcohol content leaving no tangible evidence in law enforcement's possession, there is no possessory interest in exhaled breath, and the act of submitting to testing involves minimal embarrassment.[66]

Unlike breath testing, blood testing is a greater intrusion since collecting a sample requires penetrating a driver's skin, blood provides more information than simply a blood alcohol content measurement, collected samples are easily preserved, and people have a possessory interest in their blood.[67] Given the higher level of intrusion and the availability of a less intrusive option (breath tests), the Court held that blood tests taken incident to an arrest are prohibited under the Fourth Amendment absent the consent of the driver.[68] Though holding blood tests could not be conducted as a search incident to an arrest, the Court reiterated its

[60] Birchfield v. North Dakota, 136 S. Ct. 2160, 2185 (2016).
[61] State v. Birchfield, 858 N.W.2d 302 (N.D. 2015); State v. Bernard, 859 N.W.2d 762 (Minn. 2015); Beylund v. Levi, 859 N.W.2d 403 (N.D. 2015).
[62] *Birchfield*, 136 S. Ct. at 2172.
[63] *Id.* at 2170–72.
[64] *Id.* at 2174.
[65] *See id.* at 2176, 2184.
[66] *Id.* at 2176–77.
[67] *Id.* at 2178, 2184 (citations omitted).
[68] *Id*. at 2184–85.

position in *Missouri v. McNeely*[69] that warrantless blood testing may be permissible when exigent circumstances are present, which should be evaluated on a case-by-case basis.[70]

State v. Ryce, 368 P.3d 342 (Kan. 2016), *reh'g granted*

Full Case Citation: State v. Ryce, 368 P.3d 342 (Kan.), *reh'g granted* (Sept. 29. 2016).

2016 CPS Sections:

- II.C.4. – Searches and the Fourth Amendment / Exceptions to the Search Warrant Requirement / Other Circumstances in Which Limited Searches are Allowed Without a Warrant or Probable Cause
- II.G.3. – Searches and the Fourth Amendment / Technology and Searches / Chemical Drug Tests
- III.B.2. – Seizures / Types of Seizures and Reasonability / Seizure of Persons

Summary:

A summary of *State v. Ryce* is included below. However, after the Kansas Supreme Court issued its *Ryce* opinion, the United States Supreme Court issued its opinion in *Birchfield v. North Dakota*,[71] and the Kansas Supreme Court granted the State's motion for rehearing of the *Ryce* case.[72] Oral argument on the rehearing before the court was held on December 16, 2016, and an opinion is expected to be forthcoming.[73]

In *Ryce*, the Kansas Supreme Court found K.S.A. § 8-1025 (which criminalizes refusing to submit to breath, blood, or urine testing to determine the presence of alcohol and drugs during a DUI investigation) to be an unconstitutional search under the Fourth Amendment and in violation of due process because it was not narrowly tailored to serve the governmental interest of combating drunk driving.[74] In the case, after the defendant was arrested for DUI and while being booked into jail, a law enforcement officer requested that the defendant submit to a breath-alcohol test.[75] The defendant was provided with an oral and written advisory that his refusal to submit to the breath-alcohol test could lead to being criminally charged under K.S.A. § 8-1025 if he had prior DUI convictions or had refused a similar test previously.[76] The defendant refused to submit to the breath-alcohol test and was criminally charged under K.S.A. § 8-1025 because of his refusal to submit to the test in this case and four prior DUI convictions.[77] The defendant filed a motion to dismiss the criminal refusal charge on the grounds that K.S.A. § 8-1025 was an unconstitutional violation of his Fourth Amendment right against unreasonable searches and the

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[69] Missouri v. McNeely, 133 S. Ct. 1552 (2013).
[70] *Birchfield*, 136 S. Ct. at 2184–85.
[71] *See supra* notes 61–71 and accompanying text.
[72] State v. Schmidt, 385 P.3d 936, 940 (Kan. Ct. App. 2016) (noting that the Kansas Supreme Court "has granted the State's motion for rehearing in both [*State v.*] *Ryce* and [*State v.*] *Nece*").
[73] KANSAS SUPREME COURT, DOCKET, at 5 http://www.kscourts.org/Cases-and-Opinions/dockets/Supreme-Court-Docket-December-2016.pdf (last updated Dec. 9, 2016).
[74] *See* State v. Ryce, 368 P.3d 342, 380 (Kan. 2016); *see also* KAN. STAT. ANN. § 8-1025 (Supp. 2016).
[75] *Ryce*, 368 P.3d at 347.
[76] *Id.*; *see* KAN. STAT. ANN. § 8-1001(k) (Supp. 2016).
[77] *Ryce*, 368 P.3d at 347.

district court granted his motion.[78] The Kansas Supreme Court affirmed, holding K.S.A. § 8-1025 to be facially unconstitutional because it was not narrowly tailored to the government's interest in limiting drinking and driving because the government could achieve that aim through the use of warrants instead of violating individuals' Fourth Amendment rights.[79]

State v. Nece, 367 P.3d 1260 (Kan. 2016), *reh'g granted*

Full Case Citation: State v. Nece, 367 P.3d 1260 (Kan.), *reh'g granted* (Sept. 29, 2016).

2016 CPS Sections:

- II.C.4. – Searches and the Fourth Amendment / Exceptions to the Search Warrant Requirement / Other Circumstances in Which Limited Searches are Allowed Without a Warrant or Probable Cause
- II.G.3. – Searches and the Fourth Amendment / Technology and Searches / Chemical Drug Tests
- III.B.2. – Seizures / Types of Seizures and Reasonability / Seizure of Persons

Summary:

A summary of *State v. Nece* is included below. However, after the Kansas Supreme Court issued its *Nece* opinion, the United States Supreme Court issued its opinion in *Birchfield v. North Dakota*,[80] and the Kansas Supreme Court granted the State's motion for rehearing of the *Nece* case.[81] Oral argument on the rehearing before the court was held on December 16, 2016 and an opinion is expected to be forthcoming.[82]

In *Nece*, the Kansas Supreme Court held that breath-alcohol test results should be suppressed when the implied consent advisory provided to the defendant inaccurately included the warning that the defendant could be criminally charged under K.S.A. § 8-1025 for refusing to submit to testing.[83] In *Nece*, after the defendant was arrested for DUI and while being booked into jail, a law enforcement officer requested that the defendant submit to a breath-alcohol test.[84] The defendant was provided oral and written notice of the implied consent advisories (through the DC-70 Implied Consent Advisory form, which is based on K.S.A. § 8-1001), which included notice that the defendant could be charged with a separate crime under K.S.A. § 8-1025 if he refused the test and had previously refused a test or had a prior DUI conviction.[85] Though the defendant submitted to the breath-alcohol test, he filed a motion to suppress the breath-alcohol test results on the basis that his Fourth Amendment right to be free from an unreasonable search was violated because his consent was not voluntary.[86]

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[78] *Id.* at 347–48.
[79] *See id.* at 378–80.
[80] *See supra* notes 61–71 and accompanying text.
[81] State v. Schmidt, 385 P.3d 936, 940 (Kan. Ct. App. 2016) (noting that the Kansas Supreme Court "has granted the State's motion for rehearing in both [*State v.*] *Ryce* and [*State v.*] *Nece*").
[82] KANSAS SUPREME COURT, DOCKET, at 5 http://www.kscourts.org/Cases-and-Opinions/dockets/Supreme-Court-Docket-December-2016.pdf (last updated Dec. 9, 2016).
[83] State v. Nece, 367 P.3d 1260, 1262, 1267 (Kan. 2016).
[84] *Id.* at 1262.
[85] *See id.*
[86] *Id.* at 1262–63.

Relying on its opinion from *Ryce*, issued the same day as the *Nece* decision, in which it found K.S.A. § 8-1025 to be unconstitutional,[87] the Kansas Supreme Court held that the defendant's breath-alcohol test results must be suppressed because the breath-alcohol test results were obtained through involuntary consent.[88] Since Nece could not have been constitutionally convicted under K.S.A. § 8-1025, the advisory notifying him that he could be criminally charged for a refusal was inaccurate and coercive.[89]

State v. Kraemer, 371 P.3d 954 (Kan. Ct. App. 2016); State v. Schmidt, 385 P.3d 936 (Kan. Ct. App. 2016)

Full Case Citations:

- State v. Kraemer, 371 P.3d 954 (Kan. Ct. App. 2016).
- State v. Schmidt, 385 P.3d 936 (Kan. Ct. App. 2016).

2016 CPS Section: II.D.2. – Searches and the Fourth Amendment / The Exclusionary Rule / Good[-]Faith Exception

Summary:

Following the February 2016 decisions by the Kansas Supreme Court in *State v. Ryce*[90] and *State v. Nece*[91] and the June 2016 decision by the United States Supreme Court in *Birchfield v. North Dakota*,[92] the Kansas Court of Appeals held that the good-faith exception to the exclusionary rule for a warrantless breath test or blood draw applied in cases that were factually similar to *Ryce*, *Nece*, and *Birchfield*, but occurred before these cases were decided. There was not a change to the law of the good-faith exception, but the cases discussed below demonstrate an application of the good-faith exception.

First, in *State v. Kraemer*, the defendant challenged the application of the good-faith exception to the exclusionary rule on the grounds that his consent to a breath test was coerced.[93] Prior to the decision in *Ryce*, the district court in *Kraemer* found that the criminal refusal statute[94] was facially unconstitutional.[95] Similarly, and again forecasting the holding in *Nece*, the district court determined that Kraemer's consent was not voluntary because it was obtained via unconstitutional coercion.[96] Ultimately, the Kansas Court of Appeals held that the good-faith

[87] *See supra* notes 72–80 and accompanying text.
[88] *Id.* at 1266–67.
[89] *Id.*
[90] State v. Ryce, 368 P.3d 342 (Kan. 2016) (striking down KAN. STAT. ANN. § 8-1025 (Supp. 2016), which criminalized refusal to submit to blood-alcohol testing, as unconstitutional); *see also supra* notes 72–80 and accompanying text.
[91] State v. Nece, 367 P.3d 1260 (Kan. 2016) (holding that a defendant's consent to a breathalyzer test was coerced because the officer informed the defendant he could be prosecuted for refusing consent); *see also supra* notes 81–90 and accompanying text.
[92] Birchfield v. North Dakota, 136 S. Ct. 2160 (2016) (holding that warrantless breath tests incident to DUI arrests are permitted by the Fourth Amendment, but warrantless blood tests are not); *see also supra* notes 61–71 and accompanying text.
[93] State v. Kraemer, 371 P.3d 954, 957 (Kan. Ct. App. 2016).
[94] KAN. STAT. ANN. § 8-1025 (Supp. 2016).
[95] *Kraemer*, 371 P.3d at 962.
[96] *Id.* at 963.

exception was rightfully applied because the criminal refusal statute was declared unconstitutional *after* Kraemer's arrest and the officer had reasonably relied on the statute at the time of the arrest.[97]

Then, in *State v. Schmidt*, the defendant had submitted to a warrantless blood test at least four years prior to the holding in *Ryce* and was now challenging the admission of that evidence.[98] The court first determined that the State could raise the good-faith exception for the first time on appeal, and then held that the good-faith exception would apply.[99] The evidence would be admitted because the officer had relied on a statute that was valid at the time of Schmidt's arrest, and also because "[s]uppressing [the] blood test results would not serve the purpose of the exclusionary rule, which is to deter police misconduct."[100] Further, the officer's reliance on the statute was objectively reasonable because he was simply fulfilling his duties to enforce the statute as written and he had no reason to know the statute would be found unconstitutional.[101]

United States v. Villanueva, 821 F.3d 1226 (10th Cir. 2016)

Full Case Citation: United States v. Villanueva, 821 F.3d 1226 (10th Cir.), *cert. denied*, 137 S. Ct. 250 (2016).

2016 CPS Section: II.D.2. – Searches and the Fourth Amendment / The Exclusionary Rule / Good[-]Faith Exception

Summary:

The Tenth Circuit recently extended the good-faith exception to the exclusionary rule by allowing the exception to apply when the magistrate issuing the search warrant was "arguably not neutral and detached."[102] The defendant, Villanueva, argued that a neutral and detached magistrate did not issue the warrant because the issuing judge "had refused to accept Mr. Villanueva's negotiated plea in a prior case, and had recused himself in a paternity case involving Mr. Villanueva's son."[103] The United States Supreme Court's decision in *United States v. Leon*, however, allows the court to address the good-faith issue without considering the warrant's validity.[104] And under the good-faith exception, evidence obtained in violation of the Fourth Amendment is admissible if "officers relied in good faith on a signed warrant in conducting a search."[105]

The Tenth Circuit affirmed the district court ruling and held that the good-faith exception applies even when "the judge who issued the search warrant was arguably not neutral and detached."[106] First, "[p]enalizing the officer for the magistrate's error . . . cannot logically

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[97] *Id.* at 963–64.
[98] *See* State v. Schmidt, 385 P.3d 936, 942 (Kan. Ct. App. 2016).
[99] *Id.* at 942, 944.
[100] *Id.* at 944.
[101] *Id.* at 943.
[102] United States v. Villanueva, 821 F.3d 1226, 1235 (10th Cir.), *cert. denied*, 137 S. Ct. 250 (2016).
[103] *Id.*
[104] United States v. Leon, 468 U.S. 897, 923–24 (1984).
[105] State v. Althaus, 305 P.3d 716, 724 (Kan. 2013) (citing *Leon*, 468 U.S. at 913).
[106] *Villanueva*, 821 F.3d at 1235.

contribute to the deterrence of Fourth Amendment violations."[107] Second, the good-faith exception is inapplicable only if the magistrate "'wholly abandons his role' when he aids law enforcement officers in their investigation of a crime."[108] Although the Tenth Circuit was unaware of any court applying the good-faith exception in such circumstances, it concluded that *Leon* made it apparent that the good-faith exception applies in this situation.[109]

Utah v. Strieff, 136 S. Ct. 2056 (2016)

Full Case Citation: Utah v. Strieff, 136 S. Ct. 2056 (2016).

2016 CPS Section: II.D. – Searches and the Fourth Amendment / The Exclusionary Rule

Summary:

The United States Supreme Court granted certiorari in *Utah v. Strieff* to resolve the issue of "how the attenuation doctrine applies [in situations] where an unconstitutional detention leads to the discovery of a valid arrest warrant."[110] In the case, the defendant, Strieff, was initially stopped after an officer saw him leave a suspected drug dealer's house.[111] During the investigatory stop, the officer discovered Strieff had an outstanding arrest warrant, promptly arrested him, and then during a search incident to that arrest the officer found a small amount of methamphetamine and drug paraphernalia.[112] At the suppression hearing, Strieff challenged the admission of the incriminating evidence arguing it had been obtained as a result of an unlawful investigatory stop.[113] The trial court admitted the evidence because despite the State's concession that the stop was unconstitutional for lack of reasonable suspicion, the discovery of the arrest warrant attenuated the connection between the unlawful conduct by the officer and the discovery of contraband.[114] Once the evidence was admitted, Strieff conditionally pleaded guilty to reduced charges but reserved the right to appeal the admission of the evidence.[115] On appeal the Utah Court of Appeals affirmed, but then the Utah Supreme Court reversed.[116]

As noted above, the United States Supreme Court granted certiorari on the issue of "how the attenuation doctrine applies [in situations] where an unconstitutional detention leads to the discovery of a valid arrest warrant."[117] As an exception to the exclusionary rule, the attenuation doctrine allows the admission of evidence obtained as a result of unconstitutional police conduct so long as the connection between them "is remote or has been interrupted by some intervening

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[107] *Id.* (quoting *Leon*, 468 U.S. at 921).
[108] *Id.* at 1235–36 (quoting Lo-Ji Sales, Inc. v. New York, 442 U.S. 319, 327 (1979)).
[109] *Id.* at 1235.
[110] Utah v. Strieff, 136 S. Ct. 2056, 2060 (2016).
[111] *Id.* at 2059–60.
[112] *Id.* at 2060.
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.* (citing United States v. Green, 111 F.3d 515, 522–23 (7th Cir. 1997) (holding that in situations where the official's misconduct was not flagrant, the discovery of a warrant is a dispositive intervening circumstance and the evidence was admissible); State v. Moralez, 300 P.3d 1090, 1102 (Kan. 2013) (placing limited importance on the discovery of the warrant)).

circumstance."[118] In answering the question of whether discovery of a valid arrest warrant was a sufficient intervening circumstance, the Court considered: (1) the "temporal proximity" between the misconduct and the discovery of evidence, (2) the "presence of intervening circumstances," and (3) the "purpose and flagrancy of the official misconduct."[119] The Court concluded that while the time between the two events—the unconstitutional stop of Strieff and the seizing of the evidence—was not a "substantial time," the discovery of the valid warrant created an obligation to arrest Strieff, and the officer's actions from that point were entirely lawful.[120] Therefore, the evidence seized was admissible because the officer's discovery of the arrest warrant attenuated the connection between the initial unlawful stop and the lawful search incident to arrest.[121]

State v. Stanley, 390 P.3d 40 (Kan. Ct. App. 2016)

Full Case Citation: State v. Stanley, 390 P.3d 40 (Kan. Ct. App. 2016).

2016 CPS Section: II.G.3. – Searches and the Fourth Amendment / Technology and Searches / Chemical Drug Tests

Summary:

In *State v. Stanley*, the Kansas Court of Appeals held that a defendant's previous Missouri conviction for driving while intoxicated ("DWI") would "not qualify as a prior conviction under K.S.A. 2012 Supp. 8-1567(i)," the Kansas DUI statute, representing an important development in the law.[122] The court compared the relevant Kansas and Missouri statutes and relevant case law to determine if the statutes were "equivalent."[123] The court determined the Kansas statute criminalizes both "operating or attempting to operate a vehicle with a blood- or breath-alcohol level in excess of .08; and . . . operating or attempting to operate a vehicle while under the influence of alcohol and/or drugs *to a degree that renders the person incapable of safely driving the vehicle*."[124] In comparison, the Missouri statute, Mo. Rev. Stat. 557.010, criminalizes "operat[ing] a motor vehicle while in an intoxicated or drugged condition."[125] Thus, the court reasoned, "[t]he Missouri statute on its face is too broad to count as a prior conviction under" the Kansas statute because it criminalized "a wider range of activity" than the Kansas DUI statute by focusing on "the fact . . . of intoxication," not on the degree of intoxication as the Kansas statute does.[126] The court ultimately concluded that "it is clearly conceivable that an act that would be considered DWI in Missouri would not be DUI in

[118] *Id.* at 2061 (citing Hudson v. Michigan, 547 U.S. 586, 593 (2006)).
[119] *Id.* at 2061–62 (quoting Brown v. Illinois, 422 U.S. 590, 603–04 (1975)).
[120] *Id.* at 2062–63 (applying the factors and determining that the latter two "strongly favor[ed]" the State).
[121] *Id.* at 2064.
[122] State v. Stanley, 390 P.3d 40, 42 (Kan. Ct. App. 2016). *Stanley* was previously filed as an unpublished opinion. 367 P.3d 1284, No. 112,828, 2016 WL 1274465 (Kan. Ct. App. Apr. 1, 2016) (unpublished table decision). The Kansas Supreme Court, however, granted a motion to publish the case under Kansas Supreme Court Rule 7.04. *Stanley*, 390 P.3d at 40 n.1.
[123] *Id.* at 43.
[124] *Id.* (citing KAN. STAT. ANN. § 8-1567(a) (Supp. 2012)).
[125] *Id.* (quoting MO. REV. STAT. § 577.010(1) (2000 & Supp. 2013).
[126] *Id.* at 43–44.

Kansas," and the defendant's prior Missouri DWI should not count as a prior conviction under the Kansas DUI statute.[127]

III. SEIZURES

State v. Mullen, 371 P.3d 905 (Kan. 2016)

Full Case Citation: State v. Mullen, 371 P.3d 905 (Kan. 2016).

2016 CPS Section: III.B.1. – Seizures / Types of Seizures and Reasonability / Seizure of Items

Summary:

The Kansas Supreme Court clarified the definition of "controlled delivery" which states that a "controlled delivery" must be "(1) performed under the control and supervision of law enforcement officers and (2) establish[] a fair probability that the contraband will be found within the site upon execution of the warrant . . . ."[128] At issue in *Mullen* was whether a "controlled delivery"[129] had successfully been accomplished, thereby giving law enforcement authority to search a home pursuant to an anticipatory search warrant.[130] The "controlled delivery" consisted of an officer delivering the package under the guise of being a mail carrier by first knocking on the door and then placing it on the front porch, all while being watched by members of the investigation team.[131] A few minutes later, the defendant, Mullen, retrieved the package and was subsequently arrested and charged with possession of marijuana with the intent to distribute.[132] The Kansas Supreme Court used the newly adopted definition to find that the "controlled delivery" was successfully accomplished.[133]

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[127] *Id.* at 44.
[128] State v. Mullen, 371 P.3d 905, 914 (Kan. 2016).
[129] *Id.* at 913 (quoting Illinois v. Andreas, 463 U.S. 765, 769–70 (1983)) ("The lawful discovery by common carriers or customs officers of contraband in transit presents law enforcement authorities with an opportunity to identify and prosecute the person or persons responsible for the movement of the contraband. To accomplish this, the police, rather than simply seizing the contraband and destroying it, make a so-called controlled delivery of the container to its consignee, allowing the container to continue its journey to the destination contemplated by the parties. The person dealing in the contraband can then be identified upon taking possession of and asserting dominion over the container.").
[130] *Id.* at 907.
[131] *Id.* at 908.
[132] *Id.*
[133] *Id.* at 914.

Luis v. United States, 136 S. Ct. 1083 (2016)

Full Case Citation: Luis v. United States, 136 S. Ct. 1083 (2016).

2016 CPS Sections:

- III.B.1. – Seizures / Types of Seizures and Reasonability / Seizure of Items
- V.B.5. – Trial Rights / Sixth Amendment Issues / Right to Counsel

Summary:

The United States Supreme Court clarified that the government cannot confiscate the "untainted" assets of a defendant before trial. After being charged with crimes related to health care fraud, the defendant, Luis, challenged the pretrial restraint of her "legitimate, untainted assets" as a violation of the Sixth Amendment.[134] Federal courts are allowed to freeze the assets of criminal defendants so long as the assets are: "(1) property 'obtained as a result of' the crime, (2) property 'traceable' to the crime, and (3) other 'property of equivalent value.'"[135] The parties agreed that the district court's order prohibiting Luis from use of her assets affected some property wholly unconnected to the crimes of which she had been charged.[136] Ultimately, the United States Supreme Court vacated the pretrial restraint order.[137]

In its majority opinion, the Court first reaffirmed the right to counsel of choice as "fundamental."[138] It then concluded that there is an important distinction between the type of "tainted" property used in the commission of crimes, and the type of "untainted" property that belongs to a criminal defendant.[139] The former is property of the sort that the government has a "substantial" interest in obtaining through a pretrial order,[140] whereas the government has no equivalent interest in the latter.[141] Therefore, a defendant's Sixth Amendment right to obtain counsel of his or her choice by using his or her own property is not overcome by the government's interest in securing its punishment of choice or victims' interest in securing restitution.[142] Furthermore, to allow the government to freeze these assets would undermine and "render less effective the basic right the Sixth Amendment seeks to protect."[143]

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[134] Luis v. United States, 136 S. Ct. 1083, 1088 (2016).
[135] *Id.* at 1087 (quoting 18 U.S.C. § 1345(a)(2) (2012)).
[136] *Id.* at 1088.
[137] *Id.* at 1096.
[138] *Id.* at 1089.
[139] *Id.* at 1090.
[140] *Id.* at 1092 (citing Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 627 (1989); United States v. Stowell, 133 U.S. 1, 19 (1890)) (discussing the justification for freezing "tainted" assets).
[141] *Id.* (citing Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 330) (analogizing the government's interest in "untainted" property to that of an unsecured creditor in bankruptcy proceedings).
[142] *Id.* at 1093.
[143] *Id.* at 1095.

State v. Walker, 372 P.3d 1147 (Kan. 2016)

Full Case Citation: State v. Walker, 372 P.3d 1147 (Kan. 2016).

2016 CPS Section: III.D.3. – Seizures / Fifth and Sixth Amendment Issues / Miranda Warnings and Interrogations

Summary:

State v. Walker demonstrates the potential difficulties defendants may face when attempting to invoke their *Miranda* rights. The defendant, Walker, appealed his conviction of first-degree premeditated murder on the grounds that the district court erred by failing to suppress statements made in a police interrogation following the defendant's invocation of his right to remain silent under the Fifth Amendment.[144] The defendant allegedly invoked his right to remain silent three separate times throughout his interrogation with his arresting officers.[145] If a suspect invokes the right to remain silent, an interrogation must end,[146] but the invocation must be unambiguous and unequivocal to a reasonable police officer under the circumstances.[147]

The court decided that the first two invocations made by Walker to his interrogating officers were ambiguous.[148] However, in the third invocation, Walker stated that he was "done" and the conversation was "over."[149] The court determined the third exchange to be a proper invocation of the right to remain silent and any of Walker's subsequent statements to police should have been suppressed.[150] However, the court ultimately ruled that the error to not suppress the defendant's statement was harmless.[151] Although this decision does not result in a change to the law, it is demonstrative of (1) a defendant's right to legally stop an interrogation upon invoking his or her *Miranda* rights, and (2) that the invocation must be unequivocal and clear.

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[144] State v. Walker, 372 P.3d 1147, 1151 (Kan. 2016).
[145] *Id.* at 1156.
[146] *Id.* at 1158 (quoting State v. Aguirre, 349 P.3d 1245, 1249 (Kan. 2015) (citing Michigan v. Mosley, 423 U.S. 96, 100 (1975))).
[147] *Id.* (quoting State v. Aguirre, 349 P.3d 1245, 1250 (Kan. 2015) (citing Berghuis v. Thompkins, 560 U.S. 370, 381–82 (2010))).
[148] *Id.* at 1158–59.
[149] *Id.* at 1159.
[150] *Id.*
[151] *Id.* at 1160.

IV. PRE-TRIAL ISSUES

State v. Dunn, 375 P.3d 332 (Kan. 2016)

Full Case Citation: State v. Dunn, 375 P.3d 332 (Kan. 2016).

2016 CPS Sections:

- IV.A.1. – Pre-Trial Issues / Formal Charges / Charging Instruments: Complaint, Information, and Indictment
- IV.A.2. – Pre-Trial Issues / Formal Charges / Bill of Particulars

Summary:

In *State v. Dunn*, the Kansas Supreme Court overruled prior case law concerning the sufficiency of charging documents and determined the State's failure to properly include all elements of the charged crimes in a charging document does not deprive courts of subject matter jurisdiction over the case.[152] The court further determined such an error is harmless when the defendant and defense counsel are aware of what the State intends to prove under the count.[153] The defendant in this case disputed his conviction for forgery, claiming that the charging document omitted several elements of the crime charged, and thus, the court lacked subject matter jurisdiction.[154] The Kansas Supreme Court first departed from prior precedent and held that insufficient pleading does not fatally divest courts of subject matter jurisdiction.[155] Accordingly, it reasoned that because an otherwise sufficient charging document's failure to specifically allege certain elements presents no problem of subject matter jurisdiction, a charging document need not include all essential elements of the charged offense to avoid insufficiency under the controlling Kansas statutes,[156] which only require the state to prove "essential facts" and be drawn in the language of the relevant statute.[157]

However, the court retained other existing safeguards to protect defendants against insufficient pleading.[158] It explained that its ruling left three avenues for challenging a charging document: (1) the constitutional requirement that the document demonstrate the action is brought in the "correct court and correct territory"; (2) the statutory requirement that the document allege sufficient facts to constitute a crime in Kansas; and (3) sufficiency to provide the defendant with adequate due process and notice, such that the defendant "has an opportunity to meet and answer

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[152] State v. Dunn, 375 P.3d 332, 355–56 (Kan. 2016).
[153] *Id.* at 360–61.
[154] *Id.* at 337.
[155] *Id.* at 355–56 (overturning State v. Minor, 416 P.2d 724, 727 (Kan. 1966), and State v. Hall, 793 P.2d 737, 756–59 (Kan. 1990)) ("Charging documents do not bestow or confer subject matter jurisdiction on state courts to adjudicate criminal cases; the Kansas Constitution does. Charging documents need only show that a case has been filed in the correct court, *e.g.*, the district court rather than municipal court; show that the court has territorial jurisdiction over the crime alleged; and allege facts that, if proved beyond a reasonable doubt, would constitute a Kansas crime committed by the defendant.").
[156] *Id.* at 356.
[157] *Id.* ("The legislature's definition of the crime charged must be compared to the State's factual allegations of the defendant's intention and action. If those factual allegations, proved beyond a reasonable doubt, would justify a verdict of guilty, then the charging document is statutorily sufficient. If the charging document is instead statutorily insufficient, then the State has failed to properly *invoke* the subject matter jurisdiction of the court, and an appropriate remedy must be fashioned.").
[158] *See id.* at 358.

the State's evidence and prevent double jeopardy."[159] It set forth remedies that corresponded with each type of error.[160] The court determined that Dunn's conviction could be upheld even though the State failed to comply with the statutory requirements for pleading because the error was harmless due to the complaint providing Dunn's counsel with sufficient information such that his counsel clearly understood what the State intended to prove under the relevant count.[161]

The court further departed from *State v. Hall* (in which the court set forth different standards for reviewing challenges to charging document sufficiency first raised at trial versus first raised on appeal) by outlining a single standard of de novo review.[162] In doing so, it held that a defendant may raise the issue of pleading sufficiency at any point, including on appeal, if the defendant can demonstrate that an exception to the ordinary rules for issue preservation apply.[163]

State v. Dupree, 373 P.3d 811 (Kan. 2016)

Full Case Citation: State v. Dupree, 373 P.3d 811 (Kan. 2016).

2016 CPS Section: IV.A.3. – Pre-Trial Issues / Formal Charges / Changes to Charging Instruments

Summary:

In *State v. Dupree*, the court determined that the State's failure to file a written amended complaint after it orally amends the underlying felony for a felony murder charge before closing at trial does not justify reversal if the error is harmless.[164] In *State v. Dupree*, the defendant appealed his conviction for felony murder on the basis that when the State orally changed the underlying felony for the felony murder charge from aggravated robbery to aggravated battery at closing argument without filing a written amended complaint, his right to a fair trial and opportunity to defend himself were violated.[165] The court conceded that when the State makes an oral amendment to a complaint, "the prosecution has the duty to memorialize the amendment by filing an amended complaint."[166] The court noted, however, that although a failure to memorialize such amendment in writing may justify reversal, the failure to do so is not always fatal because it does not deprive the court of jurisdiction.[167]

The court outlined a longstanding two-part test that courts use to determine whether the State's failure to memorialize an oral amendment to a complaint constitutes reversible error: "(1) whether the amendment was appropriate—meaning no additional or different crime was charged

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[159] *Id.*
[160] *Id.* at 358–60; *see also Minor*, 416 P.2d at 727; *Hall*, 793 P.2d at 756–59. Under *Hall*, if the defendant first raised the issue on appeal, the court would dismiss a complaint only if it failed to charge the defendant for the offense of which the defendant was convicted. 793 P.2d at 764. On appeal, the defendant had to prove prejudice, impairment or ability to plead in subsequent prosecution, or violation of the right to a fair trial. *Id.* at 765.
[161] *Dunn*, 375 P.3d at 361.
[162] *Id.* at 360.
[163] *Id.*
[164] State v. Dupree, 373 P.3d 811, 819–20 (Kan. 2016).
[165] *Id.* at 818.
[166] *See id.* at 819 (quoting State v. Switzer, 769 P.2d 645, 650–51 (Kan. 1989)).
[167] *Id.* at 820.

and the substance of the amendment was not prejudicial, and (2) whether the failure to memorialize the amendment was prejudicial to the defendant."[168] The court ultimately found no reversible error in *Dupree*.[169] For the first part of the test, the court determined that changing the underlying felony for a felony murder charge does not change the ultimate charge itself.[170] As to part two of the test, since the underlying crimes were largely irrelevant and did not change the ultimate charge, the court found no prejudice to the defendant from the State's failure to memorialize the oral amendment.[171]

V. TRIAL RIGHTS

United States v. Von Behren, 822 F.3d 1139 (10th Cir. 2016)

Full Case Citation: United States v. Von Behren, 822 F.3d 1139 (10th Cir. 2016).

2016 CPS Section: V.A.1. – Trial Rights / Fifth Amendment Issues / Self-Incrimination

Summary:

In *United States v. Von Behren*, the Tenth Circuit analyzed the issue of how mandatory polygraph testing of a parolee may violate the Fifth Amendment.[172] As a condition of the defendant's supervised release, he was required to complete a sex offender treatment program, which administered a mandatory sexual history polygraph.[173] The defendant argued that forced submission to the polygraph violated his Fifth Amendment right against self-incrimination.[174] The district court held that the polygraph questions constituted a negligible risk of incrimination.[175] On appeal, the Tenth Circuit disagreed, holding that the polygraph could violate the defendant's Fifth Amendment rights.[176]

Fifth Amendment protection "includes information which would furnish a link in the chain of evidence that could lead to prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution."[177] Assuming that the defendant's answers would have incriminated him, the court analyzed the questions to which he had objected.[178] The question for the court was not whether any answer to these questions would be enough alone to convict the defendant, but whether the answer might provide a "lead" or "link" needed to prosecute.[179] The court held that the answers could provide a "lead" or "link" because affirmative answers could affect any ongoing investigations, affect law enforcement's perception of the defendant, and be used as propensity evidence in any future prosecution of the defendant.[180] The court also rejected the government's argument that the questions would be

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[168] *See id.* at 819 (citing State v. Davis, 156 P.3d 665, 667 (Kan. 2007); *Switzer*, 769 P.2d at 650–51).
[169] *Id.* at 820.
[170] *Id.* at 819.
[171] *Id.*
[172] United States v. Von Behren, 822 F.3d 1139, 1141 (10th Cir. 2016).
[173] *Id.* at 1142.
[174] *Id.*
[175] *Id.* at 1145.
[176] *Id.*
[177] *Id.* at 1144 (quoting Maness v. Meyers, 419 U.S. 449, 461 (1975)).
[178] *Id.* at 1145.
[179] *Id.* (quoting United States v. Powe, 591 F.2d 833, 845 n.36 (D.C. Cir. 1978)).
[180] *Id.* at 1145–46.

asked for the purpose of treatment, because the question for the Fifth Amendment is whether a person is compelled to incriminate himself, not whether he will be prosecuted.[181]

Bravo-Fernandez v. United States, 137 S. Ct. 352 (2016)

Full Case Citation: Bravo-Fernandez v. United States, 137 S. Ct. 352 (2016).

2016 CPS Section: V.A.2. – Trial Rights / Fifth Amendment Issues / Immunity

Summary:

In *Bravo-Fernandez v. United States*, the United States Supreme Court resolved a circuit split when the Court held that the "issue-preclusion component of the Double Jeopardy Clause" does not "bar the Government from retrying defendants . . . after a jury has returned irreconcilably inconsistent verdicts of conviction and acquittal" when the "convictions are later vacated for legal error unrelated to the inconsistency[.]"[182] In the case, a jury convicted the defendants for "federal-program bribery, in violation of 18 U.S.C. § 666," but "acquitted them of the related conspiracy and Travel Act charges" alleged.[183] Later, the Court of Appeals for the First Circuit "vacated the § 666 convictions for [an] instructional error" and remanded the case.[184] On remand, the defendants moved for acquittal, arguing "the jury necessarily determined that they were not guilty of violating § 666 when it acquitted" them of the related charges.[185] The district court denied the acquittal and the Court of Appeals for the First Circuit and United States Supreme Court affirmed.[186] The United States Supreme Court reasoned that the defendants could not "establish the factual predicate necessary to preclude the Government from retrying them on the standalone § 666 charges–namely, that the jury in the first proceeding actually decided that they did not violate the federal bribery statute."[187] Therefore, because the Court did "not know what the jury would have concluded had there been no instructional error," the Court remanded the case for a new trial on the standalone § 666 bribery charges.[188]

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[181] *Id.* at 1146.
[182] Bravo-Fernandez v. United States, 137 S. Ct. 352, 362–63 (2016).
[183] *Id.* at 361.
[184] *Id.*
[185] *Id.* at 361.
[186] *Id.* at 362–65.
[187] *Id.* at 365.
[188] *Id.* at 366.

United States v. Smith, 815 F.3d 671 (10th Cir. 2016)

Full Case Citation: United States v. Smith, 815 F.3d 671 (10th Cir. 2016).

2016 CPS Section: V.A.2. – Trial Rights / Fifth Amendment Issues / Immunity

Summary:

In *United States v. Smith*, the Tenth Circuit discussed an unsettled area of law concerning the potential interaction between multiplicity and sharing files over the internet.[189] The defendant claimed his convictions for sharing child pornography on the internet were multiplicitous in violation of the Fifth Amendment.[190] The defendant was charged with distribution for each time a pornographic image was downloaded from his shared folder on a peer-to-peer network.[191] On review for clear error, the court held that the charges were not clearly multiplicitous.[192] The court acknowledged that the circuit's law is unclear on the proper unit of prosecution for distribution of a shared internet file.[193] However, the court did not decide whether the proper unit of prosecution was the act of making the pornographic file available on the network or the act of downloading each file.[194]

State v. Dupree, 371 P.3d 862 (Kan. 2016)

Full Case Citation: State v. Dupree, 371 P.3d 862 (Kan. 2016).

2016 CPS Section: V.B.1. – Trial Rights / Sixth Amendment Issues / Speedy and Public Trial

Summary:

In *State v. Dupree*, the Kansas Supreme Court determined that the statutory right to a speedy trial set forth in K.S.A. § 22-3402 is procedural and does not constitute a vested right.[195] The defendant, Dupree, requested that the Kansas Supreme Court overturn several convictions because—including time attributable to a continuance his attorney requested without his permission—the time between Dupree's arraignment and trial exceeded the 90-day statutory limit set forth in K.S.A. § 22-3402.[196] Dupree contended that § K.S.A. 22-3402(g), which precludes a defendant from employing K.S.A. § 22-3402 if the defendant caused the continuance or if the defendant's attorney asked for the continuance (with or without the defendant's permission, so long as the continuance was initially attributed to the defendant and subsequently

[189] United States v. Smith, 815 F.3d 671, 673 (10th Cir. 2016).
[190] *Id.* at 674.
[191] *Id.* at 675.
[192] *Id.* at 677.
[193] *Id.* at 675.
[194] *Id.* at 677.
[195] State v. Dupree, 371 P.3d 862, 874 (Kan. 2016).
[196] *Id.* at 869–70.

attributed to the state[197]) did not govern because the Kansas Legislature did not amend the statute to limit its application where the defendant or his attorney requested the continuance until after Dupree's 90-day window expired.[198] The court explained that the statute's potential retroactive application hinged on whether the right Dupree sought to protect was a vested right.[199] It reasoned that because defendants waive objections premised in the right to a speedy trial if they fail to raise them at trial,[200] and because the right was procedural,[201] the right to a speedy trial likely does not constitute a vested right.[202]

State v. Reed, 352 P.3d 530 (Kan. 2015)

Full Case Citation: State v. Reed, 352 P.3d 530 (Kan. 2015).

2016 CPS Section: V.B.1. – Trial Rights / Sixth Amendment Issues / Speedy and Public Trial

Summary:

In *State v. Reed*, the Kansas Supreme Court clarified when a defendant's Sixth Amendment right to a public trial is implicated.[203] Judicial inquiry with a witness regarding that witness's unwillingness to testify, when conducted outside the presence of the jury, is not a violation of a defendant's right to a public trial.[204] To determine whether a defendant's Sixth Amendment right to a public trial is implicated, the Kansas Supreme Court has applied a two-part "logic and experiences" test[205] set forth by the United States Supreme Court in *Press-Enterprise Co. v. Superior Court*.[206] "Under the first prong . . . , a court asks 'whether the place and process ha[s] historically been open to the press and general public'" or is "'distinct from trial proceedings.'"[207] "Under the second prong, a court considers 'whether public access plays a significant positive role in the functioning of the particular process in question,'" specifically

[197] State v. Brownlee, 354 P.3d 525, 540 (Kan. 2015) ("Absent prosecutorial misconduct or a violation of a defendant's constitutional speedy trial right, the second sentence also is applicable to any factual situation in which a delay initially charged to the defense is subsequently charged to the State.").
[198] *Dupree*, 371 P.3d at 870–71.
[199] *Id.*
[200] State v. Crawford, 262 P.3d 1070, 1077 (Kan. Ct. App. 2011).
[201] *Dupree*, 371 P.3d at 872–74.
[202] *Id.* at 870–71, 874.
[203] State v. Reed, 352 P.3d 530, 542 (Kan. 2015).
[204] *Id.*
[205] *Id.*
[206] Press-Enter. Co. v. Super. Ct., 478 U.S. 1 (1986). Although this test originally arose from a press challenge to openness under the First Amendment, the Kansas Supreme Court noted that other courts have applied it in the Sixth Amendment context. *Reed*, 352 P.3d at 540 (citing State v. Sublett, 292 P.3d 715, 723–24 (Wash. 2012); Commonwealth v. Riley, 15 N.E.3d 1165, 1169–70 (Mass. App. Ct. 2014) (noting that test is proper in the context of Sixth Amendment public trial right)). *But see* State v. Smith, 334 P.3d 1049, 1058 (Wash. 2014) (Wiggins, J., concurring) ("The logic and experience test is flawed because it fails to account for article I, section 10's uniquely strong mandate for openness at *every* stage of a judicial proceeding. Moreover, it categorically permits closures . . . without considering the effect that such closures have on the open administration of justice in that particular case.").
[207] *Reed*, 352 P.3d at 540, 542 (quoting, respectively, *Press-Enter. Co.*, 478 U.S. at 8; Richmond-Newspapers, Inc. v. Virginia, 448 U.S. 555, 598 n.23 (1980) (Brennan, J., concurring)).

looking to "whether openness in the proceeding 'enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.'"[208]

In *State v. Reed*, the victim of an attempted first-degree murder was unwilling to testify and was uncomfortable even entering the courtroom to state his refusal to testify.[209] The district judge excused the jury and emptied the courtroom to inquire about this unwillingness, eventually concluding the victim's testimony would be read to the jury.[210] Applying the logic and experiences test, the Kansas Supreme Court held that this inquiry did not violate defendant's Sixth Amendment right to a public trial.[211] Although the inquiry was privately conducted, it was similar to a sidebar because it was a question of law that was "distinct from trial proceedings."[212] Because there were no allegations of prosecutorial misconduct, openness would not have played a significant positive role.[213]

State v. Spencer Gifts, LLC, 374 P.3d 680 (Kan. 2016)

Full Case Citation: State v. Spencer Gifts, LLC, 374 P.3d 680 (Kan. 2016).

2016 CPS Section: V.B.1. – Trial Rights / Sixth Amendment Issues / Speedy and Public Trial

Summary:

In *State v. Spencer Gifts, LLC*, the Kansas Supreme Court took up the question of whether defendants not held on appearance bonds have statutory speedy trial rights under K.S.A. § 22-3402(b).[214] The court determined that when a defendant has not been "held to answer on an appearance bond," the defendant does not have statutory speedy trial rights under K.S.A. § 22-3402(b).[215] In *Spencer Gifts LLC*, a trial court judge dismissed the case against the defendant (who had not been held on appearance bond) because the State had failed to bring the case to trial within 180 days of the summons being issued.[216] A panel of the Kansas Court of Appeals affirmed the decision, holding that the dismissal was consistent with precedent stemming from the Kansas Supreme Court's decision in *City of Elkhart v. Bollacker*.[217] The concurring opinion from the Kansas Court of Appeals noted, however, that the plain language of the statute "clearly and unambiguously applies *only* to persons 'held to answer on appearance bond'" and urged the Kansas Supreme Court to overrule *Bollacker*.[218] The Kansas Supreme Court agreed with the

[208] *Id.* at 540 (quoting *Press-Enter. Co.*, 478 U.S. at 8–9).
[209] *Id.* at 534–35.
[210] *Id.* at 535.
[211] *Id.* at 542.
[212] *Id.* (quoting *Richmond-Newspapers, Inc.*, 448 U.S. at 598, n.23 (Brennan, J., concurring)).
[213] *Id.*
[214] State v. Spencer Gifts, LLC, 374 P.3d 680, 683–84 (Kan. 2016).
[215] *Id.* at 692.
[216] *Id.* at 683.
[217] State v. Spencer Gifts, LLC, 348 P.3d 611, 615–16 (Kan. Ct. App. 2015); *see also* City of Elkhart v. Bollacker, 757 P.2d 311, 313 (Kan. 1988) (holding that a criminal defendant's 180-day right to a speedy trial applies "whether bond is required or whether the accused is simply served with a notice to appear").
[218] *Spencer Gifts, LLC*, 348 P.3d at 618 (Malone, C.J., concurring) (emphasis added).

concurrence, holding that under the plain language of the statute, a defendant not held to answer on an appearance bond has no statutory right to a speedy trial.[219]

Hurst v. Florida, 136 S. Ct. 616 (2016)

Full Case Citation: Hurst v. Florida, 136 S. Ct. 616 (2016).

2016 CPS Section: V.B.2. – Trial Rights / Sixth Amendment Issues / Trial by Jury

Summary:

In *Hurst v. Florida*, the United States Supreme Court held that Florida's capital sentencing scheme—which required judges to independently engage in fact-finding analysis and weigh the circumstances before entering a sentence of life or death—violated the Sixth Amendment right to trial by jury.[220] Under Florida law, the maximum sentence a capital felon could receive on the basis of a conviction alone was life imprisonment.[221] A capital felon could be sentenced to death, but only if an additional sentencing proceeding "result[ed] in findings by the court that such person shall be punished by death."[222] In that proceeding, the sentencing judge would conduct an evidentiary hearing before a jury, which would then render an "advisory sentence" by majority vote.[223] Florida law granted the court wide discretion though; the judge must give the jury's recommendation "great weight," but ultimately the judge makes an independent decision on aggravating and mitigating factors.[224]

By applying *Apprendi v. New Jersey*,[225] the Court recognized that "any fact that 'expose[s] the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' that must be submitted to a jury."[226] Therefore, because Florida required the judge, instead of the jury, to make the critical factual findings necessary to impose the death penalty, the Court held that Florida's sentencing scheme violated the Sixth Amendment.[227] The Court noted that the fact that Florida provided an advisory jury was immaterial.[228] The Court explicitly overruled *Spaziano v. Florida*[229] and *Hildwin v. Florida*[230] "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's fact[-]finding, that is necessary for imposition of the death penalty."[231]

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[219] *Spencer Gifts, LLC*, 374 P.3d at 692. Although the Kansas Supreme Court overruled *Bollacker*'s holding, it affirmed the dismissal because the defendant's right to a statutory speedy trial had vested when it obtained dismissal in the district court, which amounted to a complete defense. *Id.* at 690 (citing State v. Dupree, 371 P.3d 862, 872–73 (Kan. 2016); State v. Noah, 788 P.2d 257, 258–60 (Kan. 1990)).

[220] Hurst v. Florida, 136 S. Ct. 616, 619 (2016).

[221] *Id.* at 620.

[222] *Id.* (quoting FLA. STAT. § 775.082(1) (2010)).

[223] *Id.* (citing FLA. STAT. § 921.141(1)–(2) (2010)).

[224] *Id.* (quoting Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975) (per curiam); Blackwelder v. State, 851 So. 2d 650, 653 (Fla. 2003)).

[225] Apprendi v. New Jersey, 530 U.S. 466 (2000).

[226] *Hurst*, 136 S. Ct. at 621 (quoting *Apprendi*, 530 U.S. at 494).

[227] *Id.* at 622.

[228] *Id.*

[229] Spaziano v. Florida, 468 U.S. 447 (1984).

[230] Hildwin v. Florida, 490 U.S. 638 (1989).

[231] *Id.* at 624.

State v. Corey, 374 P.3d 654 (Kan. 2016)

Full Case Citation: State v. Corey, 374 P.3d 654 (Kan. 2016).

2016 CPS Section: V.B.2. – Trial Rights / Sixth Amendment Issues / Trial by Jury

Summary:

State v. Corey provides an interesting example of jury misconduct and also demonstrates how Kansas courts apply the harmless error doctrine.[232] The defendant, Corey, challenged his convictions on several grounds, including an instance of jury misconduct during deliberations.[233] During deliberations, a juror commented that the trial was actually a retrial.[234] The trial court could not be sure whether the jury knew that the first trial resulted in a conviction, but was hesitant to discuss that fact with the jury for fear of "poisoning the well."[235] Although the trial court did not find sufficient prejudice to warrant a mistrial, the judge did give a curative instruction, emphasizing that "[t]he jury is not to consider any prior proceedings for purposes of determining whether the State has met its burden of proof in this case."[236]

The Kansas Supreme Court reviewed the case by following the well-established harmless error standard set forth in *Chapman v. California*.[237] The court ultimately found that the jury misconduct was harmless beyond a reasonable doubt because of (1) the defendant's initial approval of the curative instructions and (2) the overwhelming evidence in support of a guilty verdict.[238]

State v. Wallin, 366 P.3d 651 (Kan. Ct. App. 2016)

Full Case Citation: State v. Wallin, 366 P.3d 651 (Kan. Ct. App. 2016).

2016 CPS Section: V.B.2. – Trial Rights / Sixth Amendment Issues / Trial by Jury

Summary:

In *State v. Wallin*, the Kansas Court of Appeals clarified that jury misconduct instructions should be given at the beginning of trial.[239] The defendant, Wallin, appealed his convictions on the grounds that a jury instruction given after closing arguments, but before jury deliberations, deprived him of a fair trial.[240] The instruction advised the jury of their responsibility to avoid outside information, as any juror misconduct would result in a mistrial that would lead to tremendous expenses for both the court and the parties.[241] On appeal, the Kansas Court of

[232] State v. Corey, 374 P.3d 654, 660 (Kan. 2016).
[233] *Id.*
[234] *Id.* at 662–63.
[235] *Id.* at 663.
[236] *Id.*
[237] *Id.* at 665 (citing Chapman v. California, 385 U.S. 18, 23–24 (1967)).
[238] *Id.* at 665–66.
[239] State v. Wallin, 366 P.3d 651, 661 (Kan. Ct. App. 2016).
[240] *Id.* at 659.
[241] *Id.*

Appeals articulated that the "better practice" for administering jury misconduct instructions is to provide it to the jury at the beginning of the trial, as opposed to after closing arguments.[242] However, it is not per se erroneous to provide jury misconduct instructions prior to deliberation because "there is both the opportunity for and danger of juror misconduct during the deliberation phase of the trial."[243] Additionally, the defendant failed to prove that the jury instruction impacted the outcome of his trial.[244]

Ultimately, the court upheld the conviction and refused to hold that the jury instruction was erroneous.[245] Although the decision did not overturn prior Kansas law, it clarifies that the preferred timing of jury misconduct instructions should be prior to trial. However, this does not mean that jury misconduct instructions given later in trial are necessarily erroneous.

United States v. Graham, 663 Fed. App'x 622 (10th Cir. 2016)

Full Case Citation: United States v. Graham, 663 Fed. App'x 622 (10th Cir. 2016).

2016 CPS Section: V.B.4 – Trial Rights / Sixth Amendment Issues / Right to Testify and Present a Defense

Summary:

In *United States v. Graham*, the Tenth Circuit established that requiring a defendant to make an evidentiary proffer does not violate the other components of a defendant's "'right to present a defense,' including the right to testify or the right to confront and examine witnesses."[246] The defendant, Graham, refused to make an evidentiary proffer for his duress defense, arguing that it would give the government an advantage and make his defense less effective at trial.[247] Upon refusing to provide at least some evidence on each element of the duress defense, Graham was precluded from presenting the defense at trial.[248] He was subsequently found guilty and appealed, claiming that the district court's preclusion of the duress defense violated his rights under the Fifth, Sixth, and Fourteenth Amendments.[249]

On appeal, the Tenth Circuit rejected Graham's argument.[250] Although *Graham* is an unpublished opinion, it demonstrates that requiring an evidentiary proffer does not violate a defendant's "right to present a defense" because the right to present a defense "is not without limits."[251] The defendant must present evidence that is relevant.[252] In order to make a relevance determination, the trial court must review the evidence with reference of the specific elements of

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[242] *Id.* at 661.
[243] *Id.* (quoting State v. Davis, No. 112,204, 2015 WL 6443466, at *3 (Kan. Ct. App. Oct. 23, 2015)); *see also* State v. Tahah, 358 P.3d 819, 826–27 (Kan. 2015).
[244] *Wallin*, 366 P.3d at 661.
[245] *Id.*
[246] United States v. Graham, 663 F. App'x 622, 627 (10th Cir. 2016) (quoting United States v. Markey, 393 F.3d 1132, 1135 (10th Cir. 2004)).
[247] *Id.* at 624.
[248] *Id.*
[249] *Id.*
[250] *Id.* at 628.
[251] *Id.* at 627 (quoting *Markey*, 393 F.3d at 1135).
[252] *Id.*

the defense in question.[253] If the proffer does not adequately support the defense or is not given at all, the threshold showing of relevance will not be met, and thus, the claim or defense will be barred.[254]

Fuller v. State, 363 P.3d 373 (Kan. 2015)

Full Case Citation: Fuller v. State, 363 P.3d 373 (Kan. 2015).

2016 CPS Section: V.B.5. – Trial Rights / Sixth Amendment Issues / Right to Counsel

Summary:

In *Fuller v. State*, the Kansas Supreme Court addressed an ineffective assistance of counsel claim that arose from an unconventional and aggressive direct examination.[255] The case illustrates the difficult standard for proving an ineffective assistance of counsel claim.

The court held that an aggressive direct examination of a defendant using an "unorthodox" series of questioning is not enough to render counsel ineffective.[256] The defendant's attorney, Quentin Pittman, questioned the defendant, Fuller, under direct examination.[257] Pittman used cross-examination style questions during direct, which Fuller described as a "negative and reprehensible attack."[258] After being convicted, Fuller filed a K.S.A. § 60-1507 motion alleging he had ineffective assistance of counsel during his trial.[259]

The Kansas Supreme Court ultimately held that Pittman's direct examination of Fuller did not qualify as deficient performance.[260] The court reiterated that "[i]t is within the province of a lawyer to decide . . . strategic and tactical decisions,"[261] including "how to phrase and present questions to a client on direct examination."[262] In this case, the court was persuaded by Pittman's explanation that his aggressive line of questioning was a part of his trial strategy.[263] The court stated that Pittman's direct examination was "designed to elicit and did elicit strong denials from his client."[264] Thus, the court held that when a defense attorney uses an aggressive

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[253] *Id.* (citing *Markey*, 393 F.3d at 1135).
[254] *Id.* (citing United States v. Portillo-Vega, 478 F.3d 1194, 1197–1200 (10th Cir. 2007)).
[255] Fuller v. State, 363 P.3d 373, 379–80 (Kan. 2015).
[256] *Id.* at 383–85.
[257] *Id*. at 379.
[258] *Id*. at 379, 383. "[Q]uestions [asked by Pittman] included: 'You are going over because you were going to have sex with her one way or the other, correct?' . . . 'That's when you grab her and attack her, right?' . . . 'That's when you rip her shorts off?' . . . 'Because you didn't tell the exact same story throughout that you eventually got to, you are a liar right?'; 'I mean you raped her[?]' Pittman concluded his redirect examination with 'And that's because you are a liar and rapist?'" *Id*. at 379–80.
[259] *Id*. at 373, 378–79.
[260] *Id*. at 384–85.
[261] *Id.* at 384 (quoting Sola–Morales v. State, 335 P.3d 1162, 1171 (Kan. 2014)).
[262] *Id*. at 384.
[263] *Id*. at 380. During the direct examination of Fuller, Pittman asked Fuller a series of questions intending to "take away the sting of the accusation[s]" made against the defendant by the prosecution. *Id.* Pittman would later state that these questions were part of a strategy to make the defendant appear "indignant [and] emotional" in order "for Fuller to appear credible." *Id.* at 379–80. Pittman testified that he chose to ask Fuller these questions "to 'get out in front of the issue[s] . . . in a controlled manner.'" *Id*. at 380.
[264] *Id*. at 384.

line of questioning on direct examination of the criminal defendant they represent, such conduct does not fall below an objective standard of reasonableness.[265]

State v. Boysaw, 372 P.3d 1261 (Kan. Ct. App. 2016)

Full Case Citation: State v. Boysaw, 372 P.3d 1261 (Kan. Ct. App. 2016).

2016 CPS Section: V.C.1. – Trial Rights / Evidentiary Issues / Prior Actions by the Defendant

Summary:

In *State v. Boysaw*, the Kansas Court of Appeals analyzed the constitutionality of K.S.A. § 60-455, which allows courts to admit evidence of prior acts in sexual assault cases, and determined that the Kansas statute does not violate a defendant's due process rights.[266] Under Kansas law, in criminal sexual assault cases, evidence that the defendant committed a prior sexual assault is admissible.[267] The evidence may be considered on any matter to which it is relevant.[268] Kansas courts will interpret K.S.A. § 60-455 in light of the Federal Rules of Evidence 413 and 414 (the legislature modeled the Kansas law on these federal rules).[269] Thus, the Kansas Court of Appeals held that the Kansas law was constitutional because federal courts have frequently found that Federal Rules 413 and 414 do not violate a defendant's due process rights.[270]

State v. Cheever, 375 P.3d 979 (Kan. 2016)

Full Case Citation: State v. Cheever, 375 P.3d 979 (Kan. 2016).

2016 CPS Section: V.C.1. – Trial Rights / Evidentiary Issues / Prior Actions by the Defendant

Summary:

In *State v. Cheever*, the Kansas Supreme Court resolved confusion over whether the test set forth in *State v. Robinson* entails a two-part or three-part examination.[271] The defendant, Cheever, challenged his capital murder conviction on the grounds that expert testimony presented by a psychiatrist in rebuttal should have been inadmissible.[272] Upon review, the Kansas Supreme Court examined the test established in *Robinson* that determines whether a trial court can admit K.S.A. § 60-455 evidence.[273] This test clarifies that (1) the appellate court must

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[265] *See id*.
[266] *See* State v. Boysaw, 372 P.3d 1261, 1266–1271 (Kan. Ct. App. 2016).
[267] *Id.* at 1267 (quoting KAN. STAT. ANN. § 60-455 (Supp. 2015).
[268] *Id.*
[269] *Id.* at 1268 (citing FED. R. EVID. 413, 414).
[270] *Id.* at 1268–69.
[271] State v. Cheever, 375 P.3d 979, 995 (Kan. 2016).
[272] *Id.* at 986.
[273] *Id.* at 995; State v. Robinson, 363 P.3d 875, 1026–29 (Kan. 2015) (applying the two-step process thoroughly to a recent criminal action for capital murder, aggravated kidnapping, theft of property, first-degree premeditated murder, and aggravated interference with parental custody).

determine whether the evidence is relevant, and (2) if the evidence is relevant, the appellate court must apply the statutory provisions regarding the "admission and exclusion of evidence."[274]

The court in *Cheever* noted that in prior cases outside of the capital murder context, such as *Robinson*, this test of reviewability is sometimes referred to as a "two-part test."[275] However, in *Cheever*, the court articulated the test as:

> (1) determining whether the appellate court can or should review the issue, *i.e.*, whether there is a lack of appellate jurisdiction or a failure to preserve the issue for appeal; (2) considering the merits of the claim to determine whether error occurred below; and (3) assessing whether the error requires reversal, *i.e.*, whether the error can be deemed harmless.[276]

The court noted that the first and third steps are "interrelated in that whether a party has preserved a jury instruction issue will affect our reversibility inquiry at the third step."[277] Therefore, the ultimate effect of *Cheever* is to demonstrate that the reviewability test may be regarded as either a two-part or three-part examination, depending on the context of the case, without affecting the overall substantive effect of the test.

State v. Fisher, 373 P.3d 781 (Kan. 2016)

Full Case Citation: State v. Fisher, 373 P.3d 781 (Kan. 2016).

2016 CPS Section: V.C.2. – Trial Rights / Evidentiary Issues / Defendant's Silence

Summary:

In *State v. Fisher*, the Kansas Supreme Court expanded on the law regarding whether evidence of the defendant's post-*Miranda* silence is admissible.[278] In general, it is impermissible to impeach a defendant with evidence of "the defendant's post-*Miranda* silence."[279] But in *Fisher*, the Kansas Supreme Court held that evidence of the defendant's post-*Miranda* silence was admissible because the prosecutor "emphasiz[ed] the inconsistent content of the communications when [the defendant] was *not* silent.[280] The Kansas Supreme Court further held that any negative impact arising from the prosecutor's references to defendant's selective silence was "strictly marginal, not enough to have had reasonable possibility of contributing to the verdict."[281]

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[274] State v. Smith, 327 P.3d 441, 450 (Kan. 2014).
[275] *Cheever*, 375 P.3d at 995.
[276] *Id.* (quoting State v. Williams, 286 P.3d 195, 197 (Kan. 2012)).
[277] *Id.* (quoting State v. Bolze–Sann, 352 P.3d 511, 520 (Kan. 2015)).
[278] *See* State v. Fisher, 373 P.3d 781, 790–91 (Kan. 2016).
[279] *Id.* at 790.
[280] *Id.* at 791.
[281] *Id.* (citing State v. Santos-Vega, 321 P.3d 1, 12 (Kan. 2014)).

State v. Staples, No. 114,717, 2016 WL 7430426 (Kan. Ct. App. Dec. 23, 2016)

Full Case Citation: State v. Staples, 386 P.3d 931, No. 114,717, 2016 WL 7430426 (Kan. Ct. App. Dec. 21, 2016) (unpublished table decision).

2016 CPS Section: V.C.4. – Trial Rights / Evidentiary Issues / Eyewitness Identification

Summary:

In *Staples v. Staples*, the Kansas Court of Appeals examined the standard for "order[ing] a psychological examination of a complaining witness in a sex-crime case."[282] The court recognized that courts may order psychological examinations of complaining witnesses in sex-crime cases "only if [the court] determines, based on the totality of the circumstances, that the defendant has shown compelling reasons to justify the evaluation."[283] While the court noted "[t]his is a rigorous standard" in which a court "usually considers six nonexclusive factors,"[284] the court indicated that permitting court-ordered psychological evaluations only in sex-crime cases may be "outdated and misogynistic."[285] The defendant, Staples, appealed his convictions for aggravated indecent liberties with a child on the ground that the district court should have granted his motion requesting a psychological examination of the victim.[286] Whether to order a psychological evaluation of a complaining witness rests in the discretion of the district court.[287] Therefore, the appellate standard of review for these types of motions is an abuse of discretion standard.[288] When examining whether to grant a psychological examination of a complaining witness in a sex-crime case, Kansas courts rely on six nonexclusive factors outlined in *State v. Gregg* and *State v. Berriozabal*.[289] These factors are:

> (1) whether there was corroborating evidence of the complaining witness' version of the facts, (2) whether the complaining witness demonstrates mental instability, (3) whether the complaining witness demonstrates a lack of veracity, (4) whether similar charges by the complaining witness against others are proven to be false, (5) whether the defendant's motion for a psychological evaluation of the complaining witness appears to be a fishing expedition, and (6) whether the complaining witness provides an unusual response when questioned about his or her understanding of what it means to tell the truth.[290]

The opinion references Justice Moritz's dissenting opinion in *State v. Simpson*,[291] which strongly attacked the underlying reasoning of *Gregg*.[292] Justice Moritz contended that the *Gregg*

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[282] State v. Staples, 386 P.3d 931, No. 114,717, 2016 WL 7430426, at *1 (Kan. Ct. App. Dec. 23, 2016) (unpublished table decision).
[283] *Id.* at *3 (citing State v. Berriozabal, 243 P.3d 352, 362 (Kan. 2010)).
[284] *Id.*
[285] *Id.* at *5 (citing State v. Simpson, 327 P.3d 460, 465 (Kan. 2014) (Moritz, J., dissenting)).
[286] *Id.* at *1.
[287] *Id.* at *3 (citing State v. Gregg, 602 P.2d 85, 91 (Kan. 1979)).
[288] *Id.* (citing *Berriozabal*, 243 P.3d at 362).
[289] *Id.*; *see also* State v. Gregg, 602 P.2d 85, 92 (Kan. 1979); *Berriozabal*, 243 P.3d at 363.
[290] *Staples*, 2016 WL 7430426, at *3 (quoting *Berriozabal*, 243 P.3d at 363).
[291] State v. Simpson, 327 P.3d 460, 463 (Kan. 2014) (Moritz, J., dissenting).

rationale lacks a basis in the Constitution or applicable law, and is instead based on misogynistic and outdated reasoning.[293] Kansas courts have refused to extend the *Gregg* rationale to cases that are not related to sex-crimes.[294] Justice Moritz also contended that *Gregg* is not sound law and should be overturned, as psychological evaluations arising from *Gregg* often result in an invasion of privacy of young children.[295]

The Kansas Court of Appeals ultimately rejected the defendant's argument and ruled that the district court did not abuse its discretion by denying the request for a psychological evaluation.[296] Practitioners who rely on *Gregg* and *Berriozabal* to pursue a psychological evaluation of complaining witnesses in sexual abuse cases should be aware that their arguments might be subjected to analysis similar to that of Justice Moritz.

State v. Logsdon, 371 P.3d 836 (Kan. 2016)

Full Case Citation: State v. Logsdon, 371 P.3d 836 (Kan. 2016).

2016 CPS Section: V.C.5. – Trial Rights / Evidentiary Issues / Cross-Examination

Summary:

In *State v. Logsdon*, the Kansas Supreme Court summarized and clarified the application of the confrontation clause to testimonial evidence. A court violates a defendant's Sixth Amendment right to confront witnesses when testimonial statements from an unavailable witness are allowed "into evidence against a person without a prior opportunity to cross-examine that" witness.[297] The threshold question in this inquiry is whether a statement is "testimonial."[298]

In determining whether evidence is testimonial, courts consider four factors.[299] The four factors are:

> (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 crime the primary purpose of the interview when viewed from an objective totality of the circumstances, including circumstances of whether (a) the declarant was speaking about events as they were actually happening, instead of describing past events; (b) the statement was made while the declarant was in immediate danger, *i.e.*, during an ongoing emergency; (c) the statement was made in order to resolve an emergency or simply to learn what had happened in the past; and (d) the interview was part of a government investigation?; and (4) [W] as the level of formality of the statement

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[292] *Staples*, 2016 WL 7430426, at *5.
[293] *Simpson*, 327 P.3d at 465.
[294] *Id.*
[295] *Id.*
[296] *Staples*, 2016 WL 7430426, at *5.
[297] State v. Lodgson, 371 P.3d 836, 858 (Kan. 2016) (citing Crawford v. Washington, 541 U.S. 36, 68 (2004); State v. Bennington, 264 P.3d 440, 446 (Kan. 2011)).
[298] *Id.*
[299] *Id.* at 858–59.

> sufficient to make it inherently testimonial; *e.g.*, was the statement made in response to questions, was the statement recorded, was the declarant removed from third parties, or was the interview conducted in a formal setting such as in a governmental building?[300]

The Kansas Supreme Court recently applied these factors in determining whether certain out-of-court statements were testimonial and thus violated the Confrontation Clause.[301] In *Logsdon*, the defendant challenged evidence admitted at trial and argued that several witnesses were erroneously allowed to testify about a declarant's out-of-court statement, even though the declarant did not testify at trial.[302] In the case, when police were investigating a murder, a police officer interviewed a third party, who refused to testify at trial.[303] At trial, the police officers testified that the third party had told them "someone had been shot in the head."[304] Despite the defendant's timely hearsay objection, the district court admitted the statements.[305] Applying the four factors used to determine if a statement is testimonial, the Kansas Supreme Court held that the police officer's statement about the third party witness violated the defendant's Sixth Amendment right to confront witnesses.[306] Although the State argued it acted in good faith, the court reasoned that "the Sixth Amendment prohibits testimonial statements without prior opportunity for cross-examination, *even if* those statements would be admissible under hearsay rules, and there is no good[-]faith exception to Confrontation Clause requirements."[307]

State v. Sherman, 378 P.3d 1060 (Kan. 2016)

Full Case Citation: State v. Sherman, 378 P.3d 1060 (Kan. 2016).

2016 CPS Section: V.D.1 – Trial Rights / Actions by Different Players During a Trial / Prosecutors

Summary:

The Kansas Supreme Court recently set forth a new standard for reviewing claims of prosecutorial misconduct.[308] In *State v. Sherman*, the court narrowed and renamed prosecutorial behavior when it occurs within a criminal appeal, now describing such behavior as "prosecutorial error."[309] In establishing a new test for prosecutorial error, the court overruled the particularized harmlessness inquiry[310] and instead adopted a new process.[311] In determining whether prosecutorial error has occurred, courts now employ a two-part test described as "error and

[300] *Id.* (quoting State v. Brown, 173 P.3d 612, 634 (Kan. 2007)).
[301] *Id.* at 858–60.
[302] *See id.* at 842–43, 850.
[303] *Id.* at 844.
[304] *Id.* at 843.
[305] *Id.* at 843–44.
[306] *Id.* at 859–60.
[307] *Id.* at 859–60 (citing Crawford v. Washington, 541 U.S. 36, 55 (2004)).
[308] State v. Sherman, 378 P.3d 1060, 1064 (Kan. 2016).
[309] *Id.*
[310] *Id.* at 1074; *see* State v. Tosh, 91 P.3d 1204, 1212 (Kan. 2004).
[311] *Sherman*, 378 P.3d at 1074–75.

prejudice."[312] First, courts must decide whether the prosecutor's conduct "fall[s] outside the wide latitude afforded [to] prosecutors."[313] If there is error, the next step is "determin[ing] whether the error prejudiced the defendant's due process rights to a fair trial."[314] Prosecutorial error prejudices the defendant when it meets the constitutional harmlessness inquiry set forth in *Chapman v. California*.[315] Error is harmless if the State can show beyond a reasonable doubt that the prosecutorial error will not or did not affect the outcome of the trial.[316]

VI. SENTENCING

State v. Nguyen, 372 P.3d 1142 (Kan. 2016)

Full Case Citation: State v. Nguyen, 372 P.3d 1142 (Kan. 2016).

2016 CPS Section: VI.B.1 – Sentencing / Kansas Sentencing / Sentencing Determination

Summary:

In *State v. Nguyen*, the Kansas Supreme Court interpreted K.S.A. § 21-6806(c) and held that district courts do not have "discretion to depart from a life sentence for felony murder."[317] The defendant, Nguyen, "filed a motion for [a] durational departure from a life sentence" for her felony murder conviction and instead "sought a sanction of between 147 to 165 months in prison."[318] Felony sentencing in Kansas is divided into crimes that are addressed by statutory sentencing grids and those not addressed by the grids.[319] Nguyen argued that because the applicable state statute, K.S.A. § 21-6806(c), does not provide guidance on durational departures for off-grid crimes, "sentencing courts have discretion to grant them—at least for felony murder."[320] The State, however, argued that this lack of guidance indicated the legislature's intent to prohibit judicial discretion.[321]

The Supreme Court of Kansas ultimately held that the statute does not allow courts to have discretion to grant durational sentencing departures for felony murder.[322] The court looked to its prior decisions in *State v. Heath*[323] and *State v. Brown*,[324] in which it consistently held that a felony murder conviction carries a mandatory life sentence.[325] However, the court also analyzed statutory language prohibiting the sentence from being subject to "statutory provisions

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[312] *Id.* at 1075.
[313] *Id.*
[314] *Id.*
[315] *Id.*; *see also* Chapman v. California, 366 U.S. 18, 24 (1967).
[316] *Sherman*, 378 P.3d at 1075 (quoting State v. Ward, 256 P.3d 801, 805 (Kan. 2011)).
[317] State v. Nguyen, 372 P.3d 1142, 1142–43, 1147 (Kan. 2016).
[318] *Id.* at 1143.
[319] *See id.* (noting that felony murder is an off-grid crime for sentencing purposes).
[320] *Id.*
[321] *Id.*
[322] *Id.* at 1147. The court also noted that it "doubt[ed] that the legislature intended for the crimes" of capital murder, first-degree murder, terrorism, illegal use of weapons of mass destruction, and treason "to be eligible for a durational departure from a life sentence" *Id.* at 1146.
[323] State. Heath, 179 P.3d 403 (Kan. 2008).
[324] State v. Brown, 331 P.3d 781 (Kan. 2014).
[325] *Nguyen*, 372 P.3d at 1144–45.

for suspended sentence, community service or probation."[326] Noting that the state legislature could have chosen to substantively alter the relevant statute to include language affording courts discretion to grant durational sentencing departures after the *Heath* and *Brown* holdings, the court concluded that the legislature had never intended for courts to have such discretion when it failed to make that type of statutory change.[327] Therefore, the court held against the defendant and found that courts do not have discretion under the statute to grant durational sentencing departures for a life sentence associated with felony murder.[328]

State v. Bunyard, No. 112,645, 2016 WL 1719607 (Kan. Ct. App. Apr. 29, 2016)

Full Case Citation: State v. Bunyard, 369 P.3d 342, No. 112,645, 2016 WL 1719607 (Kan. Ct. App. Apr. 29, 2016) (unpublished table decision).

2016 CPS Section: VI.B.1. – Sentencing / Kansas Sentencing / Sentencing Determination

Summary:

The Kansas Court of Appeals clarified that expunged misdemeanor and felony convictions "must be taken into account in determining a defendant's criminal history."[329] The defendant argued that his six misdemeanor battery convictions should not be scored because they had been expunged.[330] He argued expungements should not be scored because K.S.A. § 21-6810(d)(2) of the Kansas sentencing guidelines explicitly included expungements while K.S.A. § 21-6810(d)(5) did not.[331]

The court rejected the defendant's argument for three reasons. First, K.S.A. § 28-6810(a) lists the types of prior convictions to take into account when determining the criminal history of a defendant.[332] These include battery and make no mention of expungement.[333] Second, the statutory definitions of "criminal history" and "criminal history score" make no mention of expungements.[334] Finally, and perhaps most significantly, the Kansas statute regarding expungements explicitly states that expungments may be considered as prior convictions when determining which sentence should be imposed.[335]

Construing the criminal code as a whole, the court found "clear legislative intent that expunged convictions, whether for felonies or misdemeanors, be scored for criminal history

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[326] *Id.* at 1145 (quoting KAN. STAT. ANN. § 21-6806(c) (Supp. 2016)).
[327] *Id.* at 1145–46.
[328] *Id.* at 1147.
[329] State v. Bunyard, 369 P.3d 342, No. 112,645, 2016 WL 1719607, at *16 (Kan. Ct. App. 2016) (unpublished table decision).
[330] *Id.* at *15.
[331] *Id. Compare* KAN. STAT. ANN. §21-6810(d)(2) (Supp. 2016) ("All prior adult felony convictions, *including expungements*, will be considered and scored.") (emphasis added), *with* KAN. STAT. ANN. §21-6810(d)(5) (Supp. 2016) ("All person misdemeanors, class A nonperson misdemeanors and class B select nonperson misdemeanors, and all municipal ordinance and county resolution violations comparable to such misdemeanors, shall be considered and scored.").
[332] *Bunyard*, 2016 WL 1719607, at *16 (citing KAN. STAT. ANN. §21-6810(a) (Supp. 2015)).
[333] *Id.*
[334] *Id.* (citing KAN. STAT. ANN. § 21-6803(c)–(d) (Supp. 2015)).
[335] *Id.* (citing KAN. STAT. ANN. § 21-6614f(i)(1) (Supp. 2015) (current version at KAN. STAT. ANN. § 21-6614g(i)(1) (Supp. 2016)).

purposes."[336] The court conceded that this construction left the phrase "including expungements" in K.S.A. § 21-6810(d)(2) meaningless or vestigial.[337] Despite this, the court found "the no-surplusage rule of construction" had to "yield to otherwise obvious legislative intent and purpose," meaning that misdemeanor and felony expungements should be included in criminal history scores.[338]

State v. Hankins, 372 P.3d 1124 (Kan. 2016)

Full Case Citation: State v. Hankins, 372 P.3d 1124 (Kan. 2016).

2016 CPS Section: VI.B.1. – Sentencing / Kansas Sentencing / Sentencing Determination

Summary:

In *State v. Hankins*, the Kansas Supreme Court summarized and clarified the procedure for determining the effect of out-of-state sentences on sentencing. The defendant, Hankins, filed a motion to correct an illegal sentence because he argued that the trial court wrongfully considered a deferred judgment from Oklahoma in his sentencing calculation.[339] The State argued that Kansas law required such deferred judgments from other states to be included in sentencing determinations.[340] The Supreme Court of Kansas found that there was a discrepancy between Kansas and Oklahoma's statutory standards for an entry of a judgment of guilt.[341] Under Kansas law, the court concluded that a conviction requires a judgment of guilt.[342] However, under Oklahoma law, "an entry of judgment will not be entered for an offender who successfully completes a deferred judgment.[343] The initial conditions are to be imposed 'without entering a judgment of guilt.'"[344] Therefore, the court found that no conviction could be imported from Oklahoma because Hankins had received a deferred judgment, which, under Oklahoma's statute, does not result in a judgment of guilt.[345] Thus, the court vacated Hankins' sentence and remanded his case.[346]

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[336] *Id.*
[337] *Id.*
[338] *Id.* (citing State v. Schreiner, 264 P.3d 1033, 1039–40 (Kan. Ct. App. 2011)).
[339] State v. Hankins, 372 P.3d 1124, 1127 (Kan. 2016).
[340] *Id.*
[341] *Id.* at 1131–33.
[342] *Id.* at 1131.
[343] *Id.*
[344] *Id.* (quoting OKLA. STAT. tit. 22, § 991c(A) (Supp. 1998)).
[345] *Id.*
[346] *Id.* at 1133.

State v. Moore, 377 P.3d 1162 (Kan. Ct. App.), *review granted* (Dec. 13, 2016)

Full Case Citation: State v. Moore, 377 P.3d 1162 (Kan. Ct. App.), *review granted*, 2016 Kan. LEXIS 796 (Dec. 13, 2016).

2016 CPS Section: VI.B.1. – Sentencing / Kansas Sentencing / Sentencing Determination

Summary:

In *State v. Moore*, the Kansas Court of Appeals held that courts do not implicate the *Apprendi* rule when classifying out-of-state convictions for sentencing purposes.[347] The defendant, Moore, challenged his sentence on the grounds that the district court violated the *Apprendi* rule when classifying his past out-of-state conviction.[348] Under the *Apprendi* rule, "because of the Sixth Amendment right to a jury trial, '[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'"[349] In Kansas, when a district court determines a defendant's criminal history score, the court must classify whether a past out-of-state conviction is a felony, and whether that felony is a person or a nonperson felony.[350] A district court does so by comparing the out-of-state conviction statute with the Kansas statutes.[351] Moore argued that this process violates his right to a jury trial under *Apprendi* because a court has to make factual determinations when comparing the two statutes, which can increase sentences.[352]

The Kansas Court of Appeals disagreed with Moore and held that his conviction does not implicate *Apprendi*.[353] The court reasoned that district courts only look at the statutory elements of the past conviction and do not do any fact-finding.[354] The Kansas Court of Appeals distinguished *Moore* from *State v. Dickey*[355] because *Dickey* involved additional fact-finding on the issue of whether the past conviction involved a "dwelling."[356] The court emphasized that Kansas does not require that the past out-of-state conviction statute be "identical or narrower" than the comparable Kansas offense.[357] Instead, the statute only must be comparable.[358] This holding overturns several other Kansas Court of Appeals cases that have held that it must be identical or narrower based on *Dickey*.[359] The Kansas Supreme Court granted review of *Moore* on December 13, 2016.[360]

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[347] State v. Moore, 377 P.3d 1162, 1173 (Kan. Ct. App.), *review granted* 2016 Kan. LEXIS 796 (Kan. Dec. 13, 2016); *see also* Apprendi v. New Jersey, 530 U.S. 446 (2000).
[348] *Moore*, 377 P.3d at 1164.
[349] *Id.* at 1167 (quoting *Apprendi*, 530 U.S. at 490).
[350] *Id.* at 1166–67.
[351] *Id.* at 1167.
[352] *Id.* at 1164.
[353] *See id.* at 1173.
[354] *Id.*
[355] State v. Dickey, 350 P.3d 1054 (Kan. 2015).
[356] *Moore*, 377 P.3d at 1169.
[357] *Id.* at 1171.
[358] *Id.*
[359] *Id.* at 1172 (citing cases such as State v. Mullens, 360 P.3d 1107 (Kan. Ct. App. 2015) and other similar unpublished cases).
[360] State v. Moore, 2016 Kan. LEXIS 796 (Kan. Dec. 13, 2016).

State v. Bernhardt, 372 P.3d 1161 (Kan. 2016)

Full Case Citation: State v. Bernhardt, 372 P.3d 1161 (Kan. 2016).

2016 CPS Section: VI.B.1. – Sentencing / Kansas Sentencing / Sentencing Determination

Summary:

In *State v. Bernhardt*, the Kansas Supreme Court clarified that an amendment to Kansas law imposing a hard 50 sentence could be applied retroactively because the change to the statute was merely procedural and did not alter the definition of criminal conduct or increase the penalty by which the conduct was punished.[361]

In *Alleyne v. United States*, the United States Supreme Court ruled that proof beyond a reasonable doubt and submission to a jury are required to increase a mandatory minimum sentence from a hard 25 to a hard 50.[362] In light of that ruling, the Kansas Supreme Court invalidated the Kansas hard 50 statute as unconstitutional because it only required a preponderance of the evidence standard for aggravating factors.[363] The Kansas legislature changed the statute to comply with these rulings.[364]

In *Bernhardt*, the defendant committed his crime before the legislature amended the statute, but was sentenced after the statute's effective date.[365] The defendant argued that his hard 50 sentence was in violation of the United States Constitution's Ex Post Facto clause, which prohibits retroactive convictions.[366] The Kansas Supreme Court held, however, that two elements must be present for an ex post facto challenge to be upheld: "(1) [t]he law must be retrospective, applying to events occurring before its enactment, and (2) it must alter the definition of criminal conduct or increase the penalty by which a crime is punishable."[367] The court found that the Kansas hard 50 amendment did neither, as it only changed the procedure by which the sentence was imposed, not the sentence itself.[368] "Likewise, Bernhardt had fair warning at the time he murdered [the victim] that he could be sentenced to a hard 50 term if he was ultimately convicted of premeditated first-degree murder."[369]

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[361] State v. Bernhardt, 372 P.3d 1161, 1176 (Kan. 2016).
[362] Alleyne v. United States, 133 S. Ct. 2151, 2158 (2013).
[363] State v. Soto, 322 P.3d 334, 349 (Kan. 2014).
[364] *Bernhardt*, 372 P.3d at 1175 (citing KAN. STAT. ANN. § 21-6620(e) (Supp. 2014)).
[365] *Id.* at 1174.
[366] U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto Law . . . .").
[367] *Bernhardt*, 372 P.3d at 1175 (citation omitted) (quoting State v. Prine, 303 P.3d 662, 669–70 (Kan. 2013)).
[368] *Id.* at 1176.
[369] *Id.*

State v. Brown, 368 P.3d 1101 (Kan. 2016)

Full Case Citation: State v. Brown, 368 P.3d 1101 (Kan. 2016).

2016 CPS Section: VI.B.1. – Sentencing / Kansas Sentencing / Sentencing Determination

Summary:

In *State v. Brown*, the Kansas Supreme Court clarified that sentences longer than "twice the base sentence" for on-grid crimes do not violate K.S.A. § 21-6819(b)(4) when the defendant is also charged with off-grid crimes. The defendant, Brown, was charged with several on-grid felonies in connection with a drug-related killing, including aggravated robbery, aggravated burglary, criminal possession of a firearm, and criminal discharge of a firearm.[370] In addition, he was charged with the off-grid felony of first-degree felony murder based on the killing of the victim in combination with at least one of the aforementioned felony charges.[371] After the jury returned guilty verdicts on all charges, the judge imposed a hard 20 life sentence for the off-grid felony murder conviction plus a consecutive sixty-month sentence and accompanying concurrent sentences for the on-grid felonies.[372]

Brown challenged his hard 20 life sentence on appeal, claiming that it was illegal in light of K.S.A. § 21-6819(b)(4), which limits the total prison sentence that can be imposed in cases involving multiple convictions to twice the base sentence.[373] The statute specifically forbids using an off-grid crime (in this case, felony murder) as the "primary crime" in sentencing, and the district judge had used Brown's aggravated burglary conviction as the primary crime in determining the consecutive sixty-month sentence.[374] Brown sought a ruling that the total length of a sentence in a case involving both on-grid and off-grid convictions could not exceed twice the longest *on-grid* sentence.[375] He argued, in effect, that his total sentence could not exceed 120 months, and that the hard 20 life sentence for his felony murder conviction was therefore illegal.[376]

The Kansas Supreme Court held that K.S.A. § 21-6819(b)(4) does not control sentencing for off-grid felonies, and that Brown's sentence was therefore legal.[377] The court faulted Brown for considering K.S.A. § 21-6819(b)(4) in isolation rather than in context with separate statutes that specifically addressed off-grid felonies.[378] The court pointed to three other statutes relevant to Brown's off-grid felony murder conviction: K.S.A. § 21-6806(c), requiring life imprisonment for off-grid crimes; K.S.A. § 22-3717(b)(3), governing parole eligibility for life terms not covered by other mandatory minimums; and K.S.A. § 21-6623, requiring prisoners to serve twenty years before release.[379] It also noted that Brown's position was inconsistent with

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[370] State v. Brown, 368 P.3d 1101, 1104 (Kan. 2016).
[371] *Id.*
[372] *Id.* at 1106.
[373] *Id.* at 1108.
[374] *Id.* at 1109.
[375] *Id.*
[376] *See id.*
[377] *Id.*
[378] *Id.* (citing State v. Hobbs, 340 P.3d 1179, 1184 (Kan. 2015) (explaining that the "court considers provisions of an act *in pari materia* with view to reconciling, bringing provisions into workable harmony")).
[379] *Brown*, 368 P.3d at 1109.

legislative intent, pointing out that his interpretation would eliminate the legislature's prescribed life sentences for off-grid crimes where perpetrators just happened to also be charged with on-grid crimes.[380] The court concluded by stating that K.S.A. § 21-6819(b)(4) "refers only to the total maximum sentence received for multiple *on-grid* crimes in one case."[381]

State v. Medina, 384 P.3d 26 (Kan. Ct. App. 2016)

Full Case Citation: State v. Medina, 384 P.3d 26 (Kan. Ct. App. 2016).

2016 CPS Section: VI.B.3. – Sentencing / Kansas Sentencing / Constitutional Challenges

Summary:

In *State v. Medina*, the Kansas Court of Appeals extended the holding in *State v. Dull*[382] to find that mandatory lifetime post-release supervision for juveniles convicted of a sex offense violates the Eighth Amendment's prohibition against cruel and unusual punishment.[383] The defendant, Medina, pled no contest to one count of aggravated criminal sodomy, which he committed as a minor.[384] As part of the plea deal, the sentencing judge imposed a sentence of 165 months imprisonment and lifetime post-release supervision.[385] Medina appealed the ruling, arguing that mandatory lifetime post-release supervision for juveniles convicted of a sex offense is unconstitutional.[386]

After determining that it could hear a categorical proportionality challenge under the Eighth Amendment for the first time on appeal, the Kansas Court of Appeals reviewed Medina's claim de novo.[387] Medina relied on *Dull* in his appeal, in which the Kansas Supreme Court held that mandatory lifetime post-release supervision violated the Eighth Amendment when applied to juveniles convicted of indecent liberties with a child.[388] Medina argued that the holding in *Dull* should be extended to *all* sex crimes committed by juveniles rather than being limited to indecent liberties with a child.[389]

The Kansas Court of Appeals agreed with Medina and held that *Dull* should extend to all sex crimes committed by juveniles.[390] In reaching this conclusion, it reexamined *Dull* and noted that while *Dull*'s holding was limited to the indecent liberties charge, the Kansas Supreme Court used broad language and reasoning to suggest that its holding applied to juveniles convicted of any sex offense.[391] The Kansas Court of Appeals pointed to the Kansas Supreme Court's references to "juvenile sex offenders" generally, and to its reliance on case law that treated juveniles as a class rather than considering particular juveniles convicted of particular crimes.[392]

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[380] *See id.*
[381] *Id.* (emphasis added).
[382] State v. Dull, 351 P.3d 641 (Kan. 2015).
[383] State v. Medina, 384 P.3d 26, 32 (Kan. Ct. App. 2016).
[384] *Id.* at 28.
[385] *Id.*
[386] *Id.* at 28.
[387] *Id.* at 28–29.
[388] State v. Dull, 351 P.3d 641, 660 (Kan. 2015).
[389] *Medina*, 384 P.3d at 29.
[390] *Id.* at 32.
[391] *Id.* at 30–32.
[392] *Id.* at 31.

It also pointed to the Kansas Supreme Court's own observation that none of the factors it considered in determining whether juveniles deserved different treatment than adults under the Eighth Amendment was crime specific.[393] The Kansas Court of Appeals concluded that mandatory lifetime post-release supervision is categorically unconstitutional for juveniles convicted of any sex offense.[394]

State v. Petersen-Beard, 377 P.3d 1127 (Kan. 2016)

Full Case Citation: State v. Petersen-Beard, 377 P.3d 1127 (Kan. 2016).

2016 CPS Section: VI.B.3. – Sentencing / Kansas Sentencing / Constitutional Challenges

Summary:

In *State v. Petersen-Beard*, the Kansas Supreme Court overruled its contrary decisions in *Doe v. Thompson*,[395] *State v. Buser*,[396] and *State v. Redmond*[397] to hold that the Kansas Offender Registration Act's ("KORA") requirement of lifetime sex offender registration is constitutional because it is not punishment; therefore, it cannot be cruel or unusual.[398] The defendant, Petersen-Beard, pled guilty to and was convicted of one count of rape.[399] Petersen-Beard asked the district court to declare KORA's requirement of lifetime sex offender registration unconstitutional as constituting cruel or unusual punishment.[400] The district court denied this request, and the Kansas Court of Appeals affirmed this decision.[401] The Kansas Supreme Court again affirmed, finding that "KORA's requirement of lifetime sex offender registration in Petersen-Beard's case is not punishment" for purposes of applying the United States Constitution or the Kansas Constitution.[402] With these findings, the court did not have to go through the analysis of determining whether the KORA lifetime registration was cruel or unusual.[403] Moreover, by deciding KORA's registration provision does not constitute punishment and is not punitive, the court overruled its contrary decisions in *Thompson*, *Buser*, and *Redmond*.[404] In its explanation of why KORA does not constitute punishment, the court found that the legislature did not intend KORA to be punishment,[405] and incorporated the dissent in *Thompson*, which explained that because KORA's purposes or effects are not punitive, the statute is not a form of punishment.[406]

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[393] *Id.* (citing *Dull*, 351 P.3d at 659).
[394] *Id.* at 32.
[395] Doe v. Thompson, 373 P.3d 750 (Kan.), *overruled by* State v. Petersen-Beard, 377 P.3d 1127 (Kan. 2016).
[396] State v. Buser, 371 P.3d 886 (Kan.), *overruled by* State v. Petersen-Beard, 377 P.3d 1127 (Kan. 2016).
[397] State v. Redmond, 371 P.3d 900 (Kan.), *overruled by* State v. Petersen-Beard, 377 P.3d 1127 (Kan. 2016).
[398] *Petersen-Beard*, 377 P.3d at 1140–41.
[399] *Id*. at 1129.
[400] *Id.*; *see* Kansas Offender Registration Act, KAN. STAT. ANN. §§ 22-4901 to -4913 (2007 & Supp. 2016).
[401] *Petersen-Beard*, 377 P.3d at 1129.
[402] *Id.* at 1129–40 (evaluating the United States Constitution); *id.* at 1140–41 (evaluating the Kansas Constitution).
[403] *Id.* at 1140.
[404] *Id.* at 1131.
[405] *Id.* at 1130–31.
[406] *See id.* at 1331–40 (quoting Doe v. Thompson, 373 P.3d 750, 772–81 (Kan.) (Biles, J., concurring in part and dissenting in part), *overruled by* State v. Petersen-Beard, 377 P.3d 1127 (Kan. 2016)).

VII. POST-TRIAL ISSUES

State v. Barlow, 368 P.3d 331 (Kan. 2016)

Full Case Citation: State v. Barlow, 368 P.3d 331 (Kan. 2016).

2016 CPS Section: VII.A.3. – Post-Trial Issues / Appeals / Judgment of Acquittal

Summary:

In *State v. Barlow*, the Kansas Supreme Court clarified that a district court judge may invoke "Stand-Your-Ground immunity to acquit the defendant after a jury verdict of guilt but before sentence had been pronounced on the conviction."[407] The defendant, Barlow, challenged the court of appeals' reinstatement of the jury conviction for attempted second-degree murder following the district court's Stand-Your-Ground order dismissing the attempted second-degree murder charge under K.S.A. § 21-5231.[408] At trial, the State charged Barlow with attempted second-degree murder and two charges of aggravated assault.[409] Barlow's defense during trial was that he used force out of necessity of protecting another; the district court judge instructed the jury to consider this theory of defense.[410] The jury convicted Barlow of attempted second-degree murder.[411] During sentencing, the district court judge *sua sponte* granted Barlow Stand-Your-Ground immunity under K.S.A. § 21-5231 on the charge of attempted second-degree murder and vacated and dismissed this charge.[412] The Kansas Court of Appeals reversed the district court's immunity order and reinstated the second-degree murder conviction.[413]

The Kansas Supreme Court granted review and reversed the court of appeals' decision.[414] First, the court found the immunity statute does prohibit the district court judge's action because the State's "prosecution" of a guilty defendant ends with sentencing.[415] Second, the court recognized that a judge may acquit a defendant if the judge believes "the evidence was insufficient to support that verdict."[416] The court further noted this case differed from *State v. Jones*,[417] where the court determined a defendant could not invoke Stand-Your-Ground immunity for the first time on appeal.[418]

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[407] State v. Barlow, 368 P.3d 331, 340 (Kan. 2016).
[408] *Id.* at 333–34.
[409] *Id.*
[410] *Id.* at 334.
[411] *Id.* The jury also convicted Barlow of one count of aggravated assault. *Id.*
[412] *Id.*
[413] *Id.*
[414] *Id.* at 341.
[415] *Id.* at 341 (citations omitted).
[416] *Id.* at 340–41 (citing KAN. STAT. ANN. § 22-3419(a) (2007); State v. Lloyd, 325 P.3d 1122, 1141 (Kan. 2014)).
[417] State v. Jones, 311 P.3d 1125, 1137 (Kan. 2016).
[418] *Barlow*, 368 P.3d at 339–41.

2016 Kan. Laws Ch. 58 (S.B. No. 319)

Full Case Citation: S.B. 319, 86th Leg., Reg. Sess. (Kan. 2016).

2016 CPS Section: VII.B.1. – Post-Trial Issues / Post-Conviction Remedies / Habeas Corpus

Summary:

Senate Bill 319 was introduced on January 12, 2016 and approved by the Governor on May 6, 2016.[419] The Bill amended K.S.A. § 60-1507, Kansas's *habeas corpus* statute.[420] When finding manifest injustice, the court may inquire only into "why the prisoner failed to file the motion within the one-year time limitation or whether the prisoner makes a colorable claim of actual innocence."[421] A prisoner may show "actual innocence" by demonstrating that "it is more likely than not that no reasonable juror would have convicted the prisoner in light of new evidence."[422] The court must provide the factual and legal basis for a manifest injustice finding in writing and serve it on both parties.[423] If the court on its own determines that the time limitations of K.S.A. § 60-1507 have expired and that dismissing the motion would not be manifestly unjust, "the district court must dismiss the motion as untimely filed."[424]

[419] S.B. 319, 86th Leg., Reg. Sess. (Kan. 2016).
[420] *See id.* at 3–4.
[421] *See id.* at 4 (modifying KAN. STAT. ANN. § 60-1507(f)(2)(A) (Supp. 2016)).
[422] *See id.* (modifying § 60-1507(f)(2)(A)).
[423] *See id.* (modifying § 60-1507(f)(2)(B)).
[424] *See id.* (modifying § 60-1507(f)(3)).