Criminal Procedure and Law: The Annual Review
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FEDERAL CONSTITUTIONAL ISSUES

FOURTEENTH AMENDMENT

[N]or shall any State deprive any person of life, liberty, or property, without due process of law.

FOURTH AMENDMENT

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

CARS


Mr. Rodriguez was stopped after an officer observed him swerve onto the shoulder and then back onto the road. The officer had a drug dog with him. The officer conducted the traffic stop in approximately 25 minutes or so. Then, he asked if Mr. Rodriguez for permission to walk his dog around the car. Mr. Rodriguez said no. The officer had Mr. Rodriguez turn off and get out of the car, and stand in front of the patrol car. Another officer came to the scene. The officer walked the dog around the car, and the dog alerted.

Arrest and prosecution for possession of methamphetamine ensued and a motion to suppress was filed. The case made its way to the Supreme Court, the dog sniff having been upheld by the lower courts.

The Court held that law enforcement may not extend a completed traffic stop, without reasonable suspicion, in order to conduct a dog sniff. Once the traffic stop is over, the basis for the police contact is done, and the police cannot simply move onto to general criminal investigation, absent reasonable suspicion. The Court remanded to the Eighth Circuit to make the reasonable suspicion determination.

Officer stopped the car in which Mr. Heien was a passenger, because one of its two brake lights was out. Heien owned the car and consented to a search, during which the officer found a baggie of cocaine. Mr. Heien moved to suppress the evidence arguing that the initial stop was not valid, because North Carolina law only required one working brake light. The Court held that the officer’s mistake of law was reasonable and that reasonable suspicion can rest on an objectively reasonable mistake of law.

SEARCH INCIDENT TO ARREST - CELL PHONES

LAST YEAR:
Riley v. California, Supreme Court Case No.: 13-132
Petition for writ of certiorari to the Court of Appeal of California, Fourth Appellate District, Division One, granted limited to the following question: Whether evidence admitted at petitioner's trial was obtained in a search of petitioner's cell phone that violated petitioner's Fourth Amendment rights.
   Phone at issue: Smart phone.

United States v. Wurie, Supreme Court Case No.: 13-212
Phone at issue: Flip phone.

DECISION - June 25, 2014
Consolidated opinion. Searches of cell phones were not permissible under search incident to arrest exception to the warrant clause. The two justifications of allowing those searches, 1) interest in officer safety and 2) interest in preserving evidence, were not present.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . , nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . .
SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

CONFRONTATION CLAUSE/CRAWFORD

REMEMBER:

Defendant’s wife gave statement to the police. She did not testify at trial based on state marital privilege. The state sought to introduce her statement to the police. The trial court permitted the use of the statement.

The Court held that 1) this statement to the police was testimonial, for Confrontation Clause purposes. “Statements taken by police officers in the course of interrogations are also testimonial. . .” 2) testimonial statements are not admissible, unless the witness making the statements is not available and the defendant had a prior opportunity for cross-examination.

Ohio v. Clark, U.S. Supreme Court Case No.: 13-1352 (Argued March 2, 2015).

Ohio’s Questions Presented
1. Does a daycare teacher’s obligation to report suspected child abuse make that teacher an “agent of law enforcement” for purposes of the Confrontation Clause?
2. Do a child’s out-of-court statements to daycare teachers in response to the teacher’s concerns about potential child abuse qualify as “testimonial” statements subject to the Confrontation Clause?

Respondent’s Question Presented
“When teachers suspect and investigate child abuse with a primary purpose of identifying the perpetrator,” . . . are answers a child gives to the teachers’ questions testimonial under the Confrontation Clause?

The child was 3 ½ year old L.P. His head start teacher noticed physical injuries to
the child, and she asked him what happened. L.P. said something like, “Dee, Dee.” Proper reporting was done and eventually L.P.’s mother’s boyfriend Dee Clark was charged. L.P. was determined to be incompetent to testify at trial, but the court allowed the teacher’s statements, over Clark’s Crawford objection. On appeal, Ohio appellate held that the statements should have been excluded, because they were testimonial.

The following is an excerpt from Lyle Denniston’s SCOTUSblog argument analysis:
http://www.scotusblog.com/2015/03/argument-analysis-it-was-all-about-a-child-at-risk/

Prosecutor Meyer came to the Court with a simple proposition: because the teacher is not a police officer, and not working for the police, she should be allowed to take the stand and recount the boy’s tale. The Confrontation Clause, he argued, should only bar the use of evidence gathered by government agents if they don’t come to court. A private citizen, he meant in his closing comment, is “just not the same” as a government agent like a police officer.

But Stanford law professor Jeffrey L. Fisher, speaking for the man convicted for harming that boy, asked the Court to provide a simple opportunity: give defense lawyers the same opportunity to talk with the little boy as the teacher, the police, and the prosecutors had as they prepared evidence for the trial. There are ways to conduct an interview with even a small child, Fisher said, that will be sensitive and caring, and have a chance to test the reliability of any story the child told.

Fisher’s own suggested approach to the Confrontation Clause was that, if an adult has heard the child’s accusations out of court, and was working within a system that ultimately leads those accusations to become evidence of a crime, the Confrontation Clause should govern.

Throughout both of their arguments, and the more abbreviated appearance of a Justice Department lawyer supporting Ohio, Ilana Eisenstein, an assistant to the U.S. Solicitor General, the analysis almost continuously focused on the small boy, who is known in the case only by his initials, “L.P.”

The Justices wondered how it was that his story would be considered credible if he was too young to be a witness, and whether the Confrontation Clause even applied to a potential witness who was too little to think about helping the police find the person who hurt him. But even when the questioning turned to the role of the teachers to whom the boy told his story of abuse, the Court’s members were much more intent on trying to sort out what a teacher’s first obligation would be. . . .
The constitutional understanding that the Court has been developing for the past eleven years, Justice Elena Kagan commented at one point, “doesn’t fit very well” when a three-year-old boy is the one whose evidence prosecutors want to lay before a jury.

EIGHTH AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

General Death Penalty Jurisprudence

Tuilepa v. California, 512 U.S. 967 (1994)
Our capital punishment cases under the Eighth Amendment address two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision. To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment. Coker v. Georgia, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977). To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one “aggravating circumstance” (or its equivalent) at either the guilt or penalty phase. See, e.g., Lowenfield v. Phelps, 484 U.S. 231, 244–246, 108 S.Ct. 546, 554–555, 98 L.Ed.2d 568 (1988); Zant v. Stephens, 462 U.S. 862, 878, 103 S.Ct. 2733, 2743, 77 L.Ed.2d 235 (1983). The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both). Lowenfield, supra, at 244–246, 108 S.Ct., at 554–555. As we have explained, the aggravating circumstance must meet two requirements. First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. See Arave v. Creech, 507 U.S. 463, 474, 113 S.Ct. 1534, 1542, 123 L.Ed.2d 188 (1993) (“If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm”). Second, the aggravating circumstance may not be unconstitutionally vague. Godfrey v. Georgia, 446 U.S. 420, 428, 100 S.Ct. 1759, 1764–1765, 64 L.Ed.2d 398 (1980); see Arave, supra, 507 U.S., at 471, 113 S.Ct., at 1541 (court “‘must first determine whether the statutory language defining the circumstance is itself too vague to provide any guidance to the sentencer’”) (quoting Walton v. Arizona, 497 U.S. 639, 654, 110 S.Ct. 3047, 3057–3058, 111 L.Ed.2d 511 (1990)).

We have imposed a separate requirement for the selection decision, where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence. “What is important at the selection stage is an individualized determination on

**Kansas Capital Murder and Penalty laws**

K.S.A. 21-5401(As amended March 12, 2014).

(a) Capital murder is the:

(1) Intentional and premeditated killing of any person in the commission of kidnapping, as defined in subsection (a) of K.S.A. 2013 Supp. 21-5408, and amendments thereto, or aggravated kidnapping, as defined in subsection (b) of K.S.A. 2013 Supp. 21-5408, and amendments thereto, when the kidnapping or aggravated kidnapping was committed with the intent to hold such person for ransom;

(2) intentional and premeditated killing of any person pursuant to a contract or agreement to kill such person or being a party to the contract or agreement pursuant to which such person is killed;

(3) intentional and premeditated killing of any person by an inmate or prisoner confined in a state correctional institution, community correctional institution or jail or while in the custody of an officer or employee of a state correctional institution, community correctional institution or jail;

(4) intentional and premeditated killing of the victim of one of the following crimes in the commission of, or subsequent to, such crime: Rape, as defined in K.S.A. 2013 Supp. 21-5503, and amendments thereto, criminal sodomy, as defined in subsections (a)(3) or (a)(4) of K.S.A. 2013 Supp. 21-5504, and amendments thereto, or aggravated criminal sodomy, as defined in subsection (b) of K.S.A. 2013 Supp. 21-5504, and amendments thereto, or any attempt thereof, as defined in K.S.A. 2013 Supp. 21-5301, and amendments thereto;

(5) intentional and premeditated killing of a law enforcement officer;
(6) intentional and premeditated killing of more than one person as a part of the same act or transaction or in two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct; or

(7) intentional and premeditated killing of a child under the age of 14 in the commission of kidnapping, as defined in subsection (a) of K.S.A. 2013 Supp. 21-5408, and amendments thereto, or aggravated kidnapping, as defined in subsection (b) of K.S.A. 2013 Supp. 21-5408, and amendments thereto, when the kidnapping or aggravated kidnapping was committed with intent to commit a sex offense upon or with the child or with intent that the child commit or submit to a sex offense.

(b) For purposes of this section, "sex offense" means rape, as defined in K.S.A. 2013 Supp. 21-5503, and amendments thereto, aggravated indecent liberties with a child, as defined in subsection (b) of K.S.A. 2013 Supp. 21-5506, and amendments thereto, aggravated criminal sodomy, as defined in subsection (b) of K.S.A. 2013 Supp. 21-5504, and amendments thereto, selling sexual relations, as defined in K.S.A. 2013 Supp. 21-6419, and amendments thereto, promoting the sale of sexual relations, as defined in K.S.A. 2013 Supp. 21-6420, and amendments thereto, commercial sexual exploitation of a child, as defined in K.S.A. 2013 Supp. 21-6422, and amendments thereto, or sexual exploitation of a child, as defined in K.S.A. 2013 Supp. 21-5510, and amendments thereto.

(c) Capital murder or attempt to commit capital murder is an off-grid person felony.

K.S.A. 2013 Supp. 21-6617 (as amended March 12, 2014):

(a) If a defendant is charged with capital murder, the county or district attorney shall file written notice if such attorney intends, upon conviction of the defendant, to request a separate sentencing proceeding to determine whether the defendant should be sentenced to death. In cases where the county or district attorney or a court determines that a conflict exists, such notice may be filed by the attorney general. Such notice shall be filed with the court and served on the defendant or the defendant's attorney not later than seven days after the time of arraignment. If such notice is not filed and served as required by this subsection, the prosecuting attorney may not request such a sentencing proceeding and the defendant, if convicted of capital murder, shall be sentenced to life without the possibility of parole, and no sentence of death shall be imposed hereunder.

(b) Except as provided in K.S.A. 2013 Supp. 21-6618 and 21-6622, and amendments thereto, upon conviction of a defendant of capital murder, the court, upon motion of the
prosecuting attorney, shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If any person who served on the trial jury is unable to serve on the jury for the sentencing proceeding, the court shall substitute an alternate juror who has been impaneled for the trial jury. If there are insufficient alternate jurors to replace trial jurors who are unable to serve at the sentencing proceeding, the trial judge may summon a special jury of 12 persons which shall determine the question of whether a sentence of death shall be imposed. Jury selection procedures, qualifications of jurors and grounds for exemption or challenge of prospective jurors in criminal trials shall be applicable to the selection of such special jury. The jury at the sentencing proceeding may be waived in the manner provided by K.S.A. 22-3403, and amendments thereto, for waiver of a trial jury. If the jury at the sentencing proceeding has been waived or the trial jury has been waived, the sentencing proceeding shall be conducted by the court.

(c) In the sentencing proceeding, evidence may be presented concerning any matter that the court deems relevant to the question of sentence and shall include matters relating to any of the aggravating circumstances enumerated in K.S.A. 2013 Supp. 21-6624, and amendments thereto, and any mitigating circumstances. Any such evidence which the court deems to have probative value may be received regardless of its admissibility under the rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. Only such evidence of aggravating circumstances as the state has made known to the defendant prior to the sentencing proceeding shall be admissible, and no evidence secured in violation of the constitution of the United States or of the state of Kansas shall be admissible. No testimony by the defendant at the sentencing proceeding shall be admissible against the defendant at any subsequent criminal proceeding. At the conclusion of the evidentiary presentation, the court shall allow the parties a reasonable period of time in which to present oral argument.

(d) At the conclusion of the evidentiary portion of the sentencing proceeding, the court shall provide oral and written instructions to the jury to guide its deliberations.

(e) If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 2013 Supp. 21-6624, and amendments thereto, exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced to life without the possibility of parole. The jury, if its verdict is a unanimous recommendation of a sentence of death, shall designate in writing, signed by the foreman of the jury, the statutory aggravating circumstances which it found beyond a reasonable
If, after a reasonable time for deliberation, the jury is unable to reach a verdict, the judge shall dismiss the jury and impose a sentence of life without the possibility of parole and shall commit the defendant to the custody of the secretary of corrections. In nonjury cases, the court shall follow the requirements of this subsection in determining the sentence to be imposed.

(f) Notwithstanding the verdict of the jury, the trial court shall review any jury verdict imposing a sentence of death hereunder to ascertain whether the imposition of such sentence is supported by the evidence. If the court determines that the imposition of such a sentence is not supported by the evidence, the court shall modify the sentence and sentence the defendant to life without the possibility of parole, and no sentence of death shall be imposed hereunder. Whenever the court enters a judgment modifying the sentencing verdict of the jury, the court shall set forth its reasons for so doing in a written memorandum which shall become part of the record.

(g) A defendant who is sentenced to imprisonment for life without the possibility of parole shall spend the remainder of the defendant's natural life incarcerated and in the custody of the secretary of corrections. A defendant who is sentenced to imprisonment for life without the possibility of parole shall not be eligible for commutation of sentence, parole, probation, assignment to a community correctional services program, conditional release, postrelease supervision, functional incapacitation release pursuant to K.S.A. 22-3728, and amendments thereto, or suspension, modification or reduction of sentence. Upon sentencing a defendant to imprisonment for life without the possibility of parole, the court shall commit the defendant to the custody of the secretary of corrections and the court shall state in the sentencing order of the judgment form or journal entry, whichever is delivered with the defendant to the correctional institution, that the defendant has been sentenced to imprisonment for life without the possibility of parole.

**Lethal injection**


To constitute cruel and unusual punishment, an execution method must present a “substantial” or “objectively intolerable” risk of serious harm. A State's refusal to adopt proffered alternative procedures may violate the Eighth Amendment only where the alternative procedure is feasible, readily implemented, and in fact significantly reduces a substantial risk of severe pain.

(a) This Court has upheld capital punishment as constitutional. See *Gregg v. Georgia, 428 U.S. 153, 177, 96 S.Ct. 2909, 49 L.Ed.2d 859*. Because some risk of pain is inherent in even the most humane execution method, if only from the prospect of error in following
the required procedure, the Constitution does not demand the avoidance of all risk of pain. Petitioners contend that the Eighth Amendment prohibits procedures that create an “unnecessary risk” of pain, while Kentucky urges the Court to approve the “‘substantial risk’” test used below.

(b) This Court has held that the Eighth Amendment forbids “punishments of torture, ... and all others in the same line of unnecessary cruelty,” Wilkerson v. Utah, 99 U.S. 130, 136, 25 L.Ed. 345, such as disemboweling, beheading, quartering, dissecting, and burning alive, all of which share the deliberate infliction of pain for the sake of pain, id., at 135. Observing also that “[p]unishments are cruel when they involve torture or a lingering death[,] ... something inhuman and barbarous [and] ... more than the mere extinguishment of life,” the Court has emphasized that an electrocution statute it was upholding “was passed in the effort to devise a more humane method of reaching the result.” In re Kemmler, 136 U.S. 436, 447, 10 S.Ct. 930, 34 L.Ed. 519.

THIS YEAR’S CASE

Challenge to Oklahoma’s use of midazolam hydrochloride in its lethal injection protocol. Tenth Circuit had rejected the challenge. The inmates argued that inherent characteristics of midazolam make it unsuitable as an anesthetic and its use posed a substantial risk of an inmate would experience “severe pain” and a “lingering death.”

Along with the usual argument over fact-finding and the drug’s properties, the argument swerved to explicit questions about the reasons states can’t get certain drugs.

The following is an excerpt from Lyle Denniston’s SCOTUSblog argument analysis: http://www.scotusblog.com/2015/04/argument-analysis-impatience-with-death-penalty-resistance/

“Let’s be honest about what’s going on here,” Alito began. He mentioned how controversial the death penalty is, and said its opponents would be free to continue to try to get it abolished. But, he said, until that happens, “is it appropriate for the judiciary to countenance what amounts to a guerilla war against the death penalty which consists of efforts to make it impossible for the states to obtain drugs that could be used to carry out capital punishment with little, if any, pain?”

He went on: “And so the states are reduced to using drugs like this one [midazalom] which give rise to disputed about whether, in fact, every possibility of pain is eliminated.”

After Konrad replied that it was the duty of the courts to decide whether a method of
execution was constitutional, Justice Antonin Scalia took up Alito’s point. The states, Scalia said, have tried other drugs, and those have been made unavailable “by the abolitionists putting pressure on the companies that manufacture them so that the states cannot obtain those other drugs.” The reason midazolam may not be “100 percent” certain to mask pain, he added, “is because the abolitionists have rendered it impossible to get the 100 percent sure drugs, and you think we should not view that as relevant to the decision that you’re putting before us?”

The inmates’ lawyers tried to respond that it was irrelevant, because the Court was obliged to examine the constitutionality of a particular protocol a state chose to use. When the argument seemed to move on, Justice Anthony M. Kennedy insisted, with evident impatience, that Konrad had not answered the question of whether the resistance to the death penalty was a factor that the Court should consider in weighing the validity of a given protocol.

**KANSAS DEATH PENALTY CASES**

**Three cases before the U.S. Supreme Court:**


Whether the Eighth Amendment requires that a capital-sentencing jury be affirmatively instructed that mitigating circumstances “need not be proven beyond a reasonable doubt,” as the Kansas Supreme Court held in this case, or instead whether the Eighth Amendment is satisfied by instructions that, in context, make clear that each juror must individually assess and weigh any mitigating circumstances.


The Carr brothers’ cases present the same jury instruction issue as *Gleason.* The second issue in these cases concerns the Kansas Supreme Court’s ruling that the trial court’s failure to sever the sentencing phases violated each defendant’s Eighth Amendment right to individualized sentencing.

**One attorney disbarment:**


Dennis Hawver represented Phillip Cheatham in Cheatham’s capital murder trial.
Mr. Hawver had never tried a capital case and had not tried a murder case in 20 years. Mr. Hawver failed Judge Bullock’s competency equation: Get competent, get help, or get out. Mr. Cheatham’s case was reversed on appeal for ineffective assistance of counsel. *State v. Cheatham*, 296 Kan. 417 (2013). This disciplinary proceeding followed.

Mr. Hawver defended his representation on two broad bases: 1. First Amendment 2. Sixth Amendment. He also claimed that he was shielded from discipline because his client approved the strategic decisions, that Hawver was free to make decisions about what investigations to pursue, and that the ABA guidelines cannot be used as a determinative measure of competence.

Taking the last three challenges first, the Court summed up its conclusion in the headers to its analysis: “A lawyer must undertake a client’s objectives competently;” “Decisions about pretrial investigations must be informed;” and “The panel’s conclusions were not based solely on ABA guidelines.”

On the First Amendment challenge, the Court determined that there was no protected speech at issue. The Court set out caselaw that governs First Amendment/free speech issues for an attorney during his representation of a client.

The Court rejected the Sixth Amendment challenge as an unavailable defense in a disciplinary proceeding. Besides, that Court observed, Hawver was not excused from discipline because Cheatham asked Hawver to represent him, nor was Hawver excused from discipline arising during the course of that representation.
KANSAS CRIMINAL LAW/PROCEDURE ISSUES

EYEWITNESS IDENTIFICATION - EXPERT TESTIMONY


Defense proffered the testimony of an expert on eyewitness evidence. Relying on prior Kansas Supreme Court precedent holding that such expert testimony should not be admitted, the trial court denied admission. Mr. Carr challenged that ruling on appeal, and the Kansas Supreme Court revisited the issue. The Court recognized the concerns that come with eyewitness identifications and determined that expert testimony could aid the jury. The Court abrogated its prior holding that held that such evidence was automatically excluded. The district court abused its discretion, but the Court found that the exclusion was harmless.

PLEAS and WAIVERS


Ms. Bennett pleaded guilty to second degree murder and agreed to an upward durational departure sentence of 300 months, and waived her right to appeal the sentence. The State had reduced the charge from off-grid first degree murder.

The procedure used to impose the 300 month departure sentence clearly did not comply with the statutory provisions and was unconstitutional under Apprendi. The Court determined that Ms. Bennett’s waiver did not apply to a challenge to the procedure, as her waiver was to the resulting sentence. The Court also reviewed the record and determined that it was ambiguous on the sentence appeal waiver. The Court held that:

To implement a plea agreement like the one contemplated here, the defendant must voluntarily, knowingly, and intelligently waive the right to a jury trial regarding guilt; voluntarily, knowingly, and intelligently waive the submission of aggravating factors to a jury to be proved beyond a reasonable doubt; and voluntarily, knowingly, intelligently, and unambiguously waive the right to appeal an upward durational departure sentence. Those things can be done, but they were not done here. Bennett’s unconstitutional sentence cannot be allowed to stand, regardless of her purported sentence appeal waiver.
SELF-DEFENSE - BATTERED WOMAN SYNDROME


Uneasy relationship between self-defense and battered woman syndrome. Or perhaps a defense attorney’s misunderstanding.

SELF-DEFENSE - IMMUNITY


PETITION FOR REVIEW FILED. Mr. Hardy was charged with aggravated battery. He filed a motion claiming self-defense immunity. The district court held a hearing and determined that it would review the preliminary hearing transcript, two police reports, interviews with Hardy and a witness, and other documents. There was no live testimony. The Court of Appeals noted that much of the material examined would not have been admissible at either preliminary hearing or trial. The district court ruled from the bench and granted Mr. Hardy immunity. The State appealed.

The Court of Appeals used this case as an opportunity to establish procedures to be followed when a defendant asserts self-defense immunity. 1) The court must hold an evidentiary hearing. The Court of Appeals suggested that the motion and the preliminary hearing could go forward at the same time. 2) The rules of evidence apply. 3) At the immunity hearing, the State has the burden of establishing probable cause to believe the use of force was unlawful or unjustified and thus that there is probable cause to believe a crime was committed and that the defendant committed it. 4) The court must consider the evidence in a light favoring the State.

STATUTORY SPEEDY TRIAL


STATE’S MOTION FOR REHEARING/MODIFICATION FILED. Spencer Gifts was charged with promoting obscenity harmful to minors. On October 27, 2010, a summons was issued for Spencer Gifts to appeal, which it did through counsel. It appeared as required throughout the proceedings. Before trial was set to begin in February 2014, Spencer Gifts moved to dismiss for violation of its speedy trial rights, since more that 180 days attributable to the State had passed since the commencement of the action. The district court dismissed and the State appealed. The State argued on appeal that since Spencer Gifts was not, nor could not be, subject to appearance bond, there was no applicable speedy trial requirement.
The Court of Appeals relied on prior cases to reject the State’s argument that the defendant had to have an appearance bond to have speedy trial rights. The Court observed that the legislature had not taken steps to show disapproval of the Court’s statutory construction. The Court further noted that constitutional speedy trial rights have been applied to corporate defendants. The Court stated that Spencer Gifts, though it could not be incarcerated, faced penalties for failure to appear. All of these reasons led the Court to hold that statutory speedy trial provisions apply to corporations and to sustain the district court’s dismissal. Chief Judge Malone concurred, but on the basis of the plain statutory language urged the Kansas Supreme Court to overrule the prior precedent.