

Kansas Law Review Criminal Procedure Survey^{*}

I. INTRODUCTION	1315
II. POLICE INVESTIGATION AND ARREST	1315
A. <i>Searches</i>	1315
1. Fourth Amendment Issues	1315
a. Scope of the Fourth Amendment	1315
b. Search Warrant Requirement	1317
i. Probable Cause	1317
ii. Oath or Affirmation	1317
iii. Particularity	1318
iv. Timeliness	1319
v. Jurisdiction	1319
vi. Unique Types of Search Warrants	1320
c. Exceptions to the Warrant Requirement	1322
i. Consent	1322
ii. Probable Cause Plus Exigent Circumstances	1324
iii. Automobile Exception	1324
iv. Stop and Frisk	1325
v. Plain View and Plain Feel	1326
vi. Protective Sweep of Premises	1327
vii. Search Incident to a Lawful Arrest	1327
viii. Inventory Search	1331
ix. Regulatory Search	1331
d. Evidence from Invalid Search Warrants or Illegal Searches	1331
i. General Exclusion of Evidence from Illegal Searches—Exclusionary Rule	1331
ii. Good Faith Exception	1332
iii. Inevitable Discovery	1332
iv. Knock-and-Announce General Rule and No-Knock Entry	1333
e. Standing to Object to a Search	1333
i. Search of Curtilage and Trash	1334

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ii. Tenants, Houseguests, and Third-Party Standing to Object to a Search	1334
iii. Third-Party Standing to Object to Searches of Vehicles and Baggage	1335
f. Technology and Searches	1336
i. Wiretapping and Other Electronic Surveillance ...	1336
ii. Chemical Drug Tests	1337
III. SEIZURES	1338
A. <i>Fourth Amendment Issues</i>	1338
1. Seizure of Property	1338
2. Seizure of Persons	1339
a. Traffic Stops	1340
b. Public Safety Stops and Community Caretaking	1342
c. Detention of Third Parties During a Search or Traffic Stop	1344
d. Arrests	1346
B. <i>Fifth and Sixth Amendment Issues Concerning Interrogation and Arrest</i>	1347
1. Police Officers' Duties During Interrogation	1350
a. Repeated <i>Miranda</i> Warnings	1350
b. <i>Quarles</i> Public Safety Exception	1350
2. Invocation of Rights	1351
a. <i>Montejo</i> and <i>Jackson</i>	1352
b. <i>Shatzer</i> and <i>Edwards</i>	1353
c. Ambiguous Requests	1354
3. Statements Made During Police Interrogation	1356
a. Voluntariness	1356
b. Tainted Statements	1357
IV. PRE-TRIAL ISSUES	1359
A. <i>The Formal Charge</i>	1359
1. The Charging Documents—The Complaint, Informations and Indictment, and Bills of Particulars	1359
2. Changes to the Charging Documents—Amendments, Challenges, and Variances	1362
B. <i>Initial Appearance</i>	1364
C. <i>Bail</i>	1364
D. <i>Preliminary Hearing and Examination</i>	1366
E. <i>Competency to Stand Trial</i>	1367
F. <i>Jurisdiction and Venue</i>	1369
1. Proper Jurisdiction and Venue to Bring Prosecution	1369
2. Change of Venue	1369
3. Timeliness of Challenges to Jurisdiction and Venue	1370

2010]	CRIMINAL PROCEDURE SURVEY	1313
	<i>G. Statute of Limitations</i>	1370
	<i>H. Joinder and Severance</i>	1371
	<i>I. Plea Agreements</i>	1372
	1. Types of Pleas and Their Repercussions	1373
	2. Plea Agreements	1374
	<i>J. Arraignment</i>	1374
	<i>K. Discovery</i>	1376
	<i>L. Pretrial Conference and Pretrial Motions</i>	1378
V.	TRIAL.....	1379
	<i>A. Fifth Amendment Issues</i>	1379
	1. Right to Remain Silent—Self-Incrimination and Immunity	1379
	2. Double Jeopardy and Multiplicity	1381
	3. Due Process—Pre-Accusation Delay	1386
	<i>B. Sixth Amendment Issues</i>	1387
	1. Speedy Trial.....	1387
	2. Trial by Jury.....	1388
	a. Impartial Jury.....	1388
	b. Waiver	1389
	c. Jury Selection and Peremptory Challenges	1390
	d. Juror Misconduct.....	1391
	3. Right to Confront Witnesses.....	1391
	4. Right to Testify and Present a Defense.....	1393
	5. Right to Counsel	1393
	a. Invocation of the Right to Counsel.....	1393
	b. Personal Choice of Counsel	1394
	c. Waiver of the Right to Counsel	1395
	d. Effective Assistance of Counsel.....	1396
	<i>C. Evidentiary Issues</i>	1397
	1. Prior Actions by the Defendant: Evidence of Other Crimes or Civil Wrongs.....	1397
	a. Pre-Amendment Problems: <i>State v. Gunby</i> and <i>State v. Dayhuff</i>	1398
	b. <i>State v. Prine</i>	1399
	c. Sexually Violent Predator Commitment Proceedings	1400
	d. Evidence of Gang Membership.....	1400
	2. Use of the Defendant’s Post-Arrest Silence to Impeach.....	1400
	3. Plea Agreements as Evidence	1402
	4. Evidence from Third Parties	1403
	a. Eyewitness Identification	1404

b. Witness Psychological Examinations.....	1405
5. Cross Examination: Scope, Testimonial Hearsay, and Forensic Science Reports.....	1406
6. Proof Beyond a Reasonable Doubt.....	1408
D. <i>Actions by Prosecutors and Judges at Trial</i>	1408
1. Prosecutors.....	1408
2. Trial Judges.....	1410
E. <i>Potential Trial Actions</i>	1412
1. Motion for Acquittal.....	1412
2. Submission of the Case to a Jury.....	1412
3. Mistrial.....	1413
VI. SENTENCING.....	1414
A. <i>Determining a Sentence</i>	1415
1. Crime Severity Levels.....	1415
2. Criminal History.....	1416
3. Consecutive and Concurrent Sentences.....	1416
B. <i>Ability to Modify a Sentence: Corrections, Guideline Departures, and Modifications</i>	1417
C. <i>Constitutional Challenges</i>	1418
D. <i>Retroactivity of Statutes</i>	1419
VII. POST-TRIAL ISSUES.....	1419
A. <i>Appeals</i>	1419
B. <i>Additional Post-Conviction Remedies</i>	1420

2010]

CRIMINAL PROCEDURE SURVEY

1315

I. INTRODUCTION

This Survey provides an overview of criminal procedure in Kansas. It addresses recent changes in case law based on United States Supreme Court and Kansas precedents. It also analyzes developments in Kansas and federal statutes. Additionally, the Survey provides commentary detailing the potential implications of these changes and the soundness of the reasoning used by the court or legislature.

II. POLICE INVESTIGATION AND ARREST

A. Searches

1. Fourth Amendment Issues

The Fourth Amendment states:

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.¹

Section 15 of the Kansas Constitution's Bill of Rights uses similar language.² Under both the Fourth Amendment and Section 15, a warrantless search is presumably an "unreasonable" search.³ Therefore, in order for a search to be "reasonable," it must be performed pursuant to a warrant supported by probable cause.⁴ However, as discussed later, several exceptions have been carved out that allow warrantless searches under the Fourth Amendment.

a. Scope of the Fourth Amendment

The limitations of the Fourth Amendment apply only to searches performed as "government action."⁵ A private person who is not acting with the participation or knowledge of the government is not subject to

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

2. KAN. CONST. Bill of Rights § 15.

3. *State v. Medlock*, No. 100,947, 2009 WL 3837640, at *5 (Kan. Ct. App. Nov. 13, 2009).

4. *Id.*

5. *E.g.*, *State v. Brittingham*, 218 P.3d 441, 444 (Kan. Ct. App. 2009).

the Fourth Amendment's warrant requirements.⁶ However, if the government "coerces, dominates, or directs" a private person's behavior, then the Fourth Amendment may be implicated.⁷ The determination of whether the Fourth Amendment applies to a private, non-government actor is made on a case-by-case basis by examining the particular facts and circumstances of that case.⁸

The fact that the person performing the search happens to be a government employee is insufficient to invoke the Fourth Amendment if the search does not "further[] the government's objectives as they relate to the duties of the government employee."⁹ In *State v. Brittingham*, a public-housing authority employee was directed by his supervisor to conduct a routine maintenance call on apartments previously affected by a sewage backup to confirm there were no further issues.¹⁰ Upon arrival at the defendant's apartment, the employee found two unconscious bodies and saw illegal drugs in plain view.¹¹ The trial court ruled that the government employee's entry of the apartment, even though done pursuant to housing authority policy and under the direction of her government supervisor,¹² was not government action within the meaning of the Fourth Amendment.¹³ The appellate court affirmed, agreeing that the employee did not enter the apartment with the intent to find drugs, but rather with the intent to investigate a sewage issue.¹⁴

This case's result seems questionable. The rule that private actors are not subject to the limitations of the Fourth Amendment is well established. However, it is arguable whether the housing-authority employee was in fact a private actor. She entered the apartment during her work hours as a government employee, at the direction of her government-employed boss, and pursuant to government policy. Her lack of intent to discover drugs should not be the deciding factor. Regardless of intent, she was "furthering the government's objectives"¹⁵ by performing her duties as a government employee. However, no Kansas Supreme Court appeal is pending at this time.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* (quoting *State v. Smith*, 763 P.2d 632, 637 (Kan. 1988)).

10. *Id.*

11. *Id.*

12. *Id.* ("After receiving no response, [the employee], pursuant to housing authority policy, entered the apartment with her passkey . . .").

13. *Id.* at 445.

14. *Id.* at 446.

15. *Id.* at 444.

2010]

CRIMINAL PROCEDURE SURVEY

1317

b. Search Warrant Requirement

Generally, for a search to be constitutional, a search warrant must be issued by a judge, and such warrant must meet the requirements set forth in the Fourth Amendment, as discussed below.¹⁶

i. Probable Cause

The Fourth Amendment requires that search warrants be based upon probable cause. Probable cause exists when the government agent can demonstrate a reasonable belief that a certain crime has been committed and that a specific person committed that crime.¹⁷ Therefore, when determining whether to issue a search warrant, the magistrate judge “considers the totality of the circumstances presented and makes a practical, common-sense decision whether a crime has been or is being committed and whether there is a fair probability that contraband or evidence of a crime will be found in a particular place.”¹⁸

Probable cause cannot be demonstrated by “[b]ald conclusions, mere affirmations of belief, or suspicions.”¹⁹ However, a government actor’s affidavit may be based on hearsay if it can also provide enough information for the magistrate judge to make a determination of probable cause based on the government official’s own personal knowledge.²⁰

ii. Oath or Affirmation

The Fourth Amendment requires that the government agent’s application for a search warrant be made under oath or affirmation.²¹ Kansas courts uniformly recognize that “[a] search warrant may only be issued upon statements of a person under oath.”²²

16. State v. Medlock, No. 100,947, 2009 WL 3837640, at *5 (Kan. Ct. App. Nov. 13, 2009).

17. State v. Fulton, No. 100,061, 2009 WL 3737310, at *2 (Kan. Ct. App. Nov. 6, 2009).

18. State v. Hicks, 147 P.3d 1076, 1087 (Kan. 2006).

19. *Id.*

20. *Id.*

21. U.S. CONST. amend. IV.

22. State v. Martin, No. 98,435, 2009 WL 4471699, at *1 (Kan. Ct. App. Oct. 3, 2008).

iii. Particularity

The Fourth Amendment also requires that the search warrant describe the place to be searched with particularity.²³ In *United States v. Leon*,²⁴ the United States Supreme Court recognized that in some cases, failure to particularize the place to be searched can result in the warrant being so facially deficient that an executing officer cannot reasonably presume it to be valid.²⁵ In this situation, evidence may be suppressed if the court agrees that the particularity requirement of the search warrant was severely lacking.²⁶

Courts frequently struggle in applying analog rules to a digital world, and search warrants are no exception. The Tenth Circuit recognized that applying the Fourth Amendment's particularity requirement to searches of computers is challenging, and therefore adopted a "somewhat forgiving stance" in analyzing such challenges.²⁷ In computer search situations, the particularity requirement forces government agents to "be clear as to what it is they are seeking on the computer and conduct the search in a way that avoids searching files of types not identified in the warrant."²⁸ The computer search may only be as "extensive as reasonably required to locate the items described in the search warrant."²⁹

In *United States v. Potts*, the defendant argued that the search warrant authorizing a search of his computer for child pornography was overly broad and thus did not meet the particularity requirement.³⁰ The search warrant allowed officers to open and skim the first few pages of files on Potts's computer to determine their precise contents.³¹ The court admitted that this language was very broad,³² but also noted that the warrant forced the executing officer to "limit his/her search [] to the criminal charges under investigation."³³ The court held that even if the warrant did not meet the Fourth Amendment's particularity requirement,

23. U.S. CONST. amend. IV; *see* *United States v. Potts*, 586 F.3d 823, 831 (10th Cir. 2009).

24. 468 U.S. 897 (1984).

25. *Id.* at 923.

26. *Id.*

27. *Potts*, 586 F.3d at 833 (quoting *United States v. Grimm*, 439 F.3d 1263, 1269 (Kan. 2006)).

28. *Id.* (quoting *United States v. Walser*, 275 F.3d 981, 986 (10th Cir. 2001)).

29. *Id.* (quoting *Grimm*, 439 F.3d at 1270).

30. *Id.* at 831.

31. *Id.* at 827.

32. *Id.* at 834.

33. *Id.*

it was sufficiently restrictive such that a reasonable officer could read the warrant as limited to only those computer files relating to child pornography.³⁴ Consequently, the *Leon* exception was not met and the evidence found on Potts's computer was not suppressed.³⁵

iv. Timeliness

The Fourth Amendment also requires that the information contained in an affidavit for a search warrant be timely.³⁶ A judge may not issue a search warrant if the underlying affidavit is “based upon information that has grown stale, i.e., information that no longer supports an affidavit’s underlying assertion that the item sought will be found in the area or location to be searched.”³⁷ Timeliness is not determined solely by the calendar.³⁸ When the circumstances as a whole suggest that the criminal activity is ongoing, the passage of time is not as important.³⁹ Circumstances to be examined in making a determination of timeliness are “the nature of the criminal activity, the length of the activity, and the nature of the property to be seized.”⁴⁰ Examined together, these factors will help the court arrive at a conclusion as to whether the information is timely enough to establish sufficient probable cause for issuance of a search warrant.

v. Jurisdiction

The Fourth Amendment also requires that the search warrant be obtained from a magistrate judge in the relevant jurisdiction—the jurisdiction in which the search is to take place.⁴¹ The jurisdiction of Kansas law-enforcement officers is generally limited to the city or county which employs them, unless in fresh pursuit of a suspect or when

34. *Id.* at 835.

35. *Id.*

36. *See* United States v. Iiland, 254 F.3d 1264, 1268 (10th Cir. 2001) (affirming trial court’s timeliness determination).

37. State v. Bottom, 190 P.3d 283, 289 (Kan. Ct. App. 2008) (quoting United States v. Cantu, 405 F.3d 1173, 1177 (10th Cir. 2005)).

38. *Id.*

39. *Id.*

40. *Id.* (citing *Cantu*, 405 F.3d at 1177).

41. *See* United States v. Green, 178 F.3d 1099, 1106 (10th Cir. 1999) (stating that “[t]he Fourth Amendment is satisfied where, as here, officers obtained a warrant, grounded in probable cause and phrased with sufficient particularity, from a magistrate of the relevant jurisdiction authorizing them to search a particular location”).

assistance has been requested by law-enforcement officers of another jurisdiction.⁴²

In *United States v. Green*, a search warrant was issued by a magistrate of the relevant jurisdiction.⁴³ However, it was executed by law-enforcement officers acting outside of their jurisdiction.⁴⁴ Nonetheless, the Tenth Circuit determined there was no Fourth Amendment violation.⁴⁵ Therefore, the relevant jurisdiction is arguably that of the issuing magistrate, not the jurisdiction of the executing officers.⁴⁶

However, the above rule may only be applicable to searches conducted pursuant to warrants. In dicta to *Green*, the Tenth Circuit left open the question of whether a *warrantless* search conducted by a law-enforcement officer outside of his jurisdiction is a Fourth Amendment violation.⁴⁷ The court cited *Ross v. Neff*, which held that a warrantless arrest outside of the arresting officer's jurisdiction violated the Fourth Amendment,⁴⁸ and noted that "a warrantless arrest is vastly different from a warranted search,"⁴⁹ but declined to address the question of whether *Ross* applied to warrantless searches.

vi. Unique Types of Search Warrants

One unique type of search warrant is an anticipatory search warrant. Anticipatory search warrants differ from standard warrants because when an anticipatory warrant is issued, it is not supported by probable cause to believe that contraband is currently present in the area proposed to be searched.⁵⁰ However, anticipatory warrants must still be supported by probable cause.⁵¹ The affidavit for the warrant must include enough information to allow a magistrate judge to determine that probable cause exists to believe that the items to be seized, although not presently at the search location, will be there when the warrant is executed.⁵²

42. KAN. STAT. ANN. § 22-2401a (2007).

43. 178 F.3d 1099, 1106 (10th Cir. 1999).

44. *Id.* at 1105.

45. *Id.* at 1106.

46. *See id.*

47. *See id.* (refusing to rule on warrantless grounds because the officers had in fact obtained a warrant).

48. 905 F.2d 1349, 1354 (10th Cir. 1990).

49. *Green*, 178 F.3d at 1106.

50. *United States v. Rowland*, 145 F.3d 1194, 1201 (10th Cir. 1998).

51. *Id.*

52. *Id.*

The anticipatory warrant is issued based upon expected triggering events, such as a drug delivery or purchase.⁵³ In order for the anticipatory warrant to be executed, the triggering events must occur.⁵⁴ If they do not occur, the warrant is invalid and the search cannot be performed.⁵⁵

Another unique search warrant is a no-knock warrant. The Fourth Amendment reasonableness requirement requires law-enforcement officers to “knock and announce” upon arrival at the premises to be searched.⁵⁶ The officers must identify themselves and state their intention to search.⁵⁷ There is no bright-line rule to determine how long officers must wait after knocking and announcing before forcibly entering.⁵⁸ Courts instead look to whether the officer acted reasonably in the circumstances, because the knock-and-announce requirement stems from the reasonableness requirement.⁵⁹

However, in some cases, a special “no-knock” warrant can be issued. Officers can apply for a no-knock warrant when they have a reasonable suspicion that knocking and announcing would be dangerous, futile, or allow for the destruction of evidence.⁶⁰ For example, in *United States v. Timley*, a Kansas district judge issued a no-knock warrant when the police officer’s application for the warrant stated that the defendant had an extensive criminal history (including murder convictions) and a history of evading arrest, destroying and hiding evidence, and use or possession of weapons.⁶¹ These circumstances were sufficient to convince the judge that knocking and announcing could be dangerous or result in destruction of evidence.⁶²

53. *Id.*

54. *Id.*

55. *Id.*

56. *United States v. Harwell*, 426 F. Supp. 2d 1189, 1199 (10th Cir. 2006) (citing *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995)).

57. *United States v. Banks*, 540 U.S. 31, 36 (2003).

58. *Id.*

59. *Harwell*, 426 F. Supp. 2d at 1199–1200.

60. *Id.* at 1199 n.5.

61. 338 F. App’x 782, 785 (10th Cir. 2009).

62. *See id.* at 785–86.

c. Exceptions to the Warrant Requirement

i. Consent

Generally, consent to search an area makes a search constitutional, even without a warrant.⁶³ The person giving the consent must have the authority to do so. A person generally only has the authority to consent to a search of his own belongings, home, and other like categories.⁶⁴ When there are multiple people living in a single residence, the consent of one occupant is sufficient to search the common areas of the residence.⁶⁵ However, an individual's own consent is necessary to search private areas such as a bedroom.⁶⁶

A defendant generally has the right to refuse to consent to the search.⁶⁷ In a residential search with multiple residents, "law enforcement officers are not free to ignore a resident's refusal of consent to search . . . and then seek a more welcoming response elsewhere."⁶⁸ They also cannot manipulate an uncooperative resident's presence to silence him.⁶⁹ However, once one resident's voluntary consent has been obtained, "officers are not required to seek out consent or refusal" of any other residents.⁷⁰

A citizen's consent to a search must also be voluntary.⁷¹ A valid consent must meet two conditions—first, it must be proven by "clear and positive testimony that consent was unequivocal, specific, and freely given;" and second, "the consent must have been given without duress or coercion, express or implied."⁷² The government has the burden to establish voluntariness of consent.

63. Callahan v. Millard County, 494 F.3d 891, 896–97 (10th Cir. 2007) ("Consent is a well-established method of conducting a reasonable search, despite lacking a warrant."), *rev'd on other grounds*, 129 S. Ct. 808 (2002).

64. See State v. Vandiver, 891 P.2d 350, 357 (Kan. 1995) (explaining that a search of someone else's belongings is acceptable only "under proper circumstances").

65. State v. Seeley, No. 99,456, 2009 WL 500960, at *5 (Kan. Ct. App. Feb. 27, 2009).

66. See *id.* (properly obtaining consent).

67. The rules are different in the DUI context. Under section 8-1001(a), a person is deemed to have consented to an alcohol test simply by driving a motor vehicle. See State v. Weaver, No. 97,921, 2009 WL 2242420, at **7–9 (Kan. Ct. App. July 24, 2009) (refusing to strike down section 8-1001 as an unconstitutional search).

68. State v. Ransom, 212 P.3d 203, 213 (Kan. 2009).

69. *Id.*

70. *Id.*

71. State v. Thompson, 166 P.3d 1015, 1026 (Kan. 2007).

72. *Id.*

When examining if consent to search was given voluntarily, the court will examine several factors, including the defendant's mental condition and capacity.⁷³ If the defendant is found to be mentally incapable of consenting to the search, the search can be found invalid because of lack of voluntariness.⁷⁴

Even though consent to search must be voluntary, it may be implied.⁷⁵ For example, although nonverbal, a nod of the head can be construed as consent to a search.⁷⁶ Furthermore, when there are multiple occupants in a dwelling, one occupant gives consent to search, and the other occupants are present and do not object, their consent can be implied.⁷⁷ Also, as a condition of his parole agreement, a parolee may be required to consent to warrantless searches at any time.⁷⁸ Such agreements remain effective even if the parolee is arrested and in police custody when the search takes place.⁷⁹

Even after consent to search has been given, the scope of this consent may become an issue. Consent can be limited when given or while the search is already underway.⁸⁰ However, limitations on the scope of consent must be made known.⁸¹ A defendant's failure to object to the search techniques being used by the law enforcement officers is considered an indication that the search is within the scope of consent.⁸²

In addition to limiting consent, a person may also withdraw his consent.⁸³ For example, in *United States v. Chavira*,⁸⁴ a trooper spent twenty minutes searching the defendant's car with consent when the

73. *United States v. McKinney*, 470 F. Supp. 2d 1226, 1233 (D. Kan. 2007). Other factors include "physical mistreatment, use of violence, threats, promises, inducements, deception, trickery, an aggressive tone," physical condition and capacity, "the number of officers present, and the display of police weapons." *Id.*

74. *See id.*

75. *See State v. Kimberlin*, 977 P.2d 276, 278 (Kan. Ct. App. 1999) (inviting one officer inside implied an invitation to backup officers).

76. *See State v. Seeley*, No. 99,451, 2009 WL 500960, at *4 (Kan. Ct. App. Feb. 27, 2009) (stating that "a nod of the head can be unequivocal and specific").

77. *See id.*

78. *See United States v. Cordova*, 340 F. App'x 427, 429 (10th Cir. 2009).

79. *Id.* at 432.

80. *See United States v. Bugarin*, No. 09-40064-01-RDR, 2009 WL 4158191, at *4 (D. Kan. Nov. 23, 2009).

81. *Id.* (stating that because defendant never objected to the extent of the search, the officers' actions were deemed to be within the scope of the search).

82. *Id.*

83. *See United States v. Chavira*, No. 05-40010-01-JAR, 2005 WL 1213670, at *6 (D. Kan. May 18, 2005).

84. *Id.*

defendant was allowed to withdraw his consent.⁸⁵ However, the trooper was still within his rights to hold Chavira for an hour while a drug dog was transported to continue the search.⁸⁶

ii. Probable Cause Plus Exigent Circumstances

The combination of probable cause plus exigent circumstances provides another exception to the warrant requirement.⁸⁷ Automobile searches are a common application of this doctrine, as “the mobility of the vehicle provides the exigent circumstances, so only probable cause needs to be shown to stop and search a moving vehicle.”⁸⁸

Emergency is another well-recognized type of exigent circumstance. To use the Emergency Aid Doctrine as basis for warrantless entry, “the police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for assistance for the protection of life or property.”⁸⁹ Furthermore, there must be a reasonable basis to associate the emergency with the area to be searched.⁹⁰

“Hot pursuit” is a third type of exigent circumstance. The Fourth Amendment does not prohibit law-enforcement officers from entering a home without a warrant when officers are in hot pursuit of a suspect who has fled from a public area into a house, even if the suspect does not own or reside in the house.⁹¹

iii. Automobile Exception

Police officers have probable cause to search a vehicle if “a fair probability exists that the vehicle contains contraband or evidence” of illegal activity.⁹² If such probable cause exists, officers may lawfully search any area of the vehicle which may contain evidence of the suspected illegal activity “without first obtaining a search warrant.”⁹³ Known as the “automobile exception,” this rule permits police to search

85. *Id.*

86. *Id.* at **6–7 (holding that after the twenty minute search, the trooper established at least reasonable suspicion, if not probable cause, that the defendant was transporting drugs).

87. *State v. Sanchez-Loredo*, 220 P.3d 374, 378 (Kan. Ct. App. 2009) (citing *State v. Fitzgerald*, 192 P.3d 171, 173 (Kan. 2008)).

88. *Id.*

89. *State v. Peterman*, 216 P.3d 710, 713 (Kan. Ct. App. 2009).

90. *Id.*

91. *State v. Thomas*, 124 P.3d 48, 57 (Kan. 2005).

92. *United States v. Triska*, 574 F. Supp. 2d 1208, 1215–16 (D. Kan. 2008).

93. *Id.* at 1216.

every part of the vehicle which could conceivably contain the contraband or evidence that is the object of the search “to the same extent as a magistrate could legitimately authorize by warrant.”⁹⁴

Dog sniffs of the exterior of a vehicle parked in a public location by a drug detection canine do not constitute a Fourth Amendment search.⁹⁵ Because such activity does not constitute a search, officers need not have probable cause or any additional suspicion to conduct a dog sniff during an investigative detention.⁹⁶ An alert by a properly-certified drug-sniffing dog constitutes probable cause and, in turn, justifies a warrantless search of the vehicle and its contents.⁹⁷ The scope of the search is not limited to the precise region of the car to which the dog alerted.⁹⁸ Such an alert “creates general probable cause to search a vehicle; it does not implicate the precision of a surgeon working with scalpel in hand.”⁹⁹

iv. Stop and Frisk

Kansas law permits officers to conduct a safety pat-down, known as a *Terry* stop, if an officer has reasonable suspicion that such a search is required to protect the officer’s safety.¹⁰⁰ “The officer must have prior knowledge of facts, observe conduct of the detained person, or receive responses from the detained person that, in light of the officer’s experience, would give rise to reasonable suspicion that such a search is necessary.”¹⁰¹ The scope of the pat-down is generally limited to the

94. *Id.* (citing *United States v. Ross*, 456 U.S. 798, 825 (1982)).

95. *United States v. Roberts*, 572 F. Supp. 2d 1240, 1249 (D. Kan. 2008) (citing *United States v. Engles*, 481 F.3d 1243, 1245–46 (10th Cir. 2007)).

96. *Id.* (citing *United States v. Ramirez*, 479 F.3d 1229, 1245 (10th Cir. 2007)).

97. *Id.* (citing *United States v. Rosborough*, 366 F.3d 1145, 1152 (10th Cir. 2004)). However, a defendant may “rebut the finding of probable cause by showing that the particular drug dog is unreliable.” *Triska*, 574 F. Supp. 2d at 1217 (citing *United States v. Ludwig*, 10 F.3d 1523, 1528 (10th Cir. 1993)). “[D]og alert may not provide probable cause if dog has poor accuracy record.” *Id.* (summarizing the holding from *Ludwig*). “The Tenth Circuit has held that a 70 to 80 per cent reliability rate satisfies the liberal standard for probable cause” *Id.* (citing *United States v. Kennedy*, 131 F.3d 1371, 1378 (10th Cir. 1997)).

98. *United States v. Parada*, 577 F.3d 1275, 1282–83 (10th Cir. 2009). When a dog alerted only to the driver’s side door region of a vehicle, probable cause to search the vehicle was not limited to the driver’s door. *Id.*

99. *Id.* at 1283 (quoting *Rosborough*, 366 F.3d at 1153). This rule is consistent with the Supreme Court’s ruling in *Ross* that when probable cause exists, “it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.” *Id.* at 1283 (quoting *United States v. Ross*, 456 U.S. 798, 825 (1982)).

100. *State v. Johnson*, 217 P.3d 42, 47 (Kan. Ct. App. 2009) (citing *Terry v. Ohio*, 392 U.S. 1 (1968); KAN. STAT. ANN. § 22-2402(2) (Supp. 2009)).

101. *Id.* (citing *State v. Davis*, 11 P.3d 1177, 1182 (Kan. Ct. App. 2000); *Terry*, 392 U.S. at 20–

“person’s outer clothing without placing the officer’s hands inside any pockets or under the outer surface of any garment, unless or until a weapon is found.”¹⁰² Officers may conduct such *Terry* stops not only of the person, but also “the area within the immediate control of the person from which the person might gain access to a weapon, or contraband, such as the passenger compartment of an automobile.”¹⁰³ However, there are limits to what objects within that area may be searched. An officer’s seizure of a cigarette package from a purse that was within reach of the defendant, for instance, was not considered reasonable when the officer had no sufficient safety concerns under *Terry* to justify such a search of that particular object.¹⁰⁴

v. Plain View and Plain Feel

Officers may seize evidence they encounter in plain view without a warrant.¹⁰⁵ Federal courts in Kansas require that four elements be present to justify a seizure under the plain view doctrine: “(1) the item is indeed in plain view; (2) the police officer is lawfully located in a place from which the item can plainly be seen; (3) the officer has a lawful right of access to the item itself; and (4) it is immediately apparent that the seized item is incriminating on its face.”¹⁰⁶ Alternatively, the Kansas Court of Appeals requires that under the plain view doctrine, “a law enforcement official can seize evidence of a crime if (1) the initial intrusion which afforded authorities the plain view is lawful; (2) the discovery of the evidence is inadvertent; and (3) the incriminating character of the article is immediately apparent to searching authorities.”¹⁰⁷

29). “The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” *Terry*, 392 U.S. at 27. Additionally, the officer need not obtain the defendant’s consent prior to the safety pat-down as it “is not the same as a search of the suspect, which requires either probable cause to search or consent.” *State v. Golston*, 203 P.3d 10, 18 (Kan. Ct. App. 2009).

102. *Golston*, 203 P.3d at 18 (citing *Terry*, 392 U.S. at 30).

103. *Johnson*, 217 P.3d at 47 (citing *Michigan v. Long*, 463 U.S. 1032, 1045–51 (1983)).

104. *Id.* at 47–48. As such, the search was unconstitutional in light of the Supreme Court’s recent restriction on searches incident to arrest, as expressed in *United States v. Gant*, discussed *infra* Part II.A.1.c.vii. (discussing the permissible scope of a warrantless search incident to an arrest).

105. *State v. Ulrey*, 208 P.3d 317, 323 (Kan. Ct. App. 2009) (citing *State v. Horn*, 91 P.3d 517, 526 (Kan. 2004)).

106. *United States v. Troxel*, 547 F. Supp. 2d 1190, 1197 (D. Kan. 2008) (quoting *United States v. Corral*, 970 F.2d 719, 723 (10th Cir. 1992)).

107. *Ulrey*, 208 P.3d at 323 (quoting *State v. Canaan*, 964 P.2d 681, 689 (Kan. 1998)).

2010]

CRIMINAL PROCEDURE SURVEY

1327

vi. Protective Sweep of Premises

“A protective sweep is a quick, limited search of premises incident to an arrest and conducted to protect the safety of officers or others.”¹⁰⁸ For such a sweep to be constitutional, the officer must have a “reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant[s] the officer in believing, that the area swept harbored an individual posing a danger to the officer or others.”¹⁰⁹ In the vehicle context, if the “officer has reasonable belief based on specific and articulable facts that the suspect is dangerous and may gain immediate control of weapons,” a protective search of a vehicle’s passenger compartment is constitutional when it is limited to areas where a weapon may be found.¹¹⁰

vii. Search Incident to a Lawful Arrest

The United States Supreme Court substantially curtailed the permissible scope of an automobile search incident to a lawful arrest in 2009.¹¹¹ Officers arrested Rodney Gant due to an outstanding warrant for driving with a suspended license, then handcuffed him, and placed him in the back of a patrol car.¹¹² After his arrest, officers searched his car, discovering cocaine in the pocket of a jacket on the car’s back seat.¹¹³ Gant was charged with multiple drug offenses.¹¹⁴ At trial, Gant moved to suppress the narcotics evidence, arguing the warrantless search violated his Fourth Amendment rights.¹¹⁵ Even though officers lacked probable cause to search the car, the court found the search permissible as a search incident to an arrest, because officers had lawfully arrested Gant for driving with a suspended license.¹¹⁶ Gant was convicted and sentenced to three years in prison.¹¹⁷

108. *United States v. Freeman*, 479 F.3d 743, 750 (10th Cir. 2007) (quoting *Maryland v. Buie*, 494 U.S. 325, 327 (1990)) (internal quotation marks omitted).

109. *Id.* (quoting *Buie*, 494 U.S. at 327).

110. *State v. Preston*, 207 P.3d 1081, 1087 (Kan. Ct. App. 2009) (citing *Michigan v. Long*, 463 U.S. 1032, 1050 (1983)).

111. *Arizona v. Gant*, 129 S. Ct. 1710, 1723–24 (2009).

112. *Id.* at 1715.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

On appeal, the Arizona Supreme Court held that a search incident to a lawful arrest is only “justified by interests in officer safety and evidence preservation.”¹¹⁸ When the “arrestee is handcuffed, secured in the back of a patrol car, and under the supervision of an officer . . . a warrantless search of the arrestee’s car cannot be justified as necessary to protect the officers at the scene or prevent the destruction of evidence.”¹¹⁹ As such, the Arizona Supreme Court held the search was unreasonable and the evidence should be suppressed.¹²⁰

The United States Supreme Court granted certiorari, acknowledging existing questions stemming from its previous decision in *Belton* and its “fidelity to Fourth Amendment principles.”¹²¹ The Court expressed concern that the *Belton* holding had been widely understood “to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search.”¹²² This broad reading would “untether the rule from the justifications” outlined in *Chimel*: officer safety and evidence preservation.¹²³ As such, the Supreme Court rejected the broad interpretation of *Belton* permitting such a search and held “that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”¹²⁴ Additionally, the Court held that “circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’”¹²⁵ These exceptions “ensure that officers may search a vehicle when genuine safety or evidentiary concerns encountered during the arrest of a vehicle’s recent occupant justify a search.”¹²⁶ The Court concluded that police may search a vehicle

118. *Id.* at 1715–16.

119. *Id.* at 1716.

120. *Id.*

121. *Id.* In *Belton*, the Supreme Court held that “when an officer lawfully arrests the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile and any containers therein.” *Id.* at 1717 (quoting *New York v. Belton*, 453 U.S. 454, 460 (1981)).

122. *Id.* at 1718.

123. *Id.* at 1719.

124. *Id.* Furthermore, “[c]onstruing *Belton* broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis.” *Id.* at 1721.

125. *Id.* at 1719 (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in the judgment)).

126. *Id.* at 1721.

incident to a lawful arrest “only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.”¹²⁷

In response to *Gant*, the Kansas Supreme Court held unconstitutional a Kansas statute that permitted officers to search, incident to an arrest, a person for evidence of *any* crime, not just the crime of the arrest.¹²⁸ Randy Henning was arrested for an outstanding warrant by an officer who observed him exit a convenience store and enter a waiting vehicle.¹²⁹ The officer requested Henning step out of the vehicle, confirmed his identity, and placed him in handcuffs.¹³⁰ The officer searched the vehicle while Henning stood handcuffed about five to seven feet away.¹³¹ The officer discovered drug paraphernalia in the car’s closed center console.¹³² In a suppression hearing, the officer testified that he searched the car because the recent changes to the Kansas statute allowed him to search for “fruits of *a* crime” in any car out of which he made an arrest.¹³³ The officer was referring to a recent change in section 22-2501(c) of the Kansas Statutes by the 2006 Kansas Legislature.¹³⁴ Prior to 2006, the statute permitted officers to “. . . ‘search the person arrested and the area within his immediate presence for the purpose of . . . discovering the fruits, instrumentalities, or evidence of *the* crime.’ (Emphasis added).”¹³⁵ In 2006, the statute was revised to widen the scope to permit a search for the purpose of “[d]iscovering the fruits, instrumentalities, or evidence of *a* crime.’ (Emphasis added).”¹³⁶ At the time the officer searched the vehicle, “he had no expectation that he would find evidence of any particular crime committed by any particular person.”¹³⁷ The officer clearly acted within the scope of the new statutory language (“evidence of *a* crime”) in a manner that would have violated the prior narrower statute (“evidence of *the* crime”), as there could be no evidence of the crime for which Henning was arrested (the

127. *Id.* at 1723. Absent these justifications, a search of the vehicle “will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.” *Id.* at 1723–24.

128. *State v. Henning*, 209 P.3d 711, 720 (Kan. 2009).

129. *Id.* at 714.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* (emphasis added).

134. *Id.*

135. *Id.* (quoting KAN. STAT. ANN. § 22-2501 prior to the 2006 revision).

136. *Id.* (quoting KAN. STAT. ANN. § 22-2501(c) (2006)).

137. *Id.*

outstanding warrant).¹³⁸ The trial court found the search unconstitutional, but the Court of Appeals reversed.¹³⁹

The Kansas Supreme Court then granted the petition for review.¹⁴⁰ The court addressed the significance of the legislature's change from "the" to "a" in the statute, and whether the current statute was constitutional.¹⁴¹ The court noted that it previously addressed the validity of the earlier narrower version of the statute in *State v. Anderson*.¹⁴² The *Anderson* Court concluded that section 22-2501(c) permitted an officer to search a vehicle incident to an occupant's arrest "for the purpose of uncovering evidence to support *only* the crime of arrest."¹⁴³ The *Anderson* Court held that the then-current statutory language allowed for the search "of a space, including a vehicle, incident to an occupant's . . . arrest, even if the search was not focused on uncovering evidence only of the crime of arrest."¹⁴⁴ Here, as in *Gant*, the defendant was not within reaching distance of a weapon, nor could the officer reasonably believe evidence of the crime of arrest was present in the vehicle.¹⁴⁵ Considering the *Gant* decision, the Kansas Supreme Court was "compelled to strike down the current version of K.S.A. 22-2501(c) as facially unconstitutional under the Fourth Amendment and Section 15 of the Kansas Constitution Bill of Rights."¹⁴⁶ On January 25, 2010, the Kansas Senate passed a bill amending the language of section 22-2501(c) to revert to the narrower language of the pre-2006 version of the statute.¹⁴⁷

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* at 715.

143. *Id.* at 716. The Supreme Court stated the legislative history of the 2006 change to section 22-2501 indicated that the change was instigated at least in part to "undercut" the court's holding in *Anderson*. *Id.* at 718.

144. *Id.* at 718. After reciting the historical context in which the Supreme Court decided *Gant*, the Kansas Supreme Court stated that the *Gant* Court had arrived at the same basic conclusion as the Kansas Supreme Court had in *Anderson*. *Id.* at 720. "To have a valid search incident to arrest, when there is no purpose to protect law enforcement present, the search must seek evidence to support the crime of arrest, not some other crime, be it actual, suspected, or imagined." *Id.*

145. *Id.* at 720. The State's only claim that a search of the car was proper was that it fell within the recently-widened scope permitted by section 22-2501(c). *Id.*

146. *Id.*

147. S.B. 435, 83rd Leg., Reg. Sess. (Kan. 2010) (amending KAN. STAT. ANN. § 22-2501(c) from "[d]iscovering the fruits, instrumentalities, or evidence of a crime" to "[d]iscovering the fruits, instrumentalities, or evidence of *the* crime" (emphasis added)).

viii. Inventory Search

Another exception to the warrant requirement is the inventory search of a lawfully impounded vehicle.¹⁴⁸ An inventory search of the vehicle must be preceded by a legal impoundment that stems from authority granted to the police by statute or ordinance or if the state has “reasonable grounds” for the impoundment.¹⁴⁹ Such a search may extend to all personal property in the vehicle, “including the glove box and trunk, when the same may be accomplished without damage to the vehicle.”¹⁵⁰

ix. Regulatory Search

Warrantless administrative searches of commercial vehicles do not necessarily violate the Fourth Amendment. The reasonable expectation of privacy that an owner of commercial property may enjoy is markedly less than that of a private property owner.¹⁵¹ As such, the privacy interest in commercial property may be “adequately protected by regulatory schemes authorizing warrantless inspections.”¹⁵²

d. Evidence from Invalid Search Warrants or Illegal Searches

i. General Exclusion of Evidence from Illegal Searches—Exclusionary Rule

When officers exceed the scope of a warrant, the Exclusionary Rule requires that “the improperly seized evidence, not all of the evidence,

148. *State v. Branstetter*, 199 P.3d 1272, 1274 (Kan. Ct. App. 2009) (citing *South Dakota v. Opperman*, 428 U.S. 364, 372 (1976); *State v. Shelton*, 93 P.3d 1200, 1205 (Kan. 2004)).

149. *Id.* at 1274–75 (citing *State v. Teeter*, 819 P.2d 651, 653 (Kan. 1991)). Three purposes are served by inventory searches: “the protection of the owner’s property while it remains in police custody, the protection of the police against claims or disputes over lost or stolen property, and the protection of the police from potential danger.” *Id.* at 1274 (citing *Opperman*, 428 U.S. at 372; *Shelton*, 93 P.3d at 1205).

150. *Id.* at 1274–75 (quoting *State v. Fortune*, 689 P.2d 1196, 1203 (Kan. 1984)). However, such an inventory search cannot simply serve as “a ruse for a general rummaging in order to discover incriminating evidence.” *Id.* at 1277.

151. *New York v. Burger*, 482 U.S. 691, 700 (1987).

152. For instance, officers can stop and inspect commercial vehicles including cars, trucks, buses, and the like to ensure compliance with state law. *See* KAN. STAT. ANN. § 74-2108 (2009). The Kansas Supreme Court has held that the statute does not limit *when* officers may make such a stop. “K.S.A. 74-2108(b) is entirely reasonable in not limiting when an officer may stop a commercial vehicle.” *State v. Crum*, 19 P.3d 172, 177 (Kan. 2001). For an inspection to effectively serve as a credible deterrent, commercial inspections must be unannounced and frequent. *Id.*

must be suppressed”¹⁵³ In the majority of cases, the court does not require that *all* items seized be suppressed because only some of those seized were outside the scope of the warrant.¹⁵⁴ ““This is particularly true when the non-specified items are not admitted into evidence against the defendant.””¹⁵⁵

ii. Good Faith Exception

When an officer acts in good faith to obtain a search warrant from a neutral, detached magistrate and the officer’s search is within the scope of that warrant, the evidence seized may be admissible even if it is later found that probable cause was lacking.¹⁵⁶ Known as the good faith exception to the exclusionary rule, it is founded on the principle that because officers were acting under the belief their actions were lawful, there is no illegal activity for the court to deter.¹⁵⁷ Courts must determine whether the underlying documents in support of the warrant request “are ‘devoid of factual support.’”¹⁵⁸ If the affidavit used to support the warrant request was “not so lacking in indicia of probable cause that the executing officers should have known the search was illegal despite the issuing judge’s authorization,” then the good faith exception applies and the evidence is not suppressed under the exclusionary rule.¹⁵⁹

iii. Inevitable Discovery

The inevitable discovery doctrine permits admission of evidence that could have otherwise been obtained through means independent of any constitutional violation.¹⁶⁰ For such evidence to be admissible, “the prosecution must establish by a preponderance of the evidence that the unlawfully obtained evidence ultimately or inevitably would have been discovered by lawful means.”¹⁶¹ The Kansas Supreme Court recently

153. *United States v. Roberts*, 572 F. Supp. 2d 1240, 1252 (D. Kan. 2008) (quoting *United States v. Hargus*, 128 F.3d 1358, 1363 (10th Cir. 1997)).

154. *Id.* (quoting *Hargus*, 128 F.3d at 1363).

155. *Id.* However, when officers display “flagrant disregard” for the terms of a search warrant, the court may apply the “unusual remedy of blanket suppression” of all evidence collected, even that outlined by the warrant. *Id.* (citing *United States v. Medlin*, 842 F.2d 1194, 1199 (10th Cir. 1988)).

156. *Id.* at 1251–52.

157. *Id.* at 1252 (citing *United States v. Nolan*, 199 F.3d 1180, 1184 (10th Cir. 1999)).

158. *Id.* (citing *United States v. Danhauer*, 229 F.3d 1002, 1006 (10th Cir. 2000)).

159. *Id.* (citing *United States v. Leon*, 468 U.S. 897, 922 n.23 (1984)).

160. *State v. Canaan*, 964 P.2d 681, 690 (Kan. 1998).

161. *Id.* (citing *Nix v. Williams*, 467 U.S. 431, 445–46 (1984)). The prosecution is also not required to establish the absence of bad faith in obtaining the evidence for it to be admissible under

ruled that when a defendant driver was stopped for a traffic violation and refused to consent to a search, the unconstitutional search that followed was not cured when the third-party owner arrived later and consented to a search after it was completed.¹⁶² The court found that when a search was unconstitutional at its inception but was followed by valid consent, the inevitability doctrine does not excuse the warrantless search.¹⁶³ “The warrantless search that bore usable fruit had already been conducted when . . . consent was sought; it was simply too late for the consent alone to absolve [the officer] of his responsibility to comply with the Fourth Amendment.”¹⁶⁴

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

As discussed earlier, the Fourth Amendment requires that law-enforcement officers knock and announce their presence and provide residents a chance to open the door before making entry.¹⁶⁵ However, officers need not knock and announce when there exists a threat of physical violence, reason to believe evidence may be destroyed if advance notice is given, or if giving notice would be futile.¹⁶⁶ To satisfy one of these exceptions, officers must have reasonable suspicion to believe “one of these grounds for failing to knock and announce exists.”¹⁶⁷

e. Standing to Object to a Search

The Tenth Circuit adheres to a simple two-step approach to determine whether a defendant has standing to claim a violation of his Fourth Amendment rights. The court must determine “whether the defendant manifested a subjective expectation of privacy in the area searched and whether society is prepared to recognize that expectation as objectively reasonable.”¹⁶⁸ The court has developed specific rules for

this exception. *Id.*

162. *State v. Fitzgerald*, 192 P.3d 171, 176–77 (Kan. 2008).

163. *Id.* at 177.

164. *Id.* The court held that even if they assumed the consent was voluntary and valid, they would not hold, based on the facts presented, that consent itself was also *inevitable*. *Id.*

165. *Hudson v. Michigan*, 547 U.S. 586, 589 (2006).

166. *Id.* at 589–90.

167. *Id.* at 590 (citing *Richards v. Wisconsin*, 520 U.S. 385, 394 (1997)).

168. *United States v. Parada*, 577 F.3d 1275, 1280 (10th Cir. 2009) (quoting *United States v. Allen*, 235 F.3d 482, 489 (10th Cir. 2000)).

searches involving tenants, houseguests, third parties, vehicles, luggage, and other situations that require special attention.

i. Search of Curtilage and Trash

The act of law-enforcement officers retrieving someone's trash and looking through it for potential evidence has become an accepted method of criminal investigation.¹⁶⁹ The United States Supreme Court has upheld the constitutionality of such trash pulls from garbage bags left sitting at the curb outside the home's curtilage for city trash collection.¹⁷⁰ Curtilage is defined by the United States Supreme Court as the "area immediately surrounding a dwelling house' . . . [in which] 'intimate activity associated with the sanctity of a man's home and the privacies of life' are conducted."¹⁷¹ The Kansas Supreme Court stated that if the garbage is located within the curtilage, the court must determine if the person who deposited the trash has "manifested a subjective expectation of privacy in the trash container and whether that expectation of privacy in the garbage is objectively reasonable."¹⁷² A rural homeowner who deposited trash in a dumpster on his property over a quarter-mile from the nearest public road was within the curtilage and that owner manifested an objectively reasonable subjective expectation of privacy, even when it was deposited for a third-party refuse service to retrieve.¹⁷³

ii. Tenants, Houseguests, and Third-Party Standing to Object to a Search

While law-enforcement officers are not free to ignore the refusal of consent from one resident of a dwelling and seek out a "more welcoming response elsewhere," officers are "not required to seek out consent or refusal of another resident once one resident's voluntary consent has

169. *State v. Hoffman*, 196 P.3d 939, 940 (Kan. Ct. App. 2009).

170. *Id.* (citing *California v. Greenwood*, 486 U.S. 35, 40–41 (1988)). The Court stated it does not believe the public would accept a claim of a reasonable expectation of privacy in such refuse left at the curb where it can be rummaged through by animals, scavengers, or other passers-by. *Id.*

171. *United States v. Redding*, 540 F. Supp. 2d 1184, 1186 (D. Kan. 2008) (quoting *United States v. Dunn*, 480 U.S. 294, 300 (1987)). In determining whether an area is within the curtilage, the court examines "the proximity of the area to the home, inclusion of the area within an enclosure surrounding the home, the nature and uses of the area, and steps taken to protect the area from observation by a passerby." *Id.* (citing *United States v. Long*, 176 F.3d 1304, 1308 (10th Cir. 1999)).

172. *Hoffman*, 196 P.3d at 941 (quoting *State v. Fisher*, 154 P.3d 455, 471 (Kan. 2007)).

173. *Id.* at 942.

been obtained.”¹⁷⁴ As such, the consent of one resident, absent any objection by another resident prior to the search, makes such a search valid.¹⁷⁵ In the case involving a third-party owner and the defendant resident of a home, the court found such an owner had actual authority to consent to a search of any common areas, including those rented by the defendant tenant, as long as such areas were not within the exclusive control of the tenant.¹⁷⁶ Regarding infrequent guests, a motion to suppress evidence collected during a search of a residence “may be made only by a person aggrieved by the unlawful search and seizure.”¹⁷⁷ When a person does not have a possessory interest in the residence and is only an “infrequent social guest,” he does not have a reasonable expectation of privacy and thus lacks standing to object to a search of the residence.¹⁷⁸

iii. Third-Party Standing to Object to Searches of Vehicles and Baggage

Absent a possessory interest in a vehicle, passengers generally lack standing to challenge the search of a vehicle.¹⁷⁹ The Tenth Circuit held that the following criteria are important, but not determinative: “(1) whether the defendant asserted ownership over the items seized from the vehicle; (2) whether the defendant testified to his expectation of privacy at the suppression hearing; and (3) whether the defendant presented any testimony at the suppression hearing that he had a legitimate possessory interest in the vehicle.”¹⁸⁰ However, in 2007, the United States Supreme Court held that “a passenger is seized in the same manner as the driver

174. *State v. Ransom*, 212 P.3d 203, 213 (Kan. 2009).

175. *Id.* Such consent may be gained by anyone with actual authority to grant such consent. Such actual authority “rests on a ‘mutual use of the property by persons generally having joint access or control for most purposes’ [such that others have] ‘assumed the risk that [another] might permit the common area to be searched.’” *United States v. Thompson*, 524 F.3d 1126, 1132 (10th Cir. 2008) (quoting *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974)).

176. *Thompson*, 524 F.3d at 1133.

177. *United States v. Ridley*, 639 F. Supp. 2d 1235, 1238 (D. Kan. 2009).

178. *Id.*

179. *United States v. Worthon*, 520 F.3d 1173, 1178 (10th Cir. 2008) (quoting *United States v. Eylicio-Montoya*, 70 F.3d 1158, 1162 (10th Cir. 1995)).

180. *United States v. Parada*, 577 F.3d 1275, 1280 (10th Cir. 2009) (quoting *United States v. Allen*, 235 F.3d 482, 489 (10th Cir. 2000)). For instance, the Kansas Supreme Court has held that a driver who has physical possession of the vehicle and the consent of the owner to operate the vehicle has a “sufficient interest as possessor to justify a reasonable expectation of privacy and to assert his or her constitutional rights against unreasonable search and seizure.” *State v. Preston*, 207 P.3d 1081, 1086 (2009) (citing *State v. Boster*, 539 P.2d 294, 297 (1975)). *But see Worthon*, 520 F.3d at 1179 (quoting *United States v. Jones*, 44 F.3d 860, 871 (10th Cir. 1995) (stating that in the context of a rental car, “a defendant in sole possession and control of a car rented by a third party has no standing to challenge a search or seizure of the car”)).

during a traffic stop and therefore has standing to challenge the constitutionality of the stop.”¹⁸¹ If a search is unconstitutional vis-à-vis the driver, the passenger has the same standing as the driver to contest the validity of a search.¹⁸²

Even if a defendant lacks standing to object to a search of a vehicle, he may still have standing to object to a search of personal belongings within the vehicle.¹⁸³ However, in the case of unlocked duffel bags in the open compartment of a van, both the unauthorized driver of the van and a passenger of another car that was accompanying the van were not considered to have standing to object to a search of the duffel bags.¹⁸⁴

f. Technology and Searches

i. Wiretapping and Other Electronic Surveillance

The Tenth Circuit determined that “[t]he Federal Wiretap Act ‘generally forbids the intentional interception of wire communications . . . when done without court-ordered authorization.’”¹⁸⁵ Authorization to conduct wiretap surveillance must be preceded by other less invasive investigative procedures that either have been employed but failed to succeed or are too dangerous to employ.¹⁸⁶ If information is collected without the requisite authorization, “no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial.”¹⁸⁷ However, the consent provision of the

181. *State v. Gilbert*, No. 100,150, 2009 WL 2902575, at *5 (Kan. Ct. App. Sept. 4, 2009) (citing *Brendlin v. California*, 551 U.S. 249, 257 (2007)).

182. *Id.* While a passenger can challenge the initial detention and search of his person, “*Brendlin* is unclear concerning the degree to which the passenger can challenge a search of the vehicle.” *State v. Ulrey*, 208 P.3d 317, 323 (Kan. Ct. App. 2009) (citing *United States v. Cortez-Galaviz*, 495 F.3d 1203, 1206 (10th Cir. 2007)).

183. *Worthington*, 520 F.3d at 1182 (citing *United States v. Edwards*, 242 F.3d 928, 936–37 (10th Cir. 2001)).

184. *Id.*

185. *United States v. Faulkner*, 439 F.3d 1221, 1223 (10th Cir. 2006) (citing *United States v. Workman*, 80 F.3d 688, 692 (2d Cir. 1996)).

186. *United States v. Cline*, 349 F.3d 1276, 1280 (2003) (citing 18 U.S.C. § 2518(1)(c)). The traditional “other less invasive procedures” include (1) traditional visual and audio surveillance; ““(2) questioning and interrogation of witnesses . . . ; (3) use of search warrants; and (4) infiltration of conspiratorial groups by undercover agents or informants.”” *Id.* (quoting *United States v. VanMeter*, 278 F.3d 1156, 1163–64 (10th Cir. 2002)).

187. *Faulkner*, 439 F.3d at 1223 (quoting 18 U.S.C. § 2515). However, only an aggrieved party with standing to contest such evidence is permitted to move to suppress it. *Id.* (quoting 18 U.S.C. § 2518(10)(a)). To confer standing, a party seeking to suppress such unlawfully intercepted evidence must demonstrate that “(1) he was a party to the communication, (2) the wiretap efforts were directed at him, or (3) the interception took place on his premises.” *Id.* (citing *United States v.*

Federal Wiretap Act provides that such wire communications may be intercepted by law enforcement when “one of the parties to the communication has given prior consent” to the interception.¹⁸⁸ Kansas courts hold that “evidence derived from a telephone conversation which was obtained by any means authorized by [the Federal Wiretap Act] is admissible in any criminal proceeding in Kansas.”¹⁸⁹

ii. Chemical Drug Tests

Kansas courts hold that “[d]rawing of a blood sample from a criminal suspect” implicates the constitutional protections against unreasonable searches of the Fourth and Fourteenth Amendments.¹⁹⁰ However, a warrantless search is not unreasonable if it falls within one of the judicially recognized exceptions to the warrant requirement:

A warrantless blood draw from a DUI suspect [is permitted] so long as the blood draw meets three requirements: (1) there are exigent circumstances . . . ; (2) the officer has probable cause to believe the suspect has been driving under the influence . . . ; and (3) reasonable procedures are used to extract the blood.¹⁹¹

Kansas courts also do not recognize a constitutional right to refuse a blood alcohol test when one is stopped for suspicion of driving under the influence of alcohol.¹⁹² Because there is no right to refuse testing, “there can be no constitutional bar to the admission of testing evidence.”¹⁹³ Further, the admissibility of a refusal to submit to blood or breath testing is not a Fifth Amendment violation.¹⁹⁴

Apple, 915 F.2d 899, 905 (4th Cir. 1990)).

188. *Id.* at 1224 (quoting 18 U.S.C. § 2511(2)(d)).

189. *State v. Andrews*, 176 P.3d 245, 248 (Kan. Ct. App. 2008) (quoting *State v. Irving*, 644 P.2d 389, 395 (Kan. 1982)).

190. *State v. Davis*, 207 P.3d 281, 285 (Kan. Ct. App. 2009) (citing *State v. Murry*, 21 P.3d 528, 531 (Kan. 2001)).

191. *Id.* (citing *Murry*, 21 P.3d at 531). Factors that the court may use to consider the reasonableness of the procedures “include the qualifications of the person drawing the blood, the environment in which the blood was drawn, and the manner in which the blood was drawn.” *Id.* at 286. Further, “the Kansas implied consent statute provides the blood draw of a DUI suspect may be performed only by persons with certain qualifications.” *Id.* (citing KAN. STAT. ANN. § 8-1001(c) (Supp. 2008)).

192. *State v. Bussart-Savaloja*, 198 P.3d 163, 171–72 (Kan. Ct. App. 2008).

193. *Id.*

194. *Id.* at 171. The statute at issue provides, “The person’s refusal shall be admissible in evidence against the person at any trial on a charge arising out of the alleged operation or attempted operation of a vehicle while under the influence of alcohol or drugs, or both.” KAN. STAT. ANN. § 8-1001(n) (2009).

III. SEIZURES

A. *Fourth Amendment Issues*

The United States Constitution guarantees the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable . . . seizures.”¹⁹⁵ This guarantee is echoed in the Kansas Constitution’s Bill of Rights,¹⁹⁶ and the Kansas Supreme Court stated that the “wording and scope of the two sections are identical for all practical purposes. If conduct is prohibited by one it is prohibited by the other.”¹⁹⁷ However, these guarantees do not offer a limitless proscription against government seizures of persons and property.¹⁹⁸ “The touchstone of the Fourth Amendment is reasonableness. Thus, the Fourth Amendment does not protect against all . . . seizures, but only those that are unreasonable.”¹⁹⁹

“The essence of the Fourth Amendment prohibition against unreasonable . . . seizures is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials by imposing a standard of reasonableness upon the exercise of those officials’ discretion.”²⁰⁰ The degree of intrusion into an individual’s privacy must therefore be weighed against the public interest.²⁰¹ A three-factor test is used to balance these competing concerns.²⁰² The court will weigh the “gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.”²⁰³

1. Seizure of Property

“A ‘seizure’ of property occurs when there is some meaningful interference with an individual’s possessory interests in that property.”²⁰⁴ In the context of seizures by police officers, a seizure occurs “when a

195. U.S. CONST. amend. IV.

196. KAN. CONST. Bill of Rights § 15.

197. *State v. Johnson*, 856 P.2d 134, 138 (Kan. 1993).

198. *State v. Bennett*, 200 P.3d 455, 459 (Kan. 2009).

199. *Id.*

200. *City of Salina v. Ragnoni*, 213 P.3d 441, 445 (Kan. Ct. App. 2009) (citing *Delaware v. Prouse*, 440 U.S. 648, 653–54 (1979)).

201. *Id.* (citing *Brown v. Texas*, 443 U.S. 47, 50–51 (1979)).

202. *Id.* (citing *Brown*, 443 U.S. at 50–51).

203. *Id.* (citing *Brown*, 443 U.S. at 50–51).

204. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

police officer exercises control over the property by removing it from an individual's possession or when an officer informs an individual that he is going to take his property.²⁰⁵ However, a seizure does not occur when the interference is not a meaningful one.²⁰⁶ For example, there is no seizure when "baggage is temporarily removed from one public area to another without causing any delay in travel plans."²⁰⁷ Nor is there a seizure when a mailed package is seized in-transit so long as the "detention of the package for investigative purposes did not delay the likelihood or probability of its timely delivery."²⁰⁸

In the mail context, the test for a reasonable seizure is whether the government official possesses reasonable suspicion to believe that a package contains contraband.²⁰⁹ If so, the official "may detain that package for a reasonable length of time while investigating."²¹⁰ The constitutionality of the government official's suspicion is "intensely fact specific,"²¹¹ though the United Postal Service does maintain a "narcotics package profile" to assist with the determination.²¹² Characteristics of the profile are:

(1) the size and shape of the package; (2) whether the package is taped to close all openings; (3) handwritten or printed labels; (4) an unusual return name and address; (5) unusual odors coming from the package; (6) a fictitious return address; and (7) the package's destination. In addition, postal inspectors pay special attention to the package's city of origin and to the recipient's name.²¹³

2. Seizure of Persons

A person is seized when "there is the application of physical force or if there is a show of authority which, in view of all the circumstances surrounding the incident, would communicate to a reasonable person that he or she is not free to leave and the person submits to the show of

205. *United States v. Wood*, 6 F. Supp. 2d 1213, 1224 (D. Kan. 1998) (citations omitted).

206. *Id.*

207. *Id.* (citing *United States v. Harvey*, 961 F.2d 1361, 1363-64 (8th Cir. 1992)).

208. *Id.* at 1224-25.

209. *See id.*

210. *State v. Duhon*, 109 P.3d 1282, 1287 (Kan. Ct. App. 2005) (citing *United States v. Dennis*, 115 F.3d 524, 531 (7th Cir. 1997)).

211. *Id.* (citing *United States v. Terroqies*, 319 F.3d 1051, 1056 (8th Cir. 2003)).

212. *Id.*

213. *Id.*

authority.”²¹⁴ Because encounters between police and citizens can give rise to unconstitutional seizure concerns, four types of police-citizen encounters have been delineated. The first type is a “voluntary encounter, which is not considered a seizure under the Fourth Amendment.”²¹⁵ The second type is an investigatory detention, or *Terry* stop, “in which an officer may detain any person in a public place if the officer reasonably suspects that the person is committing, has committed, or is about to commit a crime.”²¹⁶ During a *Terry* stop, “the officer is allowed to frisk the person seized for weapons if necessary for the officer’s personal safety.”²¹⁷ The third type of encounter is a “public safety stop in which an officer may approach a person to check on his or her welfare when the officer can articulate specific facts indicating a concern for the public’s safety.”²¹⁸ The fourth type is arrest.²¹⁹ When a person is seized by a police officer without being placed under arrest, the encounter turns into an investigatory detention.²²⁰

a. Traffic Stops

A traffic stop qualifies as an investigatory detention.²²¹ A police officer conducts a constitutional traffic stop so long as he has a “reasonable and articulable suspicion, based on fact, that the person stopped has committed, is committing, or is about to commit a crime.”²²² A traffic violation, for example, provides an “objectively valid reason to effectuate a traffic stop, i.e., articulable facts sufficient to constitute reasonable suspicion.”²²³ The officer is then permitted to do whatever is necessary to “carry out the purpose of the traffic stop.”²²⁴ This includes requesting documentation from the driver, performing a computer check

214. *State v. Morris*, 72 P.3d 570, 576–77 (Kan. 2003) (citing *California v. Hodari D.*, 499 U.S. 621, 624, 628, 629 (1991)).

215. *State v. Hill*, 130 P.3d 1, 6 (Kan. 2006) (citing *Nickelson v. Kan. Dep’t of Revenue*, 102 P.3d 490, 493 (Kan. Ct. App. 2004)).

216. *Id.*; KAN. STAT. ANN. § 22-2402(1) (2008).

217. *Hill*, 130 P.3d at 6; KAN. STAT. ANN. § 22-2402(2) (2008).

218. *Hill*, 130 P.3d at 6 (citing *State v. Vistuba*, 840 P.2d 511, 514 (Kan. 1992)).

219. *Id.*

220. *Id.* at 7 (citing *State v. Boone*, 556 P.2d 864, 870 (Kan. 1976)).

221. *See State v. Thompson*, 166 P.3d 1015, 1024 (Kan. 2007) (discussing investigatory traffic stops).

222. *Id.* (quoting *State v. DeMarco*, 952 P.2d 1276, 1282 (Kan. 1998)).

223. *State v. Morlock*, 218 P.3d 801, 806 (Kan. 2009) (summarizing *State v. Moore*, 154 P.3d 1, 6 (Kan. 2007)).

224. *State v. Murphy*, 219 P.3d 1223, 1226 (Kan. Ct. App. 2009).

against that information, and issuing a citation.²²⁵ If, while completing these tasks, the officer obtains information that raises a “reasonable and articulable suspicion of illegal activity,” he may extend the detention appropriately—otherwise the detainee “must be allowed to leave without further delay.”²²⁶

For a constitutional seizure, an officer must be able to “point to specific, articulable facts to support reasonable suspicion for *both* the stop and the frisk.”²²⁷ For example, a search will be found unconstitutional, despite an officer’s justified concern in the safety of himself and others if the officer fails to “determine [that the] initial detention was justified by reasonable suspicion that [the detainee] was engaged in criminal activity.”²²⁸ In *State v. Dean*, while performing a consensual search of a residence, an officer “informed [a suspect] that he was going to pat him down” after noticing the suspect appeared nervous.²²⁹ The officer subsequently found a crack pipe and some cocaine, and the individual was charged with possession.²³⁰ The defendant alleged, and the Court of Appeals agreed, that suppression of the evidence was proper because he was unlawfully seized when the officer had no articulable suspicion that the defendant was engaged in illegal activity at the time he performed the pat down.²³¹

Notwithstanding a lack of “reasonable and articulable” suspicion of illegal activity, an officer may extend a traffic stop encounter if the stop “ceases to be a detention and becomes consensual.”²³² This occurs when the driver voluntarily consents to additional questioning.²³³ In *State v. Murphy*, a police officer pulled over a motorist for driving nine miles over the posted speed limit.²³⁴ The officer asked the motorist to exit the vehicle and then issued him a warning ticket.²³⁵ The officer told the motorist he was free to leave and waited until he began walking back to his car before asking whether he had any illegal contraband in the vehicle.²³⁶ The motorist denied having any illegal contraband and

225. *Id.*

226. *Id.*

227. *State v. Dean*, 214 P.3d 1190, 1194 (Kan. Ct. App. 2009) (citing *Arizona v. Johnson*, 129 S. Ct. 781, 787 (2009)).

228. *Id.*

229. *Id.* at 1193.

230. *Id.*

231. *Id.*

232. *State v. Murphy*, 219 P.3d 1223, 1226 (Kan. Ct. App. 2009).

233. *Id.* (citing *State v. Thompson*, 166 P.3d 1015, 1024 (Kan. 2007)).

234. *Id.*

235. *Id.*

236. *Id.*

consented to the officer's request to search the vehicle.²³⁷ The officer found drugs and paraphernalia in the vehicle.²³⁸ At trial, the defendant moved to suppress the evidence on grounds that the traffic stop detention never "evolved into a consensual encounter."²³⁹

In affirming the district court's denial of the motion to suppress, the court in *Murphy*, using the general analysis set forth in *State v. Thompson*,²⁴⁰ held that the "factors supporting a voluntary encounter [were] strong enough to outweigh the factors supporting an illegal seizure."²⁴¹ In support of the encounter being voluntary, the court considered that the officer "returned the defendant's documents, told the defendant he was free to go, and physically disengaged the defendant; there was only one officer present; there was no display of a weapon or physical touching by the officer; and the encounter occurred in a public place."²⁴² In support of the encounter being an illegal seizure, the court considered that the officer "did not ask the defendant [for] permission to ask further questions before asking about the illegal contraband and [that] the officer's emergency lights remained on throughout the encounter."²⁴³

Courts are reluctant to draw bright-line rules regarding when a traffic stop evolves from an involuntary detention to a consensual encounter. The *Murphy* court acknowledged as much when it noted that

it would be improper to apply a rule that [the officer's] failure to ask permission to ask additional questions, and the defendant's failure to explicitly grant such permission, automatically made the ensuing encounter an illegal seizure. Instead, the officer's failure to ask permission should be considered another factor in the totality of the circumstances test.²⁴⁴

b. Public Safety Stops and Community Caretaking

The Tenth Circuit recognizes that "[e]ncounters are initiated by the police for a wide variety of purposes, some of which are wholly

237. *Id.*

238. *Id.*

239. *Id.*

240. 166 P.3d 1015 (Kan. 2007).

241. *Murphy*, 219 P.3d at 1228.

242. *Id.*

243. *Id.*

244. *Id.*

unrelated to the desire to prosecute crime.”²⁴⁵ Moreover, the police functions related to minimizing disorder are “equal in their importance to the police function in identifying and punishing wrongdoers.”²⁴⁶ These “community caretaking functions” are “totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.”²⁴⁷ However, “[u]nless a public safety stop is based upon specific and articulable facts, the concept could ‘emasculate the constitutional protection afforded’ by the Fourth Amendment.”²⁴⁸ “For this reason, courts must employ careful scrutiny in applying the public safety rationale.”²⁴⁹

Under the community caretaking concept, “a police officer may stop a vehicle to ensure the safety of the occupant without a reasonable suspicion of criminal activity.”²⁵⁰ The *Ragnoni* Court described some scenarios that often surround a police officer performing his community caretaking role in the context of traffic stops.²⁵¹ Frequently, “these stops are made after the officer has actually observed something to indicate a potential public safety risk.”²⁵² For example, an officer may stop a vehicle: (1) “out of concern that the driver might be falling asleep;” (2) out of “concern after seeing a vehicle’s ‘bouncy’ rear tire and open hatch cover over [a] fuel tank;” (3) after seeing “a vehicle turn into a ‘farm plug’ with no buildings, outbuildings, businesses, or residences in the area and turn off its lights;” or (4) out of concern that a vehicle may have broken down—however, this concern should be set aside if the car is moved and parked in a lot.²⁵³ Public safety stops may also be properly based on anonymous tips rather than on an officer’s direct observation.²⁵⁴

It is unnecessary “for the officer to observe an emergency or to perceive an immediate need for assistance in order to justify [a community caretaking stop].”²⁵⁵ Additionally, it is irrelevant “whether the peril might have been addressed more promptly by authorities.”²⁵⁶ In

245. *United States v. King*, 990 F.2d 1552, 1560 (10th Cir. 1993) (quoting *Terry v. Ohio*, 392 U.S. 1, 13 (1968)).

246. *Id.* (quoting I ABA STANDARDS FOR CRIMINAL JUSTICE, § 1-1.1(c) at 18 (2d ed. 1986)).

247. *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

248. *City of Salina v. Ragnoni*, 213 P.3d 441, 444 (Kan. Ct. App. 2009) (quoting *State v. Ludes*, 11 P.3d 72, 77 (Kan. Ct. App. 2000)).

249. *Id.* (citing *State v. Schuff*, 202 P.3d 743, 746 (Kan. Ct. App. 2009)).

250. *Id.*

251. *Id.* at 444–45.

252. *Id.* at 444.

253. *Id.* at 444–45.

254. *Id.* at 445.

255. *Id.*

256. *Id.*

Ragnoni, the Kansas Court of Appeals held that an officer made a lawful public safety stop based on information in a “hot sheet” that “indicated a genuine concern regarding Ragnoni’s danger to himself or others, and . . . was coded by the department to consider Ragnoni a ‘suicidal subject.’”²⁵⁷ The information was entered into the “hot sheet” pursuant to a report by Ragnoni’s wife after Ragnoni called her and asked her to tell his children goodbye for him.²⁵⁸ An officer later observed Ragnoni driving and stopped him as he exited the vehicle after parking it in his driveway.²⁵⁹ The court reasoned that the information in the “hot sheet” provided sufficiently articulable and reliable facts to justify the officer in making contact with Ragnoni, confirming his identity, and giving him “the opportunity to address the suicidal allegation.”²⁶⁰ The *Ragnoni* Court held that the “public concerns regarding safety and the need to contact and/or observe an alleged suicidal person are indeed grave and may often save the life of the subject and others.”²⁶¹

The public safety doctrine will not justify a police officer’s warrantless entry into a residence absent an objectively reasonable basis that the entry is necessary to “save lives or property.”²⁶² In *State v. Peterman*, an officer entered a residence without a warrant after learning that there was an individual in the house who was angry.²⁶³ The Kansas Court of Appeals held that the officer did not believe anyone to be in danger, and there was no indication of any weapons present, so this seizure was found to be unconstitutional.²⁶⁴

c. Detention of Third Parties During a Search or Traffic Stop

In a traffic stop, the “passenger is seized, just as the driver is, ‘from the moment [an automobile stopped by the police comes] to a halt on the side of the road.’ A passenger therefore has standing to challenge a stop’s constitutionality.”²⁶⁵ This is true because “a traffic stop of a car communicates to a reasonable passenger that he or she is not free to

257. *Id.*

258. *Id.* at 443.

259. *Id.*

260. *Id.* at 445.

261. *Id.*

262. *State v. Peterman*, 216 P.3d 710, 713–14 (Kan. Ct. App. 2009).

263. *Id.* at 712.

264. *Id.*

265. *Arizona v. Johnson*, 129 S. Ct. 781, 787 (2009) (brackets in original) (citing *Brendlin v. California*, 551 U.S. 249, 256–59, 263 (2007)).

terminate the encounter with the police and move about at will.”²⁶⁶ When an officer pulls over a vehicle for a traffic violation, “[t]he temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop.”²⁶⁷ Furthermore, “[a]n officer’s inquiries into matters unrelated to the justification for the traffic stop do not convert the encounter into something other than a lawful seizure, so long as the inquiries do not measurably extend the stop’s duration.”²⁶⁸ However, “[i]f no information raising a reasonable and articulable suspicion of illegal activity is found during the time period necessary to perform the computer check and other tasks incident to a traffic stop, the motorist must be allowed to leave without further delay.”²⁶⁹

Relying on *Arizona v. Johnson*, in late 2009, the Kansas Supreme Court overturned a decision in which the Kansas Court of Appeals held it unlawful for a police officer to ask a passenger “how long he had been in Phoenix, why he went there, and why after flying there he was instead driving back.”²⁷⁰ The intermediate court held the questions to be unlawful because they were not “reasonably related in scope to the traffic infraction which justified the stop in the first place.”²⁷¹ The Kansas Supreme Court concluded that because the officer questioned the passenger while the passenger was searching for a rental agreement, the questions were constitutional, as they did not measurably extend the duration of the stop.²⁷² Furthermore, the court reasoned that it was not unconstitutional for the officer to take the passenger’s identification for warrant-check purposes based on the fact that drug smugglers often fly to a location and then rent a car to drive back.²⁷³

An officer is not required to disregard information which may lead him or her to suspect independent criminal activity during a traffic stop. When “the responses of the detainee and the circumstances give rise to suspicions unrelated to the traffic offense, an officer may broaden his inquiry and satisfy those suspicions.”²⁷⁴

266. *Id.* at 788 (citing *Brendlin*, 551 U.S. at 257).

267. *Id.*

268. *Id.*

269. *State v. Smith*, 184 P.3d 890, 897 (Kan. 2008) (citations omitted).

270. *State v. Morlock*, 218 P.3d 801, 808 (Kan. 2009).

271. *Id.* (quoting *State v. Morlock*, 190 P.3d 1002, 1012 (Kan. Ct. App. 2008), *rev’d*, 218 P.3d 801 (Kan. 2009)).

272. *Id.* at 810.

273. *Id.* at 811.

274. *Id.* (quoting *United States v. Barahona*, 990 F.2d 412, 416 (8th Cir. 1993)).

It was important to the court in *Morlock* that the officer responded appropriately to “increasing amounts of suspicion during the stop [that] warranted his continued investigation which resulted in an increase in detention length.”²⁷⁵ The court concluded that the officer “diligently pursue[d] his investigation to quickly address his suspicions, especially when . . . the entire stop took only [twelve] minutes.”²⁷⁶

d. Arrests

Pursuant to sections 22-2202(4) and 22-2405(1) of the Kansas Statutes, a “person is considered to be under arrest when he or she is physically restrained or when he or she submits to the officer’s custody for the purpose of answering for the commission of a crime.”²⁷⁷ Using an arrest warrant is one way an officer may lawfully make an arrest.²⁷⁸ Absent a warrant, a police officer may also lawfully make an arrest when the officer has probable cause to believe the person is committing or has committed a felony, or when exigent circumstances exist.²⁷⁹ The Kansas Supreme Court defined probable cause as

the reasonable belief that a specific crime has been or is being committed and that the defendant committed the crime. Probable cause to arrest exists when the facts and circumstances within the arresting officer’s knowledge are sufficient to assure a person of reasonable caution that an offense has been or is being committed and the person being arrested is or was involved in a crime. The officer’s knowledge must be based on reasonably trustworthy information. To determine whether probable cause exists, an appellate court considers the totality of the circumstances, including all of the information in the officer’s possession, fair inferences drawn therefrom, and any other relevant facts, even if they may not be admissible at trial.²⁸⁰

Put another way, probable cause is “that quantum of evidence that would lead a reasonably prudent police officer to believe that guilt is more than a mere possibility.”²⁸¹

275. *Id.* at 813.

276. *Id.*

277. *State v. Hill*, 130 P.3d 1, 7 (Kan. 2006) (citing KAN. STAT. ANN. §§ 22-2202(4), -2405(7) (2008)).

278. KAN. STAT. ANN. § 22-2401(a) (2008).

279. *Id.* at (c)–(d).

280. *Hill*, 130 P.3d at 9 (citation omitted).

281. *Campbell v. Kan. Dep’t of Revenue*, 962 P.2d 1150, 1151 (Kan. Ct. App. 1998).

Physical restraint of an individual, even by handcuffs, is alone insufficient to qualify as an arrest.²⁸² Instead, whether a detention constitutes an arrest may depend on why the police officer handcuffed the individual in the first place.²⁸³ If the underlying purpose behind the officer physically restraining the defendant by handcuffs is to ensure the safety of the officer and others, then section 22-2202's requirement that the restraint be aimed at forcing the individual "to answer for the commission of a crime" is not met.²⁸⁴ This is precisely what happened in *State v. Anderson*.²⁸⁵ In *Anderson*, a police officer was patrolling a high-crime area when he observed Anderson running and "an older man running behind him."²⁸⁶ When Anderson saw the officer, he immediately stopped for questioning, but when the officer exited his vehicle, Anderson fled.²⁸⁷ The officer caught Anderson and handcuffed him, at which point the officer searched Anderson and found a crack pipe and some cocaine.²⁸⁸ At trial, Anderson claimed that he was arrested when he was ordered to the ground and handcuffed; the State contended that Anderson was not arrested until after the crack pipe and drugs were located.²⁸⁹ The Kansas Court of Appeals held that because the incident occurred in a high-crime area, it was reasonable for the officer to handcuff Anderson to effectuate the safety of himself and others.²⁹⁰ As such, the officer's purpose in handcuffing Anderson was not to take him into custody "in order that the person may be forthcoming to answer for the commission of a crime."²⁹¹

B. Fifth and Sixth Amendment Issues Concerning Interrogation and Arrest

The Fifth Amendment provides: "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ." ²⁹² The Sixth Amendment provides: "In all criminal prosecutions, the accused shall . . .

282. *Hill*, 130 P.3d at 7.

283. *See State v. Anderson*, No. 99,779, 2009 WL 1591399, at *5 (Kan. Ct. App. Jun. 5, 2009).

284. *Id.*

285. *Id.*

286. *Id.* at *1.

287. *Id.*

288. *Id.*

289. *Id.* at *3.

290. *Id.* at *5.

291. KAN. STAT. ANN. § 22-2202(4) (2008).

292. U.S. CONST. amend. V.

have the Assistance of Counsel for his defense.”²⁹³ The United States Supreme Court imposed prophylactic rules to safeguard these rights through *Miranda* warnings.²⁹⁴ *Miranda* warnings involve informing the defendant that he has a right to remain silent, that anything he says may be used against him, and that he has the right to the presence of an attorney, either retained or appointed.²⁹⁵

Miranda warnings are required in order for police to interrogate a person whose freedom has been restricted so as to render him “in custody.”²⁹⁶ A “custodial interrogation” is “questioning initiated by law enforcement officers after a person has been taken into custody or deprived of his or her freedom of action in any significant way.”²⁹⁷ To determine whether custodial interrogation occurred, the Kansas Supreme Court uses a two-pronged test.²⁹⁸ First, the court analyzes the circumstances of an interrogation.²⁹⁹ Next, the court judges “whether the totality of those circumstances would have led a reasonable person to believe he or she was not at liberty to terminate the interrogation.”³⁰⁰ Essentially, if a reasonable person would not believe he could terminate the interrogation, then custodial interrogation has occurred. Factors to consider in this analysis include place and time, duration, number of officers, conduct, physical restraint or its functional equivalent, status as suspect or witness, how the person being questioned arrived at the place of interrogation, and the interrogation’s ultimate result.³⁰¹ However, each set of facts must be assessed on a case-by-case basis.³⁰²

The Kansas Supreme Court recently dealt with the issue of when a person is rendered “in custody.” In *State v. Schultz*, an apartment resident granted permission for officers to come inside.³⁰³ Standing just inside the door, the officers smelled marijuana and observed a small amount of marijuana on a coffee table, which Schultz admitted to smoking for personal use.³⁰⁴ The officers persuaded Schultz to consent to a search by explaining that they would be as unintrusive as possible

293. U.S. CONST. amend. VI.

294. *Miranda v. Arizona*, 384 U.S. 436 (1966).

295. *Id.* at 444.

296. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977); *State v. Schultz*, 212 P.3d 150, 155 (Kan. 2009).

297. *Miranda*, 384 U.S. at 444.

298. *Schultz*, 212 P.3d at 155.

299. *Id.*

300. *Id.*

301. *Id.*

302. *Id.*

303. *Id.* at 152.

304. *Id.* at 152–53.

and that if he refused, they would apply for a search warrant based on the evidence they already observed.³⁰⁵ During the search, the officers found two large packages of marijuana as well as a scale, leading officers to believe that this was more than merely personal-use marijuana.³⁰⁶ The officers then instructed Schultz to sit down at a table.³⁰⁷ At some point, Schultz's girlfriend asked the officers if she could leave and was informed that she could not.³⁰⁸ Subsequently upon the officers' request, Schultz read and signed a written consent-to-search form.³⁰⁹ The search uncovered a large duffel bag filled with bricks of marijuana and several firearms.³¹⁰ Schultz was then arrested and given his *Miranda* warnings upon arriving at the police station.³¹¹

The Kansas Supreme Court held that Schultz was subjected to custodial interrogation despite the fact that it occurred in his apartment.³¹² The court ran through the list of custodial interrogation factors, noting specifically that Schultz was kept in constant observation, his girlfriend was prevented from leaving, and the interrogation ultimately resulted in his arrest.³¹³ The court observed that Schultz was treated as a felony suspect instead of a mere witness as soon as the large packages of marijuana with a scale were discovered.³¹⁴ The district judge determined that custody occurred at this point,³¹⁵ but the Kansas Supreme Court implied that "custody" occurred even earlier. Schultz was likely in custody as soon as the officers entered and smelled marijuana based on the reasonable person standard, and the court further noted that the officers acknowledged that Schultz would not have been free to leave after that point.³¹⁶

305. *Id.* at 153.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.* at 155.

313. *Id.*

314. *Id.*

315. *Id.* at 154.

316. *Id.* at 155.

1. Police Officers' Duties During Interrogation

a. Repeated *Miranda* Warnings

Whether officers must re-*Mirandize* a suspect after he already waived his rights is determined by the totality of the circumstances.³¹⁷ One important factor in this analysis is the amount of time between the waiver and the statements at issue.³¹⁸ Generally, once *Miranda* warnings are given, they need not be repeated before each subsequent interview.³¹⁹ In *State v. Ransom*, the Kansas Supreme Court held that re-*Mirandizing* was unnecessary when an interrogation was interrupted by breaks of twenty-five minutes and then forty-five minutes.³²⁰

b. *Quarles* Public Safety Exception

The *New York v. Quarles*³²¹ exception to the *Miranda* rule provides that an officer may engage in custodial interrogation of a suspect without *Miranda* warnings if there is “an objectively reasonable need to protect the police or the public from any immediate danger associated with a weapon.”³²² In *United States v. DeJear*, police approached a suspicious vehicle and found three men inside.³²³ One of the men, DeJear, appeared very nervous and started “stuffing” both of his hands into the back part of the front seat of the car.³²⁴ The officers asked DeJear to show them his hands, then drew their guns and yelled the command again.³²⁵ Finally, on the third command, DeJear put his hands up.³²⁶ When officers asked what DeJear was “stuffing,” he replied “some weed.”³²⁷ A search of the car revealed bags of marijuana as well as a gun.³²⁸

317. *State v. Ransom*, 207 P.3d 208, 217 (Kan. 2009) (citing *State v. Cofield*, 203 P.3d 1261, 1264 (Kan. 2009)).

318. *Id.* (citing *State v. Nguyen*, 133 P.3d 1259, 1274 (Kan. 2006)).

319. *Id.* at 218 (citing *State v. Boyle*, 486 P.2d 849, 855–56 (Kan. 1971)).

320. *Id.*

321. 467 U.S. 649 (1984).

322. *United States v. DeJear*, 552 F.3d 1196, 1199 (10th Cir. 2009) (quoting *Quarles*, 467 U.S. at 659 n.8).

323. *Id.* at 1198.

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

The Tenth Circuit rejected DeJear's argument that *Quarles* did not apply because all the passengers had their hands raised in the air.³²⁹ The court instead emphasized the potential dangers presented by the fact that DeJear twice refused to comply and easily could have had a weapon in his unseen hands.³³⁰ Thus, the custodial interrogation without *Miranda* warnings was justified in this case.³³¹ The Tenth Circuit went on to adopt a general standard for determining when *Quarles* applies.³³² Borrowing from the Sixth Circuit, the court adopted a two-pronged test.³³³ The officer must have a reason to believe, first, that "the defendant might have (or recently have had) a weapon," and second, that "someone other than police might gain access to that weapon and inflict harm with it."³³⁴

2. Invocation of Rights

After officers give the *Miranda* warnings, the interrogation must cease if the suspect indicates either that he wishes to remain silent or that he wants an attorney.³³⁵ If the right to counsel is invoked, then the interrogation may resume once an attorney is present.³³⁶ *Edwards v. Arizona* imposed an additional prophylactic rule when the accused invokes his right to counsel, holding that the accused cannot waive his right to counsel at the interrogation unless the accused himself initiates the communication with the police.³³⁷ The authorities may not initiate further interrogation with someone who invoked this right to counsel until an attorney is present.³³⁸ *Minnick v. Mississippi* added yet another layer to this prophylactic protection, holding that "when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney."³³⁹

329. *Id.* at 1202.

330. *Id.*

331. *Id.*

332. *Id.* at 1201.

333. *Id.*

334. *Id.* (quoting *United States v. Williams*, 483 F.3d 425, 428 (6th Cir. 2007)).

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

336. *Id.* at 474.

337. 451 U.S. 477, 484–85 (1981).

338. *Id.*

339. 498 U.S. 146, 153 (1990).

a. *Montejo* and *Jackson*

The United States Supreme Court reconsidered an additional prophylactic rule in *Montejo v. Louisiana*.³⁴⁰ In *Michigan v. Jackson*, the Court held that police may not initiate interrogation with a criminal defendant if he requested counsel at an arraignment or similar proceeding.³⁴¹ However, in *Montejo*, the Court overruled *Jackson* and its “fourth story of prophylaxis.”³⁴² When *Montejo* was arrested, he waived his *Miranda* rights, underwent interrogation, and ultimately confessed to the murder in question.³⁴³ *Montejo* then attended a state-law required preliminary hearing where the court ordered an attorney to be appointed to represent *Montejo*.³⁴⁴ After the hearing, *Montejo* again waived his *Miranda* rights at the request of the detectives and helped them attempt to locate the murder weapon.³⁴⁵ During this trip, *Montejo* wrote an inculpatory letter of apology.³⁴⁶ *Montejo* did not meet his attorney until afterwards.³⁴⁷

In *Montejo*, the Court questioned the practical application of *Michigan v. Jackson*. Justice Scalia, writing for the majority, emphasized that *Jackson* was policy-driven, and that *Jackson*'s policy was already furthered by the collection of *Miranda* cases.³⁴⁸ Arguably, “invocation” of the right to counsel under *Jackson* does not occur when the court automatically appoints counsel to the passive defendant.³⁴⁹ However, this would render *Jackson* ineffective in states like Kansas, where counsel is automatically appointed to indigent defendants.³⁵⁰ So, the Court overruled *Jackson* entirely, and instead relied on the *Miranda*, *Edwards*, and *Minnick* levels of prophylaxis.³⁵¹

Montejo is an abrupt departure from twenty-four years of precedent under *Jackson*. Indeed, the appellant *Montejo* did not even make the appropriate arguments to succeed in a *Jackson*-less legal landscape.³⁵²

340. 129 S. Ct. 2079 (2009).

341. 475 U.S. 625, 636 (1986).

342. *Montejo*, 129 S. Ct. at 2092.

343. *Id.* at 2082.

344. *Id.*

345. *Id.*

346. *Id.*

347. *Id.*

348. *Id.* at 2090.

349. *Id.* at 2083.

350. *Id.* See also KAN. STAT. ANN. § 22-4503(c) (2007).

351. *Montejo*, 129 S. Ct. at 2090.

352. *Id.* at 2091–92.

The five-to-four split amongst the Court indicates that this was a contentious decision.³⁵³ *Jackson*'s longevity suggests that Justice Scalia may have exaggerated the rule's practical problems. Although *Jackson*'s policy interests may be served by the other prophylactic rules, the Court should have attempted to fine-tune *Jackson* instead of simply dumping it and risking exposure to even a small category of defendants.

b. *Shatzer and Edwards*

The United States Supreme Court further modified these prophylactic rules in *Maryland v. Shatzer*.³⁵⁴ Investigating sexual abuse allegations, a detective sought to interrogate Shatzer, who was serving a prison sentence for an unrelated offense.³⁵⁵ However, upon being read his *Miranda* rights, Shatzer refused to answer without an attorney, and the detective ended the interview, releasing Shatzer back into the general prison population.³⁵⁶ Two and a half years later, new information was obtained and a detective once again sought to interrogate Shatzer in prison.³⁵⁷ This time, however, Shatzer signed a written waiver of his *Miranda* rights and eventually admitted several incriminating facts about the crime.³⁵⁸ During these confessions, Shatzer never requested an attorney or referenced his refusal from two and a half years earlier.³⁵⁹ After a particularly emotional admission in a subsequent interrogation, Shatzer finally asked for an attorney and the interrogation ended.³⁶⁰

The Court considered the issue of "whether a break in custody ends the presumption of involuntariness established in *Edwards v. Arizona*."³⁶¹ Justice Scalia wrote for the unanimous Court, which held that police may reinterrogate a suspect who requested counsel if there has been a break in custody longer than fourteen days.³⁶² The Court reasoned that fourteen days is enough time to "shake off any residual coercive effects of . . . prior custody."³⁶³ The Court further held that being released back into

353. Justices Stevens, Souter, Ginsburg, and Breyer dissented. *Id.* at 2094. Justices Alito and Kennedy wrote a concurring opinion. *Id.* at 2092.

354. 130 S. Ct. 1213 (2010).

355. *Id.* at 1217.

356. *Id.*

357. *Id.* at 1217–18.

358. *Id.* at 1218.

359. *Id.*

360. *Id.*

361. *Id.* at 1217.

362. *Id.* at 1222–23.

363. *Id.* at 1223.

prison constitutes a break in custody, because “lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda*.”³⁶⁴ Thus, Shatzer’s statements are not suppressible under *Edwards* because two and a half years in jail far exceeds the fourteen-day requirement, and is considered a break in custody.³⁶⁵

The Court’s decision as applied to *Shatzer*’s set of facts is a just and reasonable resolution. Despite *Miranda*’s and *Edwards*’ protections, an interrogation occurring two and a half years after a request for an attorney, and in which the suspect is again given the full *Miranda* warnings does not reek of unconstitutionality. The precise fourteen-day requirement, however, is a wholly arbitrary length of time. Justice Stevens argues against the fourteen-day rule in his concurrence, asserting that it is “insufficiently sensitive” to the *Edwards* rationale.³⁶⁶ While fourteen days may normally be enough time to substantially reduce coercion, the Court’s standard should be more sensitive to other contextual factors. It is possible that repeated interrogations—even after two weeks—could still violate the fundamental spirit of the *Edwards* decision. Instead, fourteen days should serve as the minimum amount of time set aside after a break in custody, with discretion given to the courts to determine if involuntariness is still present in the reinterrogation. Clearly, though, a pattern has emerged. *Montejo* and *Shatzer* both indicate that the Court is rethinking many of the *Miranda*-based prophylactic rules.

c. Ambiguous Requests

Invoking the *Miranda* right to counsel requires “some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police.”³⁶⁷ When such a statement is ambiguous, the police are permitted—but not required—to clarify the statement.³⁶⁸ In *State v. Gant*, as the suspect was arrested, he called out several things to two women, including that he loved them and that *they* should call a

364. *Id.* at 1224.

365. *Id.* at 1227.

366. *Id.* at 1229 (Stevens, J., concurring).

367. *State v. Gant*, 201 P.3d 673, 677 (Kan. 2009) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991)).

368. *Id.* (citing *State v. Gonzalez*, 145 P.3d 18, 41 (2006)).

lawyer.³⁶⁹ Despite this, Gant explicitly waived his *Miranda* rights before he was interrogated at the police station, and did not tell the officers that he wanted a lawyer.³⁷⁰ The court found that this was clearly insufficient to invoke the *Miranda* right to counsel.³⁷¹ To whatever extent this was a request for counsel, it was not a request for counsel during interrogation, as no interrogation had yet occurred.³⁷² Further, the statement was not directed at police, because Gant “was presumably not telling the police that he loved them.”³⁷³

State v. Appleby clarified the unambiguous request rule in Kansas by explicitly recognizing that “[t]he timing as well as the content and context of a reference to counsel may help determine whether there has been an unambiguous assertion of the right to have the assistance of an attorney in dealing with a custodial interrogation by law-enforcement officers.”³⁷⁴ In *Appleby*, the arrested suspect asked during the routine book-in process “if he was going to have the opportunity to talk to an attorney,” to which the officer responded “absolutely.”³⁷⁵ Police had not yet read Appleby his *Miranda* rights.³⁷⁶ The officer testified that he interpreted this as a question about procedure and not as an invocation of the right to counsel.³⁷⁷ The court agreed with the officer, stating that, at that moment, interrogation was “not imminent or impending.”³⁷⁸ This is consistent with the fact that Appleby later explicitly waived his right to counsel when interrogation *was* imminent.³⁷⁹ Thus, Appleby’s ambiguous question did not invoke his right to counsel.³⁸⁰

369. *Id.* at 676.

370. *Id.* at 677.

371. *Id.* at 677–78.

372. *Id.*

373. *Id.* at 677.

374. 221 P.3d 525, 548 (Kan. 2009).

375. *Id.* at 538.

376. *Id.*

377. *Id.*

378. *Id.* at 548.

379. *Id.*

380. *Id.*

3. Statements Made During Police Interrogation

a. Voluntariness

The Kansas Supreme Court recently stated:

The voluntariness of a confession is determined under the totality of the circumstances. The State has the burden of proving that a confession is admissible, and it must prove admissibility by a preponderance of the evidence. The essential inquiry is whether the statement is a product of the defendant's free and independent will.³⁸¹

Several factors weigh on the voluntariness of a statement, including mental condition, manner and duration of interrogation, ability to communicate with the outside world, age, intellect, background, fairness of the officers, and proficiency with the English language.³⁸²

The voluntariness issue comes up frequently in Kansas courts. In *State v. Johnson*, the court held that a suspect's statements were voluntary despite the presence of mental deficiencies.³⁸³ Johnson had an IQ of eighty, but the court believed that he understood his rights and made his statements voluntarily.³⁸⁴ Mental condition is just one of many factors, and is not conclusive on its own.³⁸⁵ Further, there must be coercion or exploitation of the mental deficiency in order for a confession to become involuntary due to the mental deficiency.³⁸⁶

Similarly, the defendant's argument of "subtle deception" in *State v. McMullen* failed to convince the court that the statement was involuntary.³⁸⁷ McMullen arrived at the police station believing he would be questioned about a robbery when the officer actually sought to question him about indecent liberties with a child.³⁸⁸ Such deception by police officers "does not impact the analysis" so long as the officers follow proper procedures for a custodial interrogation.³⁸⁹

381. *State v. Cofield*, 203 P.3d 1261, 1264 (Kan. 2009) (citing *State v. Johnson*, 190 P.3d 207, 216–17 (2008)).

382. *Id.* (citing *Johnson*, 190 P.3d at 216–17).

383. 190 P.3d at 218.

384. *Id.* at 212, 217–18.

385. *Id.* at 217.

386. *Id.* at 218 (citing *Colorado v. Connelly*, 479 U.S. 157, 164–65 (1986)).

387. 221 P.3d 92, 96 (Kan. 2009).

388. *Id.* at 94.

389. *Id.* at 96.

In some circumstances, an explicit promise of leniency can coerce a confession, rendering it involuntary.³⁹⁰ In Kansas, a promise sufficient to render a confession involuntary must “concern action to be taken by a public official . . . likely to cause the accused to make a false statement to obtain the benefit of the promise . . . made by a person whom the accused reasonably believes to have the power or authority to execute it.”³⁹¹ In *State v. Sharp*, the defendant argued that her confession was exchanged for such a promise.³⁹² Sharp alleged that two promises were made: a promise that she would not go to jail and a promise to help her and her children find a place to live.³⁹³ The court was not persuaded by the first alleged promise because Sharp later inculpated herself in the crime.³⁹⁴ The court was also not persuaded by the second promise because the court viewed it as only a “collateral benefit.”³⁹⁵ The general rule is that “[a] confession induced by a promise of a collateral benefit, *with no assurance of benefit to accused with respect to the crime under inquiry*, is generally considered voluntary and admissible.”³⁹⁶ Thus, neither purported promise was enough to make the confession involuntary.³⁹⁷

b. Tainted Statements

A coerced confession in violation of the Fifth Amendment may never be introduced at trial, either in the government’s case-in-chief or for impeachment purposes.³⁹⁸ However, violations of the prophylactic rules such as *Miranda* are subject to a balancing test to determine whether the resulting statements should be excluded.³⁹⁹ *Massiah v. United States* provides a similar prophylactic rule based on the Sixth Amendment right to counsel which protects against deliberate elicitation of statements by law enforcement.⁴⁰⁰ In *Kansas v. Ventris*, the United States Supreme Court addressed the question “whether a defendant’s incriminating statement to a jailhouse informant, concededly elicited in

390. See *State v. Sharp*, 210 P.3d 590, 597–98 (Kan. 2009) (citations omitted).

391. *Id.* at 598–99 (citations omitted). See also KAN. STAT. ANN. § 60-460(f)(2)(B) (2009).

392. *Sharp*, 210 P.3d at 597.

393. *Id.* at 606.

394. *Id.* at 605.

395. *Id.*

396. *Id.* (quoting *State v. Holloman*, 731 P.2d 294, 300 (Kan. 1987)).

397. *Id.* at 606.

398. See *Kansas v. Ventris*, 129 S. Ct. 1841, 1845 (2009) (citing *New Jersey v. Portash*, 440 U.S. 450, 458–59 (1979)).

399. *Id.*

400. 377 U.S. 201, 206 (1964).

violation of Sixth Amendment strictures, is admissible at trial to impeach the defendant's conflicting statement.⁴⁰¹ Police arrested Ventris for murder and put an informant in his cell.⁴⁰² Ventris made statements to the informant incriminating himself in the murder.⁴⁰³ At trial, Ventris denied culpability and blamed the murder entirely on his partner.⁴⁰⁴ The government then sought to call the informant to impeach Ventris's prior contradictory statement.⁴⁰⁵ The government admitted that the statement violated Ventris's Sixth Amendment rights under *Massiah*, but sought to introduce it for the limited purpose of impeachment.⁴⁰⁶

The Court held that the incriminating statement in violation of *Massiah* was admissible to impeach the defendant.⁴⁰⁷ The Court reasoned that the violation occurs at the time of interrogation rather than when the statement is used against him at trial.⁴⁰⁸ The Court then conducted a balancing test, finding that the interests favoring exclusion of the statement are far outweighed by the need to prevent perjury and to ensure integrity of the trial process.⁴⁰⁹ Thus, the statement was only tainted insofar as it could not be used in the case-in-chief at trial.

The *Ventris* decision may have a profound impact on law enforcement's strategy in gathering evidence against defendants. Even though statements obtained through a jailhouse informant may be inadmissible in the case-in-chief, impeachment evidence is still an extremely valuable commodity for the government to have in its arsenal. This holding gives police a substantial incentive to elicit *Massiah*-violating statements for possible impeachment use at trial. This could lead to more jailhouse informants being employed by officers, which may lead to more convictions.

401. *Ventris*, 129 S. Ct. at 1844.

402. *Id.*

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.*

407. *Id.* at 1847.

408. *Id.* at 1846.

409. *Id.* at 1846–47.

IV. PRE-TRIAL ISSUES

A. *The Formal Charge*

The Fifth Amendment of the United States Constitution provides that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor be deprived of life, liberty, or property, without due process of law”⁴¹⁰ The Sixth Amendment of the United States Constitution states that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation . . . and to have the Assistance of Counsel for his defence.”⁴¹¹ Similarly, Section 10 of the Bill of Rights to the Kansas Constitution states that “[i]n all prosecutions, the accused shall be allowed . . . to demand the nature and cause of the accusation against him.”⁴¹²

1. The Charging Documents—The Complaint, Informations and Indictment, and Bills of Particulars

The complaint is a written statement containing a concise rendition of the important facts constituting the crime being charged.⁴¹³ The complaint must be signed by someone with knowledge of the facts and must allege the specific legal violations the defendant is accused of committing.⁴¹⁴ An error in the complaint results in dismissal only if it prejudices the defendant,⁴¹⁵ meaning technical defects or even missing information will not result in reversal of the complaint so long as the defendant can properly prepare a defense with the mistakes or missing information.⁴¹⁶ However, a complaint is “fatally defective” if it fails to assert an essential element of the crime being charged.⁴¹⁷

Another way to assert a formal charge against a defendant is through an indictment by grand jury or information.⁴¹⁸ The defendant cannot be charged with a crime other than that put forth in the information unless

410. U.S. CONST. amend. V.

411. U.S. CONST. amend. VI.

412. KAN. CONST. Bill of Rights § 10.

413. See KAN. STAT. ANN. § 22-3201(b) (2008).

414. See *id.*

415. See *id.*

416. *State v. Edwards*, 179 P.3d 472, 478 (Kan. Ct. App. 2008) (citation omitted).

417. *State v. Gonzales*, 212 P.3d 215, 226 (Kan. 2009) (citing *State v. Moody*, 144 P.3d 612, 616 (Kan. 2006)).

418. See KAN. STAT. ANN. § 22-3201(b) (2008).

the crime is a lesser-included offense of the crime charged.⁴¹⁹ An information or indictment is sufficient so long as the defendant can determine what he is accused of and prepare a defense.⁴²⁰ An indictment must be signed by the presiding officer of the grand jury.⁴²¹ An information “must be signed by the county attorney, the attorney general or any legally appointed assistant or deputy of either.”⁴²²

In *State v. Gracey*, the defendant argued that the district court lacked jurisdiction over him because the information prepared by the prosecutor failed to state his age.⁴²³ Gracey was sentenced under section 21-4643 of the Kansas Statutes for indecent liberties with a minor, which required him to be eighteen or older.⁴²⁴ The court found that the lack of a specific age on the document was not fatal to the document and upheld Gracey’s conviction.⁴²⁵ The court reasoned that the caption on the document that signified Gracey’s date of birth was sufficient.⁴²⁶ Also, the court pointed out that Gracey never argued that the lack of a specific age negatively interfered with his ability to defend against the charges—a requirement to dismiss the complaint.⁴²⁷ The court determined that Gracey had sufficient information to know about the crime charged and its penalty.⁴²⁸

The court in *Gracey* explained the test for evaluating the sufficiency of a charging document when its sufficiency is challenged for the first time on appeal.⁴²⁹ The defendant must show that the alleged defect either: (1) prejudiced the defendant’s preparation of a defense; (2) impaired the defendant’s ability to plead the conviction in any subsequent prosecution; or (3) limited the defendant’s substantial rights to a fair trial.⁴³⁰

The decision in *Gracey* was reasonable. Gracey did not have any viable argument that the lack of a specific age on the charging document hindered his defense, ability to plead, or limited his rights in any way. It is important that the defendant truly understands the nature of the

419. See *State v. Hall*, 793 P.2d 737, 756 (Kan. 1990), *overruled on other grounds by* *Ferguson v. State*, 78 P.3d 40 (Kan. 2003).

420. See *id.*

421. KAN. STAT. ANN. § 22-3201(b) (2008).

422. *Id.*

423. *State v. Gracey*, 200 P.3d 1275, 1278 (Kan. 2009); see also *State v. Gonzales*, 212 P.3d 215, 218–28 (Kan. 2009).

424. *Gracey*, 200 P.3d at 1278.

425. *Id.* at 1280.

426. *Id.*

427. *Id.*

428. *Id.* at 1281.

429. *Id.*

430. *Id.*

offenses against him, but it is also necessary to consider the timeliness of the legal proceeding. If the court advocated a stricter standard requiring more specific information in the charging document, many complaints might fail on their initial attempt, leading to protracted litigation and more court involvement. As long as the defendant can discern the legal contentions from the charging document, no other information should be necessary to plead and defend adequately.

If the complaint, information, or indictment charges a crime but lacks enough detail about the particulars of the crime for the defendant to properly prepare a defense, the court may require the prosecuting attorney to draft a bill of particulars for the defendant.⁴³¹ This is done on written motion from the defendant.⁴³² The state's evidence at trial must be limited to the particulars in this document.⁴³³ If a defendant does not move for a bill of particulars, the right is waived.⁴³⁴

In *United States v. Doe*,⁴³⁵ the Tenth Circuit was asked to solve a dispute centering around whether the word "person" within 18 U.S.C. § 1153(a), the law used to charge the Native American defendants with arson, was defined with enough clarity for the defendants to properly be charged and prepare a defense.⁴³⁶ Under § 1153, there are three uses of the word "person": (1) "commits against the person or property of another"—referencing the physical body of a living individual; (2) "of another Indian or other person"—referring to an entity that either has a physical body or that can own property; and (3) "all other persons committing any of the above offenses"—suggesting a living individual capable of committing the listed offenses.⁴³⁷ The State of Colorado did not explain its interpretation of the word "person" in its information document.⁴³⁸ The case went to trial and, after the close of the State's case-in-chief, the defendants argued that the State's lack of a clear definition for the word "person" was prejudicial because it essentially allowed the government to change its theory on who the arson victim was after the information document was given to the defendants.⁴³⁹

431. KAN. STAT. ANN. § 22-3201(f) (2008).

432. *Id.*

433. *Id.*

434. *Phillips v. United States*, 406 F.2d 599, 602 (10th Cir. 1969).

435. 572 F.3d 1162 (10th Cir. 2009).

436. *Id.* at 1165.

437. *Id.* at 1167.

438. *Id.*

439. *Id.* at 1176.

The Tenth Circuit reasoned that the proper avenue for challenging this lack of clarity was through a bill of particulars.⁴⁴⁰ This motion was needed if the defendants were unsure of the specificities of a theory or wanted to preempt prejudicial surprise.⁴⁴¹ The court found the defendants waived their right to a bill of particulars by waiting until after the close of the State's case-in-chief.⁴⁴² The court reasoned that if the defendants were unsure of how the word "person" was used, they had ample time to get the particulars of the charge and, although not entitled to all of the State's evidence, were entitled to the State's theory of arson had they properly asked for it.⁴⁴³

The ruling in *United States v. Doe* is logical. The prosecution should not have the burden of disclosing all the information necessary for the defendant to prepare a defense beyond what crime is charged and the factual basis for the charge. The defendant should be allowed to inquire further and find out the necessary information to prepare his defense, but it should not be the prosecution's responsibility to provide every detail the defendant will need. In a case where different theories are possible, the defendant should file a timely motion for a bill of particulars to ensure he can prepare the best defense possible against the charges by having the most comprehensive information. The defense should also make a conscious effort to retrieve all the possible information before the start of the trial so as to not prolong the litigation. The motion for a bill of particulars should come before the trial begins and the prosecution should not be expected to answer it close to the trial date.

2. Changes to the Charging Documents—Amendments, Challenges, and Variances

Section 22-3201(e) of the Kansas Statutes provides that a court "may permit a complaint or information to be amended at any time before verdict or finding if no additional or different crime is charged and if substantial rights of the defendant are not prejudiced."⁴⁴⁴ The Kansas Supreme Court held that even charging a different crime by amending

440. *Id.* (citing *Sullivan v. United States*, 411 F.2d 556, 558 (10th Cir. 1969) ("If the accused desired more definite information for the proper preparation of a defense and to avoid prejudicial surprise, the remedy was by motion for a bill of particulars . . .")).

441. *Id.*

442. *Id.*

443. *Id.*

444. KAN. STAT. ANN. § 22-3201(e) (2008).

the complaint before trial is permissible so long as the “rights of the defendant are not prejudiced.”⁴⁴⁵

In *State v. Beckford*, the Kansas Court of Appeals decided whether the substantial rights of the defendant were prejudiced by allowing the State to amend its complaint three days before the trial began.⁴⁴⁶ The State amended its complaint to allege an aiding and abetting theory in addition to its charge of aggravated robbery.⁴⁴⁷ The defendant argued that the promulgation of this theory showed that the State lacked adequate evidence that he committed the aggravated robbery, which resulted in his lack of preparation of a sufficient and comprehensive alibi defense.⁴⁴⁸

The court rejected the defendant’s arguments and found his rights were not substantially prejudiced by the State adding the aiding and abetting theory to its complaint.⁴⁴⁹ The court reasoned that the trial judge could instruct the jury on the aiding and abetting theory even if it was not in the complaint, as was not the case here, so long as the jury could decide this charge based on the totality of the evidence presented throughout the trial.⁴⁵⁰ The court also explained that Kansas case law previously held that a person who aids or abets in a crime can be charged and tried in the same manner as the principal, so his defense would not change.⁴⁵¹

The court’s decision in *State v. Beckford* is in the best interest of efficient litigation. Parties are collecting facts and evidence leading up to trial, so theories may change. It is important to allow those changes so the case for each side is as strong as possible. However, it is also important to consider the rights of the defendant. If the rights of the defendant are in jeopardy, the amendments should not be allowed, as it would be incredibly prejudicial and impossible for the defendant to prepare a defense if amended immediately before trial.

445. *State v. Bischoff*, 131 P.3d 531, 538 (Kan. 2006).

446. *State v. Beckford*, No. 100,077, 2009 WL 401003, at *4 (Kan. Ct. App. Feb. 13, 2009).

447. *Id.*

448. *Id.*

449. *Id.*

450. *Id.* (citing *State v. Pennington*, 869 P.2d 624, 630 (Kan. 1994)).

451. *Id.* (citing *State v. Smolin*, 557 P.2d 1241, 1245 (Kan. 1976)); see KAN. STAT. ANN. § 21-3205(1) (2008) (“A person is criminally responsible for a crime committed by another if such person intentionally aids, abets, advises, hires, counsels or procures the other to commit the crime.”).

B. *Initial Appearance*

The Sixth Amendment to the United States Constitution guarantees that “in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defence.”⁴⁵² Section 22-2901 of the Kansas Statutes provides that after an arrest, the accused must be taken before a magistrate of the court that issued the arrest warrant “without unnecessary delay.”⁴⁵³ If the arrest was based on probable cause with no warrant, the accused must be taken to the nearest available magistrate judge.⁴⁵⁴ The purpose of section 22-2901 is to “safeguard individual rights without hampering effective and intelligent law enforcement.”⁴⁵⁵ The statute is also thought to prevent unlawful police pressure over the accused before he is informed of his constitutional rights.⁴⁵⁶ Whether the accused was unnecessarily delayed in being brought before a magistrate judge is determined by the specific facts and circumstances of each case.⁴⁵⁷ Unnecessary or unreasonable delay by itself is not a violation of due process unless it prejudices the accused individual’s right to a fair trial.⁴⁵⁸

C. *Bail*

The Bill of Rights to the Kansas Constitution guarantees that “[a]ll persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted.”⁴⁵⁹ Bail ensures that the accused is present at future hearings and appearances.⁴⁶⁰ The amount of bail is left to the discretion of the magistrate judge,⁴⁶¹ but the amount is generally

452. U.S. CONST. amend. VI.

453. KAN. STAT. ANN. § 22-2901(1) (2008).

454. *Id.*

455. *State v. Crouch*, 641 P.2d 394, 396 (Kan. 1982).

456. *See id.* at 397 (“It has also been stated that the purpose of the rule is to abolish unlawful detention that provides an opportunity for improper pressure by the police before the arrestee has been informed of his rights.”).

457. *Id.*

458. *State v. Goodseal*, 553 P.2d 279, 290–91 (Kan. 1976), *overruled on other grounds by State v. Underwood*, 615 P.2d 153 (Kan. 1980).

459. KAN. CONST. Bill of Rights § 9.

460. *See State v. Way*, 461 P.2d 820, 825 (Kan. 1969) (“The purpose of bail is to insure the presence of the prisoner at a future hearing.”).

461. *Id.*

proportional to the crime being charged as well as the accused person's criminal history.⁴⁶²

Under section 22-2807 of the Kansas Statutes, the accused forfeits the bond only if he fails to appear.⁴⁶³ Bond forfeiture can ultimately be set aside if justice so requires.⁴⁶⁴ However, if the forfeiture is found to be valid, a default judgment is entered against the defendant and execution on that judgment ensues.⁴⁶⁵ The bond can be revoked and the defendant taken into custody if the defendant violates any other proscribed condition of the bond.⁴⁶⁶

If a defendant cannot post the required amount of bond, it does not necessarily mean he must be incarcerated. The accused may get a surety bond, whereby an agreement is created between the accused and the surety guarantor, who also creates an agreement with the state.⁴⁶⁷ The surety guarantor loans the money for the accused person's bail and is responsible for keeping track of the accused person's whereabouts and ensuring he is present at his scheduled court appearances.⁴⁶⁸ However, if the defendant materially alters the agreement with the surety without notice or permission, the surety is discharged from the agreement.⁴⁶⁹ A material alteration is defined as "a change that a careful and prudent person would regard as substantially increasing the risk of loss."⁴⁷⁰

In *State v. Jones*, the Kansas Court of Appeals held that section 22-2807(1) left no room for judicial discretion in whether a bond was forfeited.⁴⁷¹ Rather, the only time a bond could be considered "forfeited" is when the accused failed to appear.⁴⁷² If the accused appears, the district court has discretion to revoke a bond only if a condition to the bond is violated.⁴⁷³

462. See *State v. Robertson*, 455 P.2d 570, 572 (Kan. 1969).

463. KAN. STAT. ANN. § 22-2807(2) (2008).

464. *Id.* § (3).

465. *Id.*

466. *Id.* § (2).

467. See *State v. Sedam*, 122 P.3d 829, 831 (Kan. Ct. App. 2005) (A surety bond, or appearance bond, is a "contract between the principal and the surety on the one hand and the State on the other.").

468. *Id.*

469. *First Nat'l Bank of Anthony v. Dunning*, 855 P.2d 493, 496 (Kan. Ct. App. 1993).

470. *Id.*

471. *State v. Jones*, 173 P.3d 1179, 1181 (2008).

472. *Id.*

473. *Id.*

D. Preliminary Hearing and Examination

Section 22-2902 of the Kansas Statutes requires that any person accused of a felony has a right to a preliminary hearing where he personally appears in front of a magistrate judge unless the charge was created by a grand jury indictment.⁴⁷⁴ The preliminary hearing must be scheduled within ten days after the defendant's arrest or first appearance, whichever is earlier.⁴⁷⁵ A continuance for the preliminary hearing is possible only if good cause is shown.⁴⁷⁶

The defendant does not enter a plea at the preliminary hearing.⁴⁷⁷ Rather, he is given the opportunity to cross-examine any witness over the age of thirteen and to introduce evidence on his behalf.⁴⁷⁸ If the evidence supports a finding that a felony was committed and there is probable cause that the defendant committed said felony, the magistrate judge will order the defendant to be bound by the jurisdiction of the district court.⁴⁷⁹ In order to establish probable cause, there "must be evidence sufficient to cause a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of the defendant's guilt."⁴⁸⁰ Probable cause is a lower standard of proof than proof beyond a reasonable doubt, which is the standard of proof at trial.⁴⁸¹ If there is no probable cause that the defendant committed the felony, the defendant is free to leave.⁴⁸² A defendant also can choose to waive the preliminary hearing, which automatically binds him under the jurisdiction of the district judge.⁴⁸³

Section 22-2902a addresses the use of forensic reports at preliminary hearings.⁴⁸⁴ This provision allows for forensic evidence—including laboratory reports and DNA testing results—to be introduced at the preliminary hearing via reports and documentation rather than requiring the preparer of the document to testify.⁴⁸⁵ This provision gives the same

474. KAN. STAT. ANN. § 22-2902(1)–(2) (2008).

475. *Id.* § (2).

476. *Id.*

477. *Id.* § (3).

478. *Id.*

479. *Id.*

480. *State v. Hernandez*, 193 P.3d 915, 917 (Kan. Ct. App. 2008).

481. *See State v. Huser*, 959 P.2d 900, 910–11 (Kan. 1998) ("While the judge at a preliminary hearing must determine that there is some evidence to support a finding that a felony has been committed and the person charged committed it, the evidence need not prove guilt beyond a reasonable doubt, only probable cause.").

482. KAN. STAT. ANN. § 22-2902(3) (2008).

483. *Id.* § (4).

484. KAN. STAT. ANN. § 22-2902a (2008).

485. *Id.*

evidentiary weight to the reports as it would if the preparer actually testified in person at the hearing.⁴⁸⁶

In *State v. Leshay*, the Supreme Court of Kansas addressed whether section 22-2902a violated the Confrontation Clause of the Sixth Amendment to the United States Constitution.⁴⁸⁷ A laboratory report prepared by the Kansas Bureau of Investigation showed that residue on a scale in Leshay's home was cocaine.⁴⁸⁸ The report was admitted as evidence at the preliminary hearing.⁴⁸⁹ Leshay argued that this submission of the laboratory report without requiring the technician who prepared it to testify violated his Sixth Amendment right to confront his accusers. Using this theory, Leshay challenged the constitutionality of section 22-2902a.⁴⁹⁰ The court ultimately found that the Constitution does not require the State to enact procedures allowing for full constitutional rights at the preliminary hearing.⁴⁹¹ The court reasoned that judicial precedent established that the Sixth Amendment right to confrontation is essentially a trial right, not a right guaranteed at a preliminary hearing.⁴⁹²

The decision in *Leshay* seemed, in large part, to be based off the legislative reasoning for enacting section 22-2902a.⁴⁹³ The court reasoned that the provision was enacted to encourage more effective use of forensic examiners' time, which was eradicated by the necessity to attend preliminary hearings.⁴⁹⁴ This decision appears to be correct and constitutionally sound. If the defendant questions any report or forensic evidence presented at the preliminary hearing, he can pursue avenues within the discovery process or at the trial itself to answer questions or present allegations that the evidence is improper or flawed.

E. Competency to Stand Trial

Section 22-3301 of the Kansas Statutes governs when an accused can be determined incompetent to stand trial. Under section 22-3301, an accused will be found incompetent to stand trial when a mental illness or defect renders him unable to: (1) understand the nature and purpose of

486. *Id.*

487. 213 P.3d 1071, 1073 (Kan. 2009).

488. *Id.*

489. *Id.*

490. *Id.*

491. *Id.* at 1076.

492. *Id.* at 1075.

493. *Id.* at 1074.

494. *Id.*

the proceedings against him; or (2) to make or assist in making a defense.⁴⁹⁵

Section 22-3302 of the Kansas Statutes explains the procedure for a proceeding to determine the competency of the defendant. At any time after the accused is charged with a crime but before sentencing, the defendant, defendant's counsel, or the prosecution can request an inquiry into whether the defendant is competent to stand trial.⁴⁹⁶ If the judge, based on personal knowledge or a motion from a party, determines there needs to be an inquiry into the accused individual's competency, the proceedings must be suspended and a competency hearing held.⁴⁹⁷ The defendant must be present at this proceeding.⁴⁹⁸ The court has options in determining the competency of the defendant, including submitting the accused to a psychological or psychiatric evaluation or to an institution for a determination.⁴⁹⁹ If the accused is found to be competent, the trial continues.⁵⁰⁰

If the accused is found to be incompetent, the parties proceed under section 22-3303 of the Kansas Statutes. A defendant accused of a felony who is found incompetent to stand trial is committed to a state security hospital and, within ninety days of the commitment, the chief medical officer of the institution must communicate with the court about the likelihood of the accused being competent to stand trial at a later date.⁵⁰¹ If there is a possibility the accused can stand trial at a later date, the accused stays in the state security institution for a period of six months from the original date of commitment or until he becomes competent, whichever occurs first.⁵⁰² If the possibility of standing trial does not exist, the accused begins the process of being submitted to involuntary commitment.⁵⁰³ Any accused person that serves time at a public institution under the provisions of section 22-3303 is credited for the time of commitment if he is later sentenced.⁵⁰⁴

495. KAN. STAT. ANN. § 22-3301(1)(a)-(b) (2008).

496. *Id.* § 22-3302(1) (2008).

497. *Id.*

498. *Id.* § (7).

499. *Id.* § (3).

500. *Id.* § (4).

501. *Id.* § 22-3303(1) (2008).

502. *Id.*

503. *Id.*

504. *Id.* § (4).

F. Jurisdiction and Venue

1. Proper Jurisdiction and Venue to Bring Prosecution

Beyond proving the elements of a crime, the prosecution must also prove jurisdiction and venue in every criminal prosecution.⁵⁰⁵ The United States Constitution guarantees that a trial “shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed.”⁵⁰⁶ The Sixth Amendment also requires trial by a “jury of the State and district wherein the crime shall have been committed.”⁵⁰⁷ These guarantees are also included in both constitutional and statutory law in Kansas.⁵⁰⁸ The Bill of Rights of the Kansas Constitution provides that a criminal defendant is entitled to “a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed.”⁵⁰⁹ Because Kansas selects jurors from within each county for trial, a defendant’s trial must occur in the county where the crime took place.⁵¹⁰ This requirement is codified in section 22-2602 of the Kansas Statutes, which states, “the prosecution shall be in the county where the crime was committed.”⁵¹¹ Kansas provides some statutory exceptions to the general venue rule when the exact location of the crime is difficult to determine.⁵¹² These exceptions “are based on the commonsense notion that a criminal should not escape punishment because the crime’s exact location was concealed.”⁵¹³

2. Change of Venue

If the proper venue would cause prejudice to a defendant such that he could not receive a fair trial as guaranteed by the Sixth Amendment, the defendant may move for change of venue.⁵¹⁴ Courts consider a variety of factors when determining whether a defendant’s right to a fair trial would

505. *State v. Rivera*, 219 P.3d 1231, 1235 (Kan. Ct. App. 2009).

506. U.S. CONST. art. III, § 2, cl. 3; *see United States v. Hamilton*, 587 F.3d 1199, 1206 (10th Cir. 2009) (stating that proper venue must be proved in every criminal case).

507. U.S. CONST. amend. VI.

508. KAN. CONST. Bill of Rights § 10; KAN. STAT. ANN. § 22-2602 (2008).

509. KAN. CONST. Bill of Rights § 10.

510. *Rivera*, 219 P.3d at 1235.

511. KAN. STAT. ANN. § 22-2602 (2008).

512. *Rivera*, 219 P.3d at 1235 (citing KAN. STAT. ANN. §§ 22-2603, -2604).

513. *Id.*

514. *Gardner v. Galetka*, 568 F.3d 862, 888 (10th Cir. 2009); *State v. Krider*, 202 P.3d 722, 727 (Kan. Ct. App. 2009).

be jeopardized by the current venue.⁵¹⁵ These factors include the degree of publicity circulated throughout the community, whether another venue would have similar publicity, and the length of time between the publicity and the time of trial.⁵¹⁶ Courts also consider the selection of the jury, the size of the area for the jury pool, the jurors' familiarity with the publicity, and the defendant's challenges to the jury selection.⁵¹⁷ Additionally, courts consider whether the publicity was connected to a release of information by government officials.⁵¹⁸ The defendant has the burden to show that prejudice in the community exists as a demonstrated reality and not just as a matter of speculation.⁵¹⁹

3. Timeliness of Challenges to Jurisdiction and Venue

Subject matter jurisdiction may be raised at any time and cannot be waived or estopped.⁵²⁰ The issue may be raised for the first time on appeal or on any court's own motion.⁵²¹ Venue is a matter of jurisdiction and as such can also be raised at any time.⁵²²

G. Statute of Limitations

A statute of limitations limits a person's exposure to criminal prosecution for a certain period of time after a crime is committed.⁵²³ Limitations protect individuals from being required to defend charges where the evidence may become "obscured by the passage of time."⁵²⁴ The Kansas Supreme Court repeatedly noted that "[s]tatutes of limitations are favored in the law."⁵²⁵ As such, a statute of limitations should be construed liberally in favor of criminal defendants and any exceptions to a statute of limitations should be construed narrowly.⁵²⁶

515. *Krider*, 202 P.3d at 727.

516. *Id.* (citing *State v. Higgenbotham*, 23 P.3d 874, 881 (Kan. 2001)).

517. *Id.*

518. *Id.*

519. *Id.*

520. *Adcock v. State*, No. 101,672, 2009 WL 3428740, at *2 (Kan. Ct. App. Oct. 23, 2009).

521. *Id.*

522. *Id.*

523. *Toussie v. United States*, 397 U.S. 112, 114 (1970).

524. *Id.* at 114–15.

525. *State v. Belt*, 179 P.3d 443, 451 (Kan. 2008) (citing *State v. Palmer*, 810 P.2d 734, 737 (Kan. 1991); *State v. Bentley*, 721 P.2d 227, 228 (Kan. 1986); *State v. Mills*, 707 P.2d 1079, 1081 (Kan. 1985)).

526. *Id.* (citing *Palmer*, 810 P.2d at 737; *Bentley*, 721 P.2d at 228–29; *Mills*, 707 P.2d at 1081).

Kansas offers different time limitations depending on the nature of the crime.⁵²⁷ A limitation begins to run when the crime has occurred—the point when every element of the offense is committed.⁵²⁸ A prosecution must be commenced within the time allowed for that crime under section 21-3106 of the Kansas Statutes.⁵²⁹ “A prosecution is commenced when a complaint or information is filed, or an indictment returned, and a warrant thereon is delivered to the sheriff or other officer for execution.”⁵³⁰ If the warrant is executed without unreasonable delay, the prosecution is considered commenced.⁵³¹

Tolling of the limitations is allowed in some circumstances.⁵³² For example, if the accused is absent from or concealed within the state, the limitation will be tolled.⁵³³ Additionally, if the crime is concealed by positive acts of the accused, calculated to prevent discovery of the crime itself, the time limitation will be tolled.⁵³⁴

H. Joinder and Severance

Kansas allows for statutory consolidation of multiple charges against a defendant in the same complaint.⁵³⁵ Whether the charges are misdemeanors or felonies, they may be consolidated if the charges “are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.”⁵³⁶ A court may also order that separate complaints, indictments, or informations against a defendant be tried together if they could have been joined together.⁵³⁷ As long as there is a factually supported basis for consolidation, the district court has discretion whether to consolidate the charges.⁵³⁸

Similarly, Kansas allows joint trials of two or more defendants: “Two or more defendants may be charged in the same complaint,

527. See KAN. STAT. ANN. § 21-3106 (2007).

528. *Id.* § (6).

529. *Id.* § 21-3106.

530. *Id.* § (7).

531. *Id.*

532. See *id.* § (5).

533. *Id.*

534. *Id.*; *State v. Belt*, 179 P.3d 443, 449 (Kan. 2008) (citing *State v. Palmer*, 810 P.2d 734, 737 (Kan. 1991); *State v. Watson*, 67 P.2d 515, 517 (Kan. 1937)).

535. See KAN. STAT. ANN. § 22-3202(1) (2007).

536. *Id.*

537. § 22-3203.

538. *State v. Coburn*, 176 P.3d 203, 211 (Kan. Ct. App. 2008).

information or indictment if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting the crime or crimes.⁵³⁹ However, the defendants may move for separate trials.⁵⁴⁰ The decision whether to grant separate trials is also within the district court's discretion, but "severance should occur when a defendant has established that there would be actual prejudice if a joint trial occurred."⁵⁴¹ When determining whether separate trials are appropriate, the courts consider several factors:

(1) The defendants have antagonistic defenses; (2) important evidence in favor of one of the defendants which would be admissible on a separate trial would not be allowed in a joint trial; (3) evidence incompetent as to one defendant and introducible against another would have a prejudicial effect against the former with the jury; (4) the confession by one defendant, if introduced and proved, could foreseeably operate to prejudice the jury against the other; and (5) one defendant who could give evidence for the other defendant would become a competent and compellable witness at the separate trials of the other defendants.⁵⁴²

If none of the above factors match the facts in the case, the district court will try the defendants jointly.⁵⁴³

I. Plea Agreements

When a criminal defendant enters a guilty plea, that defendant "waives certain fundamental constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers."⁵⁴⁴ As a result of the waiver of these rights, the guilty plea must constitute an intentional relinquishment or abandonment to be valid under the Due Process Clause.⁵⁴⁵

539. § 22-3202(3).

540. § 22-3204.

541. *State v. Reid*, 186 P.3d 713, 730 (Kan. 2008) (citing *State v. White*, 67 P.3d 138, 147 (Kan. 2003)).

542. *Harris v. State*, 204 P.3d 557, 561 (Kan. 2009) (citing *State v. Winston*, 135 P.3d 1072, 1084 (Kan. 2006)).

543. *See id.*

544. *State v. Moses*, 127 P.3d 330, 335 (Kan. 2006) (citing *Boykin v. Alabama*, 395 U.S. 238, 243 (1969)).

545. *Id.* (citing *Boykin*, 395 U.S. at 243 n.5).

1. Types of Pleas and Their Repercussions

Kansas ensures compliance with due process under section 22-3210 of the Kansas Statutes.⁵⁴⁶ Before a court accepts a plea of guilty or *nolo contendere*, the defendant must enter the plea in open court.⁵⁴⁷ In felony cases, the court must also inform the defendant of the consequences of the plea—including the waiver of constitutional rights and the possible sentences—and determine “that the plea [was] made voluntarily with understanding of the nature of the charge and the consequences of the plea.”⁵⁴⁸ The court must also be satisfied that a factual basis supports the plea of guilty.⁵⁴⁹

In Kansas, a defendant may enter a plea of guilty, *nolo contendere*, or an *Alford* plea.⁵⁵⁰ A guilty plea is an admission of truth for each element of the offense.⁵⁵¹ When entering a plea of *nolo contendere* or an *Alford* plea, however, the “defendant does not admit the facts upon which his or her guilt for the crime would be based.”⁵⁵² In *State v. Case*, the Kansas Supreme Court examined the sentencing implications resulting from the difference between a guilty plea and a *nolo contendere* or *Alford* plea.⁵⁵³ The court stated that while a guilty plea admits all facts offered in support of the plea, and those admissions may be used for a sentencing enhancement, the same is not true for a *nolo contendere* or *Alford* plea.⁵⁵⁴ The court held that if the defendant stipulates to the factual basis for the offense charged with the *nolo contendere* or *Alford* plea, the defendant does not admit the truth of those facts.⁵⁵⁵ As such, the *nolo contendere* or *Alford* plea cannot establish the factual basis for an element of an offense used to enhance the sentence.⁵⁵⁶

This decision could have repercussions for prosecutors and defendants. While this decision is fair to the defendant who specifically chooses to use a *nolo contendere* or *Alford* plea to avoid admitting the facts of the offense charged, it could increase the burden on prosecutors

546. KAN. STAT. ANN. § 22-3210 (2009); *Moses*, 127 P.3d at 335.

547. KAN. STAT. ANN. § 22-3210(a)(1) (2009).

548. *Id.* § 22-3210; *see Moses*, 127 P.3d at 335 (citing *State v. Anziana*, 840 P.2d 550, 551 (Kan. Ct. App. 1992); *State v. Moore*, 825 P.2d 537, 541 (Kan. Ct. App. 1992)).

549. KAN. STAT. ANN. § 22-3210(a)(4) (2009).

550. *See State v. Case*, 213 P.3d 429, 431–32 (Kan. 2009).

551. KAN. STAT. ANN. § 22-3209(1) (2009).

552. *Case*, 213 P.3d at 432.

553. *Id.* at 432–35.

554. *Id.* at 433.

555. *Id.* at 432.

556. *Id.* at 436–37.

seeking a sentencing enhancement. The prosecutor must still prove the specific elements of the offense during sentencing for a sentencing enhancement. Essentially, the burden of proof on the prosecutor continues from the guilt determination phase of the trial into the sentencing phase of the trial. This may discourage prosecutors seeking a sentencing enhancement from entering plea negotiations with a defendant who only wishes to enter a *nolo contendere* or *Alford* plea. Thus, the decision in *Case*, while fair for the individual defendant who wishes to avoid admitting the elements of the offense, may work to the disadvantage of some prosecutors and defendants.

2. Plea Agreements

A plea agreement reached between a prosecuting attorney and a defendant represents “a promise that must be fulfilled by both parties.”⁵⁵⁷ Inherent in all plea agreements is the expectation that each party will honor the terms of the agreement.⁵⁵⁸ If the state breaches the plea agreement, the court must decide whether to fulfill the promise or allow the defendant the opportunity to withdraw the plea.⁵⁵⁹ Additionally, a defendant who enters a guilty plea must seek approval from the court to withdraw the plea.⁵⁶⁰ After sentencing, the court will only allow a defendant to withdraw a guilty plea to correct manifest injustice.⁵⁶¹ Before sentencing, a defendant may withdraw a plea for good cause.⁵⁶² To determine whether good cause exists, a court considers three factors: (1) whether the defendant received competent representation by counsel; (2) whether “the defendant was misled, coerced, mistreated, or unfairly taken advantage of;” and (3) whether “the plea was fairly and understandingly made.”⁵⁶³

J. Arraignment

The arraignment in a criminal proceeding is “the formal act of calling the defendant before a court having jurisdiction to impose

557. *State v. Woodward*, 202 P.3d 15, 18 (Kan. 2009) (citing *Santobello v. New York*, 404 U.S. 257, 262 (1971)).

558. *Id.* (citing *State v. Boley*, 113 P.3d 248, 252 (Kan. 2005)).

559. *Id.*

560. See KAN. STAT. ANN. § 22-3210(d) (2007).

561. *Id.*

562. *Id.*

563. *State v. White*, 211 P.3d 805, 809 (Kan. 2009) (quoting *State v. Schow*, 197 P.3d 825, 834 (Kan. 2008)).

sentence for the offense charged.”⁵⁶⁴ During the arraignment, the defendant is read the complaint, information, or indictment, and asked to plead guilty, not guilty, or otherwise plead as permitted by law.⁵⁶⁵ In Kansas, different rules for arraignment apply depending on whether a defendant is charged with a felony or a misdemeanor.⁵⁶⁶ Although it is well settled that a magistrate judge can hear an arraignment for a misdemeanor, the Kansas Supreme Court recently decided whether a magistrate judge has jurisdiction to hear an arraignment for a felony.⁵⁶⁷

In *State v. Valladarez*, Aaron Valladarez was arraigned before a district magistrate judge on two felony charges.⁵⁶⁸ On appeal, Valladarez argued that the arraignment was improper because the magistrate judge had no jurisdiction to conduct a felony arraignment.⁵⁶⁹ Valladarez relied on section 22-2202(3) of the Kansas Statutes, which defines an arraignment as calling the defendant ““before a court having jurisdiction to impose sentence for the offense charged,”” and section 20-302b(a), which states that a magistrate judge has no jurisdiction to impose a sentence for a felony.⁵⁷⁰

The court acknowledged that by reading these two statutes alone, a magistrate judge has no jurisdiction to hear felony arraignments.⁵⁷¹ However, the court noted the 1999 amendment to section 20-302b(a) that explicitly allows a magistrate judge to hear a felony arraignment if the arraignment had been assigned by the chief judge of the district.⁵⁷² Because the statutes were in conflict, the court looked to legislative history to determine the legislative intent.⁵⁷³ Statements made by the legislature during the 1999 amendments showed that the legislature intended to expand the jurisdiction of the magistrate judge and promote judicial efficiency.⁵⁷⁴ As a result, the court held that a magistrate judge has “jurisdiction to conduct a felony arraignment if the chief judge of the judicial district has assigned the district magistrate judge to do so.”⁵⁷⁵

564. KAN. STAT. ANN. § 22-2202(3) (2008).

565. *State v. Valladarez*, 206 P.3d 879, 887 (Kan. 2009) (quoting *State v. Smith*, 799 P.2d 497, 500 (Kan. 1990)); *see also* KAN. STAT. ANN. §§ 22-2202(3) (2008), -3205(a) (2009) (defining an arraignment).

566. *See* KAN. STAT. ANN. § 22-3205(a) (2009).

567. *See Valladarez*, 206 P.3d at 886.

568. *Id.* at 882–83.

569. *Id.* at 883–84.

570. *Id.* at 884 (citing KAN. STAT. ANN. §§ 22-2202(3), 20-302b(a) (2009)).

571. *See id.*

572. *Id.* at 885 (citing KAN. STAT. ANN. § 20-302b(a) (2009)).

573. *Id.*

574. *Id.* at 885–86.

575. *Id.* at 886.

Additionally, the court found that legislative history showed no intent to limit the arraignment procedure once a magistrate judge had jurisdiction.⁵⁷⁶ As such, the court held that a magistrate judge with jurisdiction to hear an arraignment could also accept a guilty or no contest plea and still afford the defendant all due process required to ensure the defendant entered the plea knowingly and voluntarily.⁵⁷⁷

The court in *Valladarez* reached the most logical conclusion. Allowing magistrates jurisdiction to hear arraignments comports with the explicit language of the 1999 amendment to section 20-302b(a). The Kansas Legislature would not enact a law that explicitly gives magistrates the authority to entertain felony arraignments in certain circumstances only for that law to become useless because it conflicts with previous law. Instead, section 20-302b(a) seems to carve out an exception to the general rule that magistrates do not have jurisdiction to hear felony arraignments. The exception creates judicial efficiency but still limits when a magistrate can entertain an arraignment by allowing a chief judge to decide whether to assign the arraignment to a magistrate.

The court also logically concluded that the magistrate with proper jurisdiction to hear an arraignment should have authority to conduct the full arraignment, including accepting a guilty plea. An opposite determination would be contrary to the recognized legislative intent of fostering judicial efficiency. Judicial efficiency would not be well served if a separate proceeding were required to complete part of the arraignment when a defendant entered a plea other than not guilty. Because the 1999 amendment did not create such a limitation, it is logical to conclude that the legislature did not intend such a limitation.

K. Discovery

In criminal prosecutions, discovery favors “disclosure as fully and completely as is reasonably possible under the circumstances” of the case.⁵⁷⁸ Upon request, prosecuting attorneys shall permit a defendant to inspect evidence, such as written or recorded statements made by the defendant, results of reports of physical or mental examinations, recorded testimony of the defendant before a grand jury, or memoranda of any oral confession.⁵⁷⁹ The prosecutor shall also permit inspection upon request of any physical evidence that is material to the case as long

576. *Id.* at 887–88.

577. *Id.* at 888.

578. *State v. Kessler*, 73 P.3d 761, 769 (Kan. 2003).

579. KAN. STAT. ANN. § 22-3212(a) (2007).

as it does not place an unreasonable burden on the prosecution.⁵⁸⁰ The defendant has the burden to show that the evidence is material and the request is reasonable.⁵⁸¹

The prosecutor has no affirmative duty to disclose inculpatory evidence.⁵⁸² Prosecutors, however, have an affirmative duty to disclose any exculpatory evidence.⁵⁸³ If a prosecutor withholds evidence that is favorable to the defendant and material to guilt or punishment, the prosecutor violates the defendant's due process rights regardless of whether the prosecutor is acting in good or bad faith.⁵⁸⁴

Kansas follows *Brady v. Maryland*, which outlined when due process is violated by prosecutors' failure to disclose evidence.⁵⁸⁵ Kansas developed three scenarios to determine when *Brady* applies.⁵⁸⁶ First, due process is violated "where there is a deliberate bad faith suppression for the purpose of obstructing the defense or intentional failure to disclose evidence which has high probative value and which could not have escaped the prosecutor's attention."⁵⁸⁷ Second, a violation occurs "where there is a deliberate refusal to honor a request for evidence where the evidence is material to guilt or punishment, irrespective of the prosecutor's good or bad faith in refusing the request."⁵⁸⁸ Third, "where suppression was not deliberate and no request for evidence was made, but where hindsight discloses that it was so material that the defense could have put the evidence to significant use," a violation of due process also occurs.⁵⁸⁹ These three scenarios create a sliding scale in which the required showing of materiality increases as the level of intent by the prosecution decreases.⁵⁹⁰

580. *Id.* § (b).

581. *Kessler*, 73 P.3d at 769.

582. *State v. Krider*, 202 P.3d 722, 730 (Kan. Ct. App. 2009).

583. *Id.*

584. *State v. Adams*, 124 P.3d 19, 26 (Kan. 2005); *accord* *United States v. Williams*, 576 F.3d 1149, 1163 (10th Cir. 2009).

585. *See Brady v. Maryland*, 373 U.S. 83, 86–88 (1963).

586. *Adams*, 124 P.3d at 26.

587. *State v. Kelly*, 531 P.2d 60, 63 (Kan. 1975).

588. *Id.*

589. *Id.*

590. *Adams*, 124 P.3d at 26.

L. Pretrial Conference and Pretrial Motions

In a criminal proceeding, the court may order a pretrial conference “to consider such matters as will promote a fair and expeditious trial.”⁵⁹¹ A court’s authority to entertain a motion in limine comes from the statutory authority for a pretrial conference under section 22-3217 of the Kansas Statutes.⁵⁹² Motions in limine “assure a fair and impartial trial to all parties by excluding from trial inadmissible evidence, prejudicial statements, and improper questions.”⁵⁹³ If a court finds that the evidence will be inadmissible at trial and that the mere offer of the evidence at trial would likely prejudice the jury, the court grants the motion in limine.⁵⁹⁴ If the court grants the motion in limine to exclude evidence, the opposing party must make a proffer of the excluded evidence to preserve the issue for appeal.⁵⁹⁵ Alternatively, if the court allows the evidence, the party seeking exclusion must object during trial to preserve the issue for appeal.⁵⁹⁶

A defendant may move to suppress evidence obtained in an unlawful search or seizure.⁵⁹⁷ The defendant shall move to suppress before trial by stating in writing the facts showing why the search or seizure was unlawful.⁵⁹⁸ The state then has the burden to prove that the search or seizure was lawful.⁵⁹⁹ If the defendant fails to present a written motion setting out facts showing that the search or seizure was illegal, the state is not required to show the legality of the search or seizure.⁶⁰⁰ The court may allow a motion to suppress at trial in its discretion or if the opportunity to move for suppression did not exist before trial.⁶⁰¹

591. KAN. STAT. ANN. § 22-3217 (2007).

592. *State v. Bloom*, 44 P.3d 305, 314 (Kan. 2002) (citing *State v. Quick*, 597 P.2d 1108, 1112 (Kan. 1979), *overruled on other grounds*, 772 P.2d 747 (Kan. 1989)).

593. *State v. Krider*, 202 P.3d 722, 728 (Kan. Ct. App. 2009).

594. *Id.*

595. *Id.*

596. *State v. Johnson*, 255 Kan. 252, 253 (1994).

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

598. *Id.* § (2).

599. *Id.*

600. *State v. Frischenmeyer*, No. 101,025, 2010 WL 481266, at *3 (Kan. Ct. App. Feb. 5, 2010).

601. KAN. STAT. ANN. § 22-3216(3) (2007).

V. TRIAL

A. *Fifth Amendment Issues*

1. Right to Remain Silent—Self-Incrimination and Immunity

The Fifth Amendment to the United States Constitution provides, in part, “[n]o person shall . . . be compelled in any criminal case to be a witness against himself”⁶⁰² The United States Supreme Court in *Miranda v. Arizona* found that the right against self-incrimination applies when a person is subjected to custodial interrogation.⁶⁰³ The Court defines “custodial interrogation” as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in a significant way.”⁶⁰⁴ A suspect is deemed in custody if, under similar circumstances, a reasonable person would not believe he was free to leave voluntarily.⁶⁰⁵ Because of the “compulsion inherent in custodial surroundings,”⁶⁰⁶ a warning regarding the suspect’s right to remain silent—before custodial interrogation commences—is required for admission of any statement made by that suspect.⁶⁰⁷ The warning must inform the suspect not only of his right to remain silent, but also that “anything said can and will be used against the individual in court.”⁶⁰⁸

The protection against self-incrimination applies only to compelled testimony or evidence that is testimonial and communicative.⁶⁰⁹ Therefore, evidence such as a suspect’s drug test results and DNA are not protected from compelled admission.⁶¹⁰ Further, the compelled testimony must be incriminating to invoke the privilege.⁶¹¹ In Kansas, testimony is incriminating if it provides “a reasonable inference of such a violation of the laws of this state as to subject the person to liability to punishment”⁶¹²

602. U.S. CONST. amend. V.

603. *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966).

604. *Id.* at 444.

605. *State v. Schultz*, 212 P.3d 150, 155 (Kan. 2009).

606. *Yarborough v. Alvarado*, 541 U.S. 652, 661 (quoting *Miranda*, 384 U.S. at 458).

607. *Miranda*, 384 U.S. at 469.

608. *Id.*

609. *Schmerber v. California*, 384 U.S. 757, 761 (1966).

610. *See State v. Appleby*, 221 P.3d 525, 552 (Kan. 2009).

611. *Schmerber*, 384 U.S. at 761.

612. KAN. STAT. ANN. § 60-424 (2009).

The right to remain silent is also incorporated in section 10 of the Kansas Constitution's Bill of Rights, which states that "[n]o person shall be a witness against himself . . ."⁶¹³ This protection mirrors that given defendants by the Fifth Amendment.⁶¹⁴ Kansas also provides a statutory right to remain silent and a privilege against self-incrimination. Section 60-423(a) of the Kansas Statutes grants a criminal defendant the unqualified right to refuse to testify.⁶¹⁵ However, this right is limited only to refusing to provide testimony.⁶¹⁶ A criminal defendant cannot refuse an order to be present in court for identification or to perform any other requested act in front of the trier of fact.⁶¹⁷

The use of an immunity agreement allows the state to compel witness testimony while still protecting a witness's right against self-incrimination.⁶¹⁸ Such agreements constitute a contractual waiver by the witness of his right to remain silent in return for specified protection from prosecution stemming from his testimony.⁶¹⁹ As a result, the witness is barred from asserting his Fifth Amendment right to remain silent on the basis that his testimony may be self-incriminating.⁶²⁰ In Kansas, the county attorney, district attorney, or the attorney general may grant a witness either transactional or use immunity.⁶²¹ Transactional immunity allows a witness to testify in return for not being prosecuted for a specified crime or "any other transactions arising out of the same incident."⁶²² In contrast, if granted use immunity, the witness may be prosecuted for any crime, but the testimony offered—and any resulting evidence—may not be used in any subsequent prosecution.⁶²³ The protection offered under both transactional and use immunity shields a witness from both state and federal prosecutions.⁶²⁴

Use immunity imposes an affirmative duty on the state in a later prosecution to "prove that the evidence it plans to use is derived from 'a legitimate source wholly independent of the compelled testimony.'"⁶²⁵

613. KAN. CONST. Bill of Rights §10.

614. See U.S. CONST. amend. V.

615. KAN. STAT. ANN. § 60-423(a) (2009).

616. *Id.* § (c).

617. *Id.*

618. § 22-3415.

619. See *id.*

620. *Id.* § (c).

621. *Id.* § (b).

622. *Id.* § (b)(1).

623. *Id.* § (b)(2).

624. *In re Birdsong*, 532 P.2d 1301, 1303 (Kan. 1975).

625. *State v. Hughes*, 191 P.3d 268, 282 (Kan. 2009) (quoting *Kastigar v. United States*, 406 U.S. 441, 460 (1972)).

In *State v. Hughes*, criminal defendant Hughes was convicted of murder.⁶²⁶ On appeal, Hughes argued that the State violated his Fifth Amendment right against self-incrimination by using his immunized testimony from an earlier prosecution of a co-felon.⁶²⁷ While the State did not seek to admit his testimony directly, Hughes claimed the State failed to establish an independent source—separate from his testimony—for each piece of evidence against him.⁶²⁸ The Kansas Supreme Court held that the requirement for an independent source for all evidence may require “a trial within a trial—or a trial before, during, or after the trial—if such a proceeding is necessary for the court to determine whether the government has in any fashion used compelled testimony to indict or convict a defendant.”⁶²⁹

By requiring that evidence offered at a subsequent trial of a witness granted use immunity be derived from an independent source, the court strengthened the protection against self-incrimination offered by the Fifth Amendment. In order to both protect a witness’s Fifth Amendment rights, and to encourage potential witnesses to accept immunity agreements, such witnesses must be assured that any testimony compelled will not be directly used against them later. While the burden to prove each piece of evidence’s independence may potentially delay a proceeding, the process is necessary to ensure witnesses’ and criminal defendants’ Fifth Amendment rights against self-incrimination.

2. Double Jeopardy and Multiplicity

The Fifth Amendment prevents a defendant from being “subject for the same offense to be twice put in jeopardy.”⁶³⁰ Section 21-3108 of the Kansas Statutes also provides criminal defendants protection from being subject to double jeopardy.⁶³¹ A defendant is in jeopardy when a jury is empanelled or sworn in.⁶³² In the case of a bench trial, jeopardy does not attach until the prosecution’s first witness is sworn.⁶³³ The protection against double jeopardy prevents (1) a defendant from being retried for the same offense after an acquittal, (2) a defendant being retried for the

626. *Id.* at 273.

627. *Id.* at 282.

628. *Id.*

629. *Id.*

630. U.S. CONST. amend. V.

631. KAN. STAT. ANN. § 21-3108 (2009).

632. *State v. Griffin*, 787 P.2d 701, 703 (Kan. 1990).

633. *Id.*

same offense after a conviction, and (3) a defendant receiving multiple punishments for the same offense.⁶³⁴

The protection against double jeopardy does not apply if an appellate court determines that a conviction was not supported with adequate evidence.⁶³⁵ Further, following a mistrial, double jeopardy protection is not available when the declaration was based on a “manifest necessity.”⁶³⁶ Conduct such as improper comments made by defense counsel that bias the jury may provide a court manifest necessity to declare a mistrial.⁶³⁷ Manifest necessity requires a balancing of a defendant’s right not to be placed in jeopardy twice against the interests and needs of the public in obtaining a final decision in a second trial.⁶³⁸

Preventing a defendant from receiving multiple punishments for the same offense is the most difficult double jeopardy protection for courts to apply. This right is referred to as “multiplicity” and the difficulty arises in determining whether multiple charges against the defendant really constitute the “same offense.”⁶³⁹ To determine if offenses are really the “same offense,” the United States Supreme Court, in *Blockburger v. United States*, held that a defendant may be charged for violation of two statutory provisions for the same act or conduct when “each provision requires proof of a fact which the other does not.”⁶⁴⁰ This “strict elements” test provides double jeopardy protection to a defendant from multiplicitous charges from the same act only when each offense charged requires proof of the same facts.⁶⁴¹

The Kansas Supreme Court further expanded and explained multiplicity in *State v. Schoonover*.⁶⁴² In *Schoonover*, the court explained that determining if charges are multiplicitous is a two-part inquiry. The first step is to determine whether the prosecution is for the same conduct.⁶⁴³ When conduct for which charges are brought arises out of “the same act or transaction,” then the charges are for the same conduct.⁶⁴⁴ Factors that may indicate convictions arise from the same conduct include:

634. *State v. Yeoman*, 951 P.2d 964, 965 (Kan. Ct. App. 1997).

635. *Tibbs v. Florida*, 457 U.S. 31, 42 (1982).

636. *State v. Graham*, 83 P.3d 143, 151 (Kan. 2004).

637. *State v. Gonzales*, 973 P.2d 208, 212 (Kan. Ct. App. 1999).

638. *Id.* (citing *State v. Bates*, 597 P.2d 646, 652 (Kan. 1979)).

639. *See State v. Patten*, 122 P.3d 350, 352 (Kan. 2005).

640. 284 U.S. 299, 304 (1932).

641. *Patten*, 122 P.3d at 353.

642. 133 P.3d 48 (Kan. 2006).

643. *Id.* at 60.

644. *Id.*

(1) whether the acts occur at or near the same time; (2) whether the acts occur at the same location; (3) whether there is a causal relationship between the acts, in particular whether there was an intervening event; and (4) whether there is a fresh impulse motivating some of the conduct.⁶⁴⁵

Once it is determined that the charges spring from the same conduct, the next step is to determine—by statutory definition—whether the charges are for multiple offenses. The test turns on whether the defendant is charged with violations of multiple statutes or multiple violations of the same statute.⁶⁴⁶

When a defendant is charged with violations of multiple statutes—referred to as a “multiple description” case—Kansas courts apply the *Blockburger* “strict elements” test.⁶⁴⁷ This test requires a decision on “whether each provision [charged] requires proof of a fact that the other does not.”⁶⁴⁸ The *Schoonover* Court clarified that this analysis does not depend on the actual facts of a case, but rather the elements of the specific statutes under which the defendant is charged.⁶⁴⁹ If each offense charged contains an element not included in the other, then the charges are not multiplicitous and no double jeopardy protection applies.⁶⁵⁰ Only when two or more offenses share all elements do they constitute the same offense.⁶⁵¹ This inquiry requires an examination of the legislative intent underlying each offense.⁶⁵² If Congress clearly intended to authorize punishment under the two statutes, then multiple charges for unitary conduct are allowed.⁶⁵³

In *State v. Appleby*, the Kansas Supreme Court applied the strict elements test to determine that convictions for capital murder and attempted rape were multiplicitous.⁶⁵⁴ At trial, Appleby was convicted of attempted rape under sections 21-3301 and 21-3502 of the Kansas Statutes.⁶⁵⁵ He was also convicted of capital murder under section 21-3439(a)(4),⁶⁵⁶ which requires that a murder be committed during the

645. *Id.* at 79.

646. *Id.*

647. *Id.* at 62.

648. *Id.* (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

649. *Id.*

650. *Id.* (quoting *United States v. Dixon*, 509 U.S. 688, 696 (1993)).

651. *Id.*

652. *Id.* at 63.

653. *Id.*

654. 221 P.3d 525, 538 (Kan. 2009).

655. *Id.* at 533.

656. *Id.*

commission of a rape or attempted rape.⁶⁵⁷ On appeal, Appleby argued that because the State had to prove attempted rape in order to gain a conviction for capital murder, both convictions were multiplicitous and could not be upheld.⁶⁵⁸

The court, in determining the legislature's intended punishment in the capital murder statute, relied on their previous decision in *Trotter v. State* concerning another subsection of the same provision.⁶⁵⁹ There, it held that the plain language of the statute did not allow a defendant to be convicted of capital murder—the primary offense—and the lesser included crime.⁶⁶⁰ Proving all elements of the lesser included offense was required to elevate the murder to a capital crime.⁶⁶¹ Applying this analysis to the facts in *Appleby*, the court concluded that because “all of the elements of attempted rape were identical to some of the elements of the capital murder,” the convictions were multiplicitous.⁶⁶² As a result, the court vacated Appleby's attempted rape conviction.⁶⁶³

The result in *Appleby* affords criminal defendants with ample protection of their Fifth Amendment right against double jeopardy, while still allowing the state to punish especially offensive conduct. In cases such as *Appleby*, a defendant would essentially be convicted twice for the same crime if a lesser offense led to an individual conviction and the elevation of another. Finding these convictions multiplicitous protects defendants from being placed in double jeopardy. The state, however, may still use the lesser offense to elevate the primary offense, allowing it to seek increased punishment for exceptionally heinous crimes. This elevated punishment serves the state's interest in deterring and penalizing conduct while complying with defendants' Fifth Amendment rights.

Multiplicity issues also arise when a defendant is charged with multiple violations of a single statute. These cases, referred to as “unit of prosecution” cases, rely on the “statutory definition of the crime [to] determin[e] the minimum scope of the conduct proscribed by the statute.”⁶⁶⁴ In unit of prosecution cases, a defendant can only be

657. KAN. STAT. ANN. § 21-3439(a)(4) (2007) (specifically including violations of § 21-3301 and § 21-3502 as necessary for a charge of capital murder).

658. *Appleby*, 221 P.3d at 534.

659. *Id.* at 535 (citing *Trotter v. State*, 200 P.3d 1236 (Kan. 2009)).

660. *Id.*

661. *Id.*

662. *Id.* at 536.

663. *Id.* at 538.

664. *State v. Schoonover*, 133 P.3d 48, 64 (Kan. 2006).

convicted once for the minimum unit of prosecution.⁶⁶⁵ Determining the minimum unit of prosecution requires an examination of legislative intent.⁶⁶⁶ The statute must be examined to determine the minimum intended punishment—whether Congress intended one punishment or multiple punishments for multiple violations.⁶⁶⁷ The rule of lenity applies in unit of prosecution cases, and as such, any ambiguity in the statute is resolved in favor of the defendant.⁶⁶⁸

In *State v. Thompson*, the unit of prosecution test was used to declare two convictions for possession of a chemical with intent to manufacture methamphetamine multiplicitous.⁶⁶⁹ The defendant, Thompson, was charged and convicted of two violations of section 65-7006(a) of the Kansas Statutes⁶⁷⁰ for possession of pseudoephedrine and lithium metal respectively.⁶⁷¹ Both substances are specifically listed in the statute and both convictions require an intent to manufacture methamphetamine.⁶⁷² On appeal, the convictions were deemed multiplicitous and the State petitioned for review.⁶⁷³ The State claimed that the legislature intended to allow multiple convictions by specifically listing the items.⁶⁷⁴

In affirming that the convictions were multiplicitous, the court first determined that the possession of both ingredients constituted unitary conduct.⁶⁷⁵ Both substances were found in the same location, at the same time, and it appeared that Thompson intended to use both in the same batch of methamphetamine.⁶⁷⁶ The court then determined that the statute's plain language did not indicate the intended unit of prosecution.⁶⁷⁷ As a result, the rule of lenity required any statutory ambiguity be interpreted in favor of the defendant.⁶⁷⁸ The court found that the statute was intended to punish an individual who possessed a listed ingredient *only* when intending to manufacture methamphetamine.⁶⁷⁹ It was the “combination of these elements that

665. *Id.* at 64–65.

666. *Id.* at 65.

667. *Id.*

668. *Id.*

669. 200 P.3d 22, 27, 32 (Kan. 2009).

670. *Id.* at 27.

671. *Id.*

672. *Id.*

673. *Id.*

674. *Id.*

675. *Id.* at 28–29.

676. *Id.*

677. *Id.* at 30.

678. *Id.*

679. *Id.* at 32.

form[ed] the crime, and a unitary intent to manufacture forms the unit of prosecution.⁶⁸⁰ As a result, the court affirmed that both convictions were multiplicitous because possession of both ingredients, together, represented a unitary intent to manufacture a controlled substance.⁶⁸¹

The *Thompson* Court's analysis focused heavily on statutory interpretation in applying the unit of prosecution test. Problems with such interpretation may arise when a defendant is charged with multiple violations of one statute, and that statute does not contain clear authorizing language or a clearly defined unit of prosecution. In such cases, prosecutors, defendants, and judges are left only to relevant case law—if then existing—and their own interpretation. Until judicially clarified, uncertainty regarding undecided multiple charges will remain.

3. Due Process—Pre-Accusation Delay

Criminal defendants are protected against unreasonable delay in filing formal charges by the Due Process Clause of the Fifth Amendment.⁶⁸² Pre-accusation delays may hinder a defendant's ability to properly present a defense. If the time between the crime, arrest, and indictment is unreasonably long, important evidence could be lost, witnesses' memories may fade, or the same witnesses may become unavailable.⁶⁸³ In *State v. Royal*, the seminal case concerning pre-accusation delay, the Kansas Supreme Court set forth the test for determining if a defendant's due process rights have been violated: "(1) Has the delay prejudiced the accused in his ability to defend himself, and (2) was the delay a tactical device to gain advantage over him?"⁶⁸⁴ Intentional or avoidable delay is not enough for a dismissal.⁶⁸⁵ Instead, the delay must have been used to harass or disadvantage the defendant.⁶⁸⁶ Proper protection of a defendant's Fifth Amendment right to due process requires that the government commence prosecution as soon as reasonable.⁶⁸⁷ In Kansas, a prosecution is not commenced until a warrant is properly served on the defendant.⁶⁸⁸ If the warrant is served within the

680. *Id.*

681. *Id.*

682. U.S. CONST. amend. V.

683. *State v. Royal*, 535 P.2d 413, 417 (Kan. 1975) (citing *United States v. Marion*, 404 U.S. 307, 324, 325, 326 (1971)).

684. *Id.*

685. *Id.*

686. *Id.*

687. *See State v. McDowell*, 111 P.3d 193, 196 (Kan. Ct. App. 2005).

688. *Id.*

applicable statute of limitations, an unreasonable delay in service does not bar prosecution.⁶⁸⁹

B. Sixth Amendment Issues

1. Speedy Trial

Criminal defendants are guaranteed their constitutional right to a speedy trial by the Sixth Amendment, which states that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial.”⁶⁹⁰ The United States Supreme Court, in *Barker v. Wingo*, set out a four-factor rubric to evaluate whether a defendant’s right to a speedy trial was violated.⁶⁹¹ The factors include: (1) the length of the delay, (2) the reason for the delay, (3) the defendant’s assertion of his right to a speedy trial, and (4) any prejudice caused by the delay.⁶⁹² These factors are not determinative and courts must evaluate speedy trial claims in light of specific facts and any possible prejudice against the defendant.⁶⁹³

The Kansas Supreme Court adopted this four-factor test to guide lower courts in evaluating constitutional speedy-trial violations.⁶⁹⁴ Kansas criminal defendants are further protected against unreasonable trial delays by statute. Section 22-3402 of the Kansas Statutes imposes specific deadlines—depending on whether a defendant is in custody—for the state to bring a case to trial.⁶⁹⁵ The statutory clock may be tolled by request, approval, or conduct of the defendant.⁶⁹⁶ If the state does not meet its burden to bring a defendant to trial within the specified time, then the charges are dismissed with prejudice.⁶⁹⁷

Recently, in *State v. Vaughn*, the court considered whether a judge’s illness alone tolls the statutory time limits set forth in section 22-3402.⁶⁹⁸ The court concluded that, by itself, a continuance due to a judge’s illness is not enough to extend the statutory clock.⁶⁹⁹ However, if the defendant

689. *Id.*

690. U.S. CONST. amend. VI.

691. 407 U.S. 514, 530 (1972).

692. *Id.*

693. *Id.*

694. *State v. Rivera*, 83 P.3d 169, 173 (Kan. 2004) (citing *Wingo*, 407 U.S. at 530).

695. See KAN. STAT. ANN. § 22-3402(1)–(2) (2007) (state has ninety days to bring defendant in jail to trial and 180 days if defendant is subject to an appearance bond).

696. *Id.* § (3).

697. See *id.* § (1)–(2).

698. See 200 P.3d 446, 454 (Kan. 2009).

699. *Id.*

acquiesced to the continuance, then that would be enough to toll the time limit.⁷⁰⁰ This acquiescence cannot be merely by passive acceptance, but instead must amount to an actual agreement by the defendant.⁷⁰¹

2. Trial by Jury

The Sixth Amendment right to a jury trial in felony cases is considered one of the most fundamental rights in Kansas and in the United States generally.⁷⁰² In addition to the constitutional right, Kansas mandates by statute that all felonies be tried before a jury unless the parties and court agree to waive the right and submit the matter to a bench trial.⁷⁰³

a. Impartial Jury

Several safeguards are in place to ensure that a jury is “competent, fair, impartial and unprejudiced,”⁷⁰⁴ including the ability to conduct voir dire of potential jurors⁷⁰⁵ and a statutory ability to challenge a juror for cause if the court determines there is doubt that the juror can act impartially and without prejudice to the rights of any party.⁷⁰⁶ In 2009, the Kansas Court of Appeals decided whether limiting voir dire questioning of potential jurors as to their attitudes on police credibility violates the right to an impartial jury.⁷⁰⁷

In *State v. Madkins*, defense counsel asked potential jurors a few questions related to police officers and briefly left the subject before asking whether any of the potential jurors believe that a police officer might not tell the truth.⁷⁰⁸ The judge interrupted and told counsel not to ask any more questions related to police officer honesty.⁷⁰⁹ On appeal, the court formulated a three-part test for whether this exact type of limitation violates the right to an impartial jury: (1) the extent to which

700. *Id.*

701. *Id.* at 451.

702. *State v. Bowers*, 216 P.3d 715, 717 (Kan. Ct. App. 2009) (citing *State v. Larraco*, 93 P.3d 725 (2004)).

703. KAN. STAT. ANN. § 22-3403(1) (2007).

704. *State v. Madkins*, 219 P.3d 831, 837 (Kan. Ct. App. 2009) (quoting *Westboro Baptist Church, Inc. v. Patton*, 93 P.3d 718, 724 (Kan. Ct. App. 2004)).

705. *Id.*

706. KAN. STAT. ANN. § 22-3410(2)(i) (2007).

707. *Madkins*, 219 P.3d at 839.

708. *Id.* at 834.

709. *Id.*

police officer credibility is at issue in the case; (2) whether the prohibited inquiry is cumulative; and (3) whether police officer testimony would be corroborated by other, nonpolice witnesses.⁷¹⁰ Using this test, the court determined that the right was not violated in this case because counsel already asked questions related to attitudes about police officers, making the prohibited questions cumulative.⁷¹¹ This test should function as an effective, straightforward guideline for determining whether to limit these types of voir dire questions.

b. Waiver

Waiver of the right to a jury trial must be knowing and voluntary.⁷¹² In order for the waiver to be effective, the defendant must be advised by the court of this right and must waive it either in writing or in open court on the record.⁷¹³ An attorney may not waive a defendant's right to jury trial for him, as it is an inherently personal right.⁷¹⁴

The Kansas Court of Appeals recently determined whether the requirement that the court must advise the defendant of his right to a jury trial is satisfied when the advice and the waiver are given at different hearings held months apart.⁷¹⁵ In *State v. Pasley*, the defendant was advised of his right to a jury trial at a plea hearing, and the defendant waived his right during the stipulation of facts at trial two months later.⁷¹⁶ On appeal, the court held that the district court has no further duty to advise the defendant of his right to a jury trial after it did so at his plea hearing.⁷¹⁷ This ruling establishes that the procedural requirements of waiver are met as long as the court advised the defendant of his right to a jury trial, regardless of whether such advisement occurred immediately before the defendant waived the right. While *Pasley* is an unpublished table case and may not be binding, its reasoning would likely be persuasive in a similar situation.

710. *Id.* at 839–40.

711. *Id.* at 841.

712. *State v. Bowers*, 216 P.3d 715, 717 (Kan. Ct. App. 2009).

713. *Id.*

714. *Id.*

715. *State v. Pasley*, No. 99,518, 2008 WL 5135092, at *2 (Kan. Ct. App. Dec. 5, 2008).

716. *Id.*

717. *Id.*

c. Jury Selection and Peremptory Challenges

Kansas statute requires both parties in a criminal case to conduct an examination of potential jurors, and allows the court to conduct additional examinations.⁷¹⁸ Parties may challenge any prospective juror for cause, and these challenges are tried by the court.⁷¹⁹ The nine grounds for a for-cause challenge are also spelled out by statute.⁷²⁰ Further, each party is allowed a certain number of peremptory challenges based on the type of crime being charged.⁷²¹

In 2009, the United States Supreme Court issued a significant opinion regarding peremptory challenges in *Rivera v. Illinois*.⁷²² In the state trial court, the defense in a murder case attempted to use a peremptory challenge to remove a potential juror who worked at a hospital where she treated victims of gunshot wounds on a regular basis.⁷²³ The judge questioned this challenge because, out of the four peremptory challenges made by the defense, this was the third against a woman and the second against an African American.⁷²⁴ Peremptory challenges that are discriminatory on the basis of race or sex violate the Constitution per *Batson v. Kentucky*.⁷²⁵ The judge disallowed the challenge and the juror was seated on the jury at trial, where the defendant was convicted.⁷²⁶

The Illinois Supreme Court later determined that there was no *Batson* violation and the peremptory challenge should have been allowed, but that court upheld the defendant's conviction because the seating of this particular juror did not prejudice the defendant.⁷²⁷ On appeal, the United States Supreme Court addressed whether this erroneous denial violated due process and required an automatic reversal of the conviction.⁷²⁸ Ultimately, the Court concluded that because peremptory challenges in state court trials are granted by the states rather than the Constitution, "the mistaken denial of a state-provided peremptory challenge does not, without more, violate the Federal

718. KAN. STAT. ANN. § 22-3408(3) (2007).

719. *Id.* § 22-3410(1).

720. *Id.* § (2)(a)–(i).

721. *Id.* § 22-3412(a).

722. 129 S. Ct. 1446 (2009).

723. *Id.* at 1451.

724. *Id.*

725. 476 U.S. 79 (1986).

726. *Rivera*, 129 S. Ct. at 1451.

727. *Id.* at 1452.

728. *Id.* at 1450.

Constitution.”⁷²⁹ The decision as to whether this type of error requires automatic reversal is therefore left to the states.⁷³⁰

d. Juror Misconduct

In order to establish a case of juror misconduct in Kansas, the defendant must prove that the jury’s actions constituted misconduct and this misconduct substantially prejudiced his right to a fair trial.⁷³¹ Kansas statute allows a juror to testify as to these issues, but the juror cannot provide testimony regarding the juror’s mental processes.⁷³²

In 2008, the Kansas Court of Appeals addressed an interesting juror misconduct question in *State v. Johnson*.⁷³³ In this case, a juror came forward after the defendant’s DUI conviction with evidence that another juror (who apparently knew the defendant) stated during deliberations that “this was not Randy’s [first] time and he was about due for the charge.”⁷³⁴ The court first determined that a juror was permitted to testify about this type of evidence, so long as he did not testify about his own mental impressions of the other juror’s statement.⁷³⁵ The court, however, determined that this statement was not sufficient to find that the defendant’s right to a fair trial had been prejudiced.⁷³⁶ The statement was vague, did not make reference to any personal knowledge of prior bad acts, and constituted a “mere opinion.”⁷³⁷ This ruling indicates that Kansas courts view the level of prejudice necessary to grant a new trial for juror misconduct as high. Certainly, more is required than the appearance that one of the jurors made vague statements as to personal knowledge of some character flaw of the defendant.

3. Right to Confront Witnesses

Chief among the rights included within the Sixth Amendment’s Confrontation Clause is the right of the accused to cross-examine witnesses, as this is “the principal means by which the believability of a

729. *Id.* at 1454.

730. *Id.* at 1456.

731. *State v. Johnson*, 198 P.3d 769, 774 (Kan. Ct. App. 2008).

732. KAN. STAT. ANN. § 60-444(a) (2005).

733. 198 P.3d 769 (Kan. Ct. App. 2008).

734. *Id.* at 774.

735. *Id.* at 775.

736. *Id.* at 777.

737. *Id.* at 776–77.

witness and the truth of his testimony are tested.”⁷³⁸ A trial court, however, may exercise discretion in limiting the scope of some subjects that such cross-examination may address.⁷³⁹ Recently, the Tenth Circuit in *United States v. Robinson* addressed just how much discretion the court may exercise without unconstitutionally limiting the right of the accused to confront the witnesses against him.⁷⁴⁰

In *Robinson*, the “star witness” for the prosecution was a confidential informant who testified that the defendant sold him a gun that the defendant possessed illegally.⁷⁴¹ This informant, however, suffered from several mental illnesses and drug problems, even experiencing auditory hallucinations.⁷⁴² The district court disallowed the defense from accessing the informant’s medical records or cross-examining on the issues of the witness’s mental health and prescription drug use.⁷⁴³ The Tenth Circuit concluded that the limitation on cross-examination violated the Confrontation Clause because this witness was central to the government’s case and the issues in question were of such importance to the credibility of his testimony that it “would have ‘provided some significant help to the jury.’”⁷⁴⁴ The court noted that these inquiries were not attempts to “unfairly malign a witness” by introducing issues of mental health, and they were related to problems currently affecting the witness’s abilities to perceive.⁷⁴⁵ Thus, the case appears to draw a line as to when cross-examination of a witness’s mental health and drug history may be limited: if the witness is a key part of the prosecution’s case, and his mental health and drug history are current issues that affect his ability to perceive, such a limitation is unconstitutional.

In the 2009 case of *State v. Laturner*, the Kansas Supreme Court determined whether a “notice-and-demand statute” placed an unconstitutional burden on a defendant by automatically waiving his right to confront a certain type of witness if an objection is not made within a specified time.⁷⁴⁶ The statute in question applied to the introduction of an analyst’s report into evidence without the analyst being present to testify.⁷⁴⁷ It required the party offering the report to give

738. See, e.g., *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

739. *United States v. Robinson*, 583 F.3d 1265, 1274 (10th Cir. 2009).

740. *Id.* at 1267.

741. *Id.*

742. *Id.*

743. *Id.*

744. *Id.* at 1274 (quoting *United States v. Moore*, 923 F.2d 910, 913 (1st Cir. 1991)).

745. *Id.*

746. 218 P.3d 23, 29 (Kan. 2009).

747. KAN. STAT. ANN. § 22-3437(3) (Supp. 2008).

notice of its intent to introduce this evidence at least twenty days prior to its introduction, at which point the opposing party has ten days to object to its admission.⁷⁴⁸ The court held that such a notice-and-demand statute is valid in its simplest form, and does not constitute an unconstitutional waiver of the right to confront a witness.⁷⁴⁹ The Kansas statute, however, went beyond the simplest form by also requiring that the objection be “sufficient to convince the court that the conclusions in the certificate will be contested at the trial or hearing.”⁷⁵⁰ The court concluded that this extra requirement “imposes too heavy a burden on a defendant’s rights” and deemed that section of the statute unconstitutional.⁷⁵¹ Accordingly an automatic waiver of the right to confront due to lapse of a specified time is acceptable, but this automatic waiver cannot be conditioned on a factual showing prior to trial.

4. Right to Testify and Present a Defense

In Kansas, the exclusion of any evidence that is an integral part of the defendant’s case violates the defendant’s right to a fair trial, but “the right to call and examine witnesses is not absolute and at times must bow to other legitimate interests in the criminal trial process.”⁷⁵² Specifically, the right is subject to limitations established by rules of evidence and case law interpreting those rules.⁷⁵³

5. Right to Counsel

a. Invocation of the Right to Counsel

By Kansas statute, the Sixth Amendment right to counsel at trial attaches automatically when a defendant appears before any court without counsel.⁷⁵⁴ At that point, it is the duty of the court to inform the defendant of his right to counsel and that counsel will be appointed if he cannot afford it.⁷⁵⁵ If the defendant is found to be indigent, the court must then appoint an attorney from the panel for indigent defense

748. *Id.*

749. *Laturner*, 218 P.3d at 32.

750. *Id.*

751. *Id.* at 38.

752. *State v. Bloom*, No. 97,883, 2009 WL 743049, at *9 (Kan. Ct. App. Mar. 13, 2009).

753. *State v. Baker*, 135 P.3d 1098, 1108 (Kan. 2006).

754. KAN. STAT. ANN. § 22-4503(b) (2007).

755. *Id.*

services.⁷⁵⁶ Therefore, invoking the right to counsel at trial is not necessary, as it is the obligation of the court to invoke it for the defendant absent a waiver.

b. Personal Choice of Counsel

Under the same statute, the court must give the defendant the opportunity to employ counsel of his own choosing if the defendant states he is able to do so.⁷⁵⁷ Although the opportunity for a defendant to obtain counsel of his own choice is necessary, “this right cannot be manipulated to impede the efficient administration of justice.”⁷⁵⁸ Therefore, when a defendant asks for a continuance to appoint counsel of his choosing, the court looks at five factors: (1) whether a continuance would inconvenience witnesses, the court, counsel, or the parties; (2) whether other continuances have been granted; (3) whether legitimate reasons exist for the delay; (4) whether the delay is the fault of the defendant; and (5) whether denial of a continuance would prejudice the defendant.⁷⁵⁹

Once counsel has been appointed for an indigent defendant, the defendant is entitled to substitute counsel only if he can establish “justifiable dissatisfaction” with the appointed counsel.⁷⁶⁰ This is established only with evidence “of conflict of interest, an irreconcilable conflict, or a breakdown in communication.”⁷⁶¹ In *State v. Smith*, the defendant’s appointed attorney attempted to withdraw and have new counsel appointed because of a claimed irreconcilable conflict; a surveillance tape convinced him his client was guilty, so he refused to put on exonerating evidence that the defendant wanted introduced.⁷⁶² The trial court denied this request based on the reasoning that any alternative counsel would face the same conflict.⁷⁶³ On appeal, this was found to be an abuse of discretion by the trial court and the defendant’s conviction was reversed and remanded.⁷⁶⁴ Though the evidence convinced the attorney of his client’s guilt, the trial court erred in

756. *Id.* § (c).

757. *Id.* § (b).

758. *State v. Anthony*, 898 P.2d 1109, 1119–20 (Kan. 1995).

759. *Id.* at 1120.

760. *State v. Smith*, 212 P.3d 232, 234 (Kan. Ct. App. 2009).

761. *Id.*

762. *Id.* at 234–35.

763. *Id.* at 235.

764. *Id.* at 238.

assuming that any other attorney would be similarly convinced.⁷⁶⁵ Consequently, if an irreconcilable conflict exists, the court must allow an appointment of new counsel even if there is a high probability that the new counsel will have the same conflict.

The defendant's constitutional right to counsel still exists after conviction and sentencing if there is a probation-revocation hearing.⁷⁶⁶ The constitutional right to be represented at this hearing includes all the other rights that normally accompany the right to counsel, including the right to effective representation free from conflicts of interest.⁷⁶⁷

c. Waiver of the Right to Counsel

A defendant has a Sixth Amendment right to self-representation, but because this right conflicts with the defendant's Sixth Amendment right to counsel, the defendant may proceed pro se only after a knowing, intelligent, and voluntary waiver of his right to counsel.⁷⁶⁸ The standard to determine if the defendant is competent to waive his right to counsel and represent himself is whether he is able to understand the proceedings—generally the same standard for determining if a defendant is competent to stand trial.⁷⁶⁹ In the 2009 case *United States v. DeShazer*, the Tenth Circuit was asked to raise this standard to require a higher level of competence for a defendant to represent himself, particularly when his only viable defense is one of insanity.⁷⁷⁰ The court declined to do so.⁷⁷¹

In the 2009 case of *United States v. Miles*, the Tenth Circuit addressed an equivocal invocation of the right to self-representation.⁷⁷² Here, the defendant proceeded pro se, until the verdict was delivered, where it was to be determined if he needed to be taken into custody.⁷⁷³ At this point, the defendant allowed his standby counsel to take over his representation.⁷⁷⁴ When the defendant later attempted to file a pro se motion for a new trial, the motion was stricken and the defendant told

765. *Id.* at 236.

766. *State v. Galaviz*, No. 101,084, 2009 WL 5206238, at *2 (Kan. Ct. App. Dec. 31, 2009).

767. *Id.*

768. *United States v. DeShazer*, 554 F.3d 1281, 1287–88 (10th Cir. 2009).

769. *Id.*

770. *Id.*

771. *Id.* at 1290.

772. 572 F.3d 832, 836 (10th Cir. 2009).

773. *Id.* at 833–34.

774. *Id.*

that all pleadings must be submitted by his counsel.⁷⁷⁵ At the sentencing hearing, the defendant once again invoked his right to proceed pro se and began doing so.⁷⁷⁶ The defendant appealed on the grounds that the court erred in preventing him from representing himself during the period between dismissal of the jury and the sentencing hearing.⁷⁷⁷ The Tenth Circuit determined that no error occurred because the trial judge reasonably inferred that the defendant invoked his right to counsel after the jury was dismissed and his attempted filing of a pro se motion did not suffice to unequivocally invoke his right to self-representation.⁷⁷⁸

d. Effective Assistance of Counsel

The Sixth Amendment right to counsel is a right not just to have counsel present, but to have effective assistance of counsel.⁷⁷⁹ For a defendant to claim that his counsel at trial was ineffective, the defendant must establish that counsel's performance was deficient, and that this deficiency was "sufficiently serious to prejudice the defense and deprive the defendant of a fair trial."⁷⁸⁰ Regarding the determination of counsel's deficiency, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."⁷⁸¹ However, "[m]ere invocation of the word 'strategy' does not insulate the performance of a criminal defendant's lawyer from constitutional criticism."⁷⁸²

Included within the right to effective counsel is the right to counsel free from conflicts of interest.⁷⁸³ Even if a conflict exists, however, the defendant must show that the conflict affected the adequacy of his attorney's representation.⁷⁸⁴ For instance, in *Boldridge v. State*, the defendant claimed ineffective assistance of counsel in her murder trial because her appointed counsel previously served as a pro tempore judge, during which time he was involved in some portions of her case, including signing subpoenas to obtain telephone records that resulted in

775. *Id.* at 834.

776. *Id.* at 834–36.

777. *Id.* at 836.

778. *Id.* at 837.

779. *State v. Gonzales*, 212 P.3d 215, 220 (Kan. 2009).

780. *Id.*

781. *Id.* at 220–21 (quoting *Bledsoe v. State*, 150 P.3d 868, 878 (Kan. 2007)).

782. *Wilkins v. State*, 190 P.3d 957, 968 (Kan. 2008).

783. *Boldridge v. State*, 215 P.3d 585, 591 (Kan. 2009).

784. *Id.*

the murder charge.⁷⁸⁵ Though the court found this to be a clear conflict of interest,⁷⁸⁶ it also determined that the conflict did not affect the attorney's ability to effectively represent the defendant.⁷⁸⁷ In general, the same test applies for determining whether appellate counsel provided ineffective assistance.⁷⁸⁸

On an appeal of a factual finding of a trial court related to ineffective assistance of counsel, the appellate court determines whether those factual findings are supported by substantial competent evidence and are sufficient to support the court's conclusions of law.⁷⁸⁹ These conclusions of law are reviewed de novo.⁷⁹⁰

C. Evidentiary Issues

1. Prior Actions by the Defendant: Evidence of Other Crimes or Civil Wrongs

Traditionally, all relevant evidence is generally admissible unless otherwise prohibited by law.⁷⁹¹ Since 1963,⁷⁹² section 60-455 of the Kansas Statutes specifically prohibited the admission of evidence of prior bad acts to show a defendant's disposition to commit a crime or a civil wrong.⁷⁹³ The rule excepts evidence "when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident."⁷⁹⁴ In 2009, the Kansas legislature substantially amended portions of section 60-455; the statute now allows the admission of evidence

to show the modus operandi or general method used by a defendant to perpetrate similar but totally unrelated crimes when the method of committing the prior acts is so similar to that utilized in the current case

785. *Id.*

786. *Id.* at 593.

787. *Id.* at 595.

788. *See Gardner v. Galetka*, 568 F.3d 862, 884–85 (10th Cir. 2009) (applying the deficiency and prejudice test to a case involving an ineffective assistance of counsel claim for appellate counsel).

789. *State v. White*, 211 P.3d 805, 809 (Kan. 2009).

790. *Id.*

791. *State v. Gunby*, 144 P.3d 647, 654 (Kan. 2006).

792. *Id.* at 655.

793. KAN. STAT. ANN. § 60-455 (Supp. 2009).

794. *Id.*

before the court that it is reasonable to conclude that the same individual committed both acts.⁷⁹⁵

Such evidence must be disclosed to the defendant prior to its admission at trial.⁷⁹⁶

Notably, the statute provides additional exceptions relating to sexual offenses.⁷⁹⁷ When a defendant faces charges under articles 34, 35, or 36 of chapter 21 of the Kansas Statutes, “evidence of the defendant’s commission of another act or offense of sexual misconduct is admissible, and may be considered for its bearing on any matter to which it is relevant and probative.”⁷⁹⁸ A review of pre-amendment jurisprudence outlines the problems that sparked the legislative change in the statutory language, especially with regard to sexual offenses.

a. Pre-Amendment Problems: *State v. Gunby* and *State v. Dayhuff*

Perhaps the amended version of section 60-455 of the Kansas Statutes will solve the problem recognized in *State v. Gunby*, in which the Kansas Supreme Court expressed unease regarding two developments that arose after the statute’s initial enactment.⁷⁹⁹ First, courts regarded the exceptions to prior crimes evidence as exclusive rather than exemplary.⁸⁰⁰ Second, when judges failed to give a limiting instruction regarding the prior crimes evidence, “reversal became an automatic and absolute remedy.”⁸⁰¹ These developments prompted courts to admit evidence of prior crimes independent of section 60-455 using “avoidance techniques,”⁸⁰² which the *Gunby* Court feared posed a threat to defendants’ rights to a fair trial.⁸⁰³

Gunby held that “the list of material facts in [section] 60-455 is exemplary rather than exclusive,” and that while judges must provide a limiting instruction when prior crimes evidence is admitted, failure to do so may constitute only harmless error.⁸⁰⁴ But the next year, in *State v. Dayhuff*, the Kansas Court of Appeals appeared to disregard *Gunby* when

795. *Id.* § (c).

796. *Id.* § (e).

797. *See id.* § (d).

798. *Id.*

799. *See* 144 P.3d 647, 657 (Kan. 2006).

800. *Id.* (citing *State v. Wright*, 398 P.2d 339, 340 (Kan. 1965)).

801. *Id.* at 657–58 (citing *State v. Rambo*, 495 P.2d 101, 103 (Kan. 1972)).

802. *Id.* at 658.

803. *Id.* at 655.

804. *Id.* at 659–60.

it ruled that prior crimes evidence is admissible only if “relevant to prove one of the facts specified in the statute,” once again interpreting section 60-455’s mandates to be exclusive.⁸⁰⁵ Kansas courts may find *Gunby* easier to apply under the amended section 60-455 because it greatly expands the scope of admissible prior acts.

b. *State v. Prine*

The legislature amended section 60-455 of the Kansas Statutes shortly after the Kansas Supreme Court decided *State v. Prine*.⁸⁰⁶ *Prine* applied the former version of this statute in a child abuse case.⁸⁰⁷ The Kansas Court of Appeals found that the trial court properly allowed testimony of other children who also claimed to have been abused by the defendant and other evidence relating to previous child abuse.⁸⁰⁸ The Kansas Supreme Court reversed this decision, holding that the error was not harmless.⁸⁰⁹ The court reasoned that the evidence was inadmissible to demonstrate intent or absence of mistake or accident because these facts were not at issue.⁸¹⁰ Furthermore, because the prior acts were not so “strikingly similar [to the crime alleged] . . . as to be a signature,” the evidence was not admissible to show a plan.⁸¹¹ The court’s opinion emphasized that the ruling was a result of merely applying the law as it stood and invited the legislature to amend section 60-455.⁸¹² The threshold for admitting evidence of prior sexual offenses is now much lower under the amended statute, as any evidence “may be considered for its bearing on any matter to which it is relevant and probative.”⁸¹³ Thus, evidence like that at issue in *Prine* will likely be admissible under the new rule.

805. *State v. Dayhuff*, 158 P.3d 330, 337 (Kan. Ct. App. 2007) (quoting *State v. Overton*, 112 P.3d 244, 249 (Kan. 2005)); *see also State v. Boggs*, 197 P.3d 441, 455 (Kan. 2008) (“Our decision in *Gunby* specifically bars the admission of any evidence of other crimes or civil wrongs independent of [section] 60-455 or some other statutory basis.”).

806. 200 P.3d 1 (Kan. 2009).

807. *Id.* at 7–8.

808. *Id.* at 4–7.

809. *Id.* at 15.

810. *Id.* at 10–11.

811. *Id.* at 15.

812. *Id.* at 16.

813. KAN. STAT. ANN. § 60-455(d) (Supp. 2009).

c. Sexually Violent Predator Commitment Proceedings

The Kansas Supreme Court ruled on the admissibility of prior nonsexual crimes and civil wrongs in civil commitment proceedings of sexually violent predators with *In re Miller*.⁸¹⁴ While the court recognized that *Gunby* commands all prior bad acts to be analyzed under section 60-455, it pointed to previous case law holding that section 60-455 is inapplicable in sexual offender commitment proceedings.⁸¹⁵ Noting the “unique nature” of civil commitment proceedings under the Sexually Violent Predator Act, the court distinguished *Miller* from *Gunby*.⁸¹⁶ Under the Act, prior crimes are not admitted to show that a defendant committed another crime in the *past*, as is the case with evidence admitted pursuant to section 60-455.⁸¹⁷ In other words, the purpose of admitting evidence under the Act is not to “use one historical act to prove another historical act”; rather, the evidence guides the court in deciding whether the respondent will be a threat to the well-being of others in the *future*.⁸¹⁸

d. Evidence of Gang Membership

Membership in a gang is not a crime or civil wrong under section 60-455 of the Kansas Statutes,⁸¹⁹ so evidence of gang membership may be admitted if relevant.⁸²⁰ Therefore, if such evidence is admitted and the judge fails to provide a limiting instruction without objection, gang evidence may be admissible to show motive, bias, or credibility.⁸²¹

2. Use of the Defendant’s Post-Arrest Silence to Impeach

In *Miranda v. Arizona*, the United States Supreme Court recognized that a suspect’s privilege against self-incrimination during custodial

814. 210 P.3d 625, 628 (Kan. 2009).

815. *Id.* at 631 (citing *In re Care & Treatment of Hay*, 953 P.2d 666, 670 (Kan. 1998); *In re Crane*, 7 P.3d 285, 293 (2000), *vacated on other grounds*, 534 U.S. 407 (2002)).

816. *Id.* at 631–32 (citing KAN. STAT. ANN. § 59-29a01 (2008)).

817. *Id.*

818. *Id.*

819. *State v. Winston*, 135 P.3d 1072, 1076 (Kan. 2006); *State v. Lowe*, 80 P.3d 1156, 1160 (Kan. 2003) (citing *State v. Bailey*, 834 P.2d 342, 350 (Kan. 1992)); *see* KAN. STAT. ANN. § 60-455 (2009).

820. *State v. Tran*, 847 P.2d 680, 686 (Kan. 1993).

821. *See, e.g., State v. Conway*, 159 P.3d 917, 927 (Kan. 2007); *State v. Gholston*, 35 P.3d 868, 880 (Kan. 2001); *State v. Roberts*, 931 P.2d 683, 687 (Kan. 1997).

interrogation and the related right to silence is protected by the Fifth Amendment of the United States Constitution.⁸²² Under the Fifth Amendment,⁸²³ section 10 of the Kansas Constitution Bill of Rights,⁸²⁴ and section 60-425 of the Kansas Statutes,⁸²⁵ Kansas prosecutors generally may not impeach the credibility of a witness by presenting evidence of the defendant's post-*Miranda* silence "directly or indirectly."⁸²⁶

The Kansas Court of Appeals applied this principle in *State v. Pruitt* to determine that a prosecutor improperly impeached a defendant's credibility.⁸²⁷ Immediately after a police officer testified that Pruitt was read his *Miranda* rights, the prosecutor asked, "Did you ask him what had taken place that night?" to which the officer responded, "[a]t that time he told me he didn't want to answer any questions."⁸²⁸ Defense counsel objected⁸²⁹ and the court found that the improper question was not a harmless error, even after the judge admonished the jury to disregard the defendant's post-*Miranda* silence.⁸³⁰ The court reasoned that the prosecutor seemed to intend to prejudice the jury in a case where credibility of the defendant was at issue, and that based on the circumstances, "[the] testimony was very prejudicial."⁸³¹

In *State v. Madkins*, the Kansas Court of Appeals addressed a defendant's claim of prosecutorial misconduct when the State repeatedly referred to the defendant's lack of evidence to refute the State's claims in a drug case.⁸³² The defendant alleged that the prosecutor (1) indirectly referred to his failure to testify; and (2) the references suggested to the jury that the defendant had the burden of proving his innocence.⁸³³ The prosecutor mentioned a lack of evidence twice, at which time the judge

822. 384 U.S. 436, 478-79 (1966).

823. U.S. CONST. amend. V ("No person shall . . . be compelled in any criminal case to be a witness against himself . . .").

824. KAN. CONST. Bill of Rights § 10 ("No person shall be a witness against himself . . .").

825. KAN. STAT. ANN. § 60-425 (2005) ("[E]very natural person has a privilege, which he or she may claim, to refuse to disclose in an action or to a public official of this state or the United States or any other state or any governmental agency or division thereof any matter that will incriminate such person.").

826. *State v. Madkins*, 219 P.3d 831, 835 (Kan. Ct. App. 2009); *see also* *State v. Cosby*, 169 P.3d 1128, 1139 (Kan. 2007) (citing *Doyle v. Ohio*, 426 U.S. 610, 618 (1976)); *State v. Nott*, 669 P.2d 660, 666 (Kan. 1983).

827. 211 P.3d 166, 172 (Kan. Ct. App. 2009).

828. *Id.* at 171.

829. *Id.*

830. *Id.* at 173.

831. *Id.* at 172.

832. 219 P.3d 831, 834-35 (Kan. Ct. App. 2009).

833. *Id.* at 834.

intervened to note that criminal defendants do not carry the burden of proof and that the jury should disregard any such inferences made by the prosecutor.⁸³⁴ The prosecutor then referred to the lack of evidence four more times.⁸³⁵ The court conducted a two-step analysis in examining the defendant's claim of prosecutorial misconduct.⁸³⁶ First, it addressed whether the comments were improper.⁸³⁷ Second, it discussed whether the comments unfairly prejudiced the defendant.⁸³⁸ While the court found that the prosecutor's conduct was at the very least flagrant, there was overwhelming evidence against the defendant.⁸³⁹ The court then conducted a statutory and constitutional harmless-error analysis.⁸⁴⁰ Because the defendant's post-*Miranda* silence was at issue, the court applied "the more stringent constitutional harmless error test."⁸⁴¹ Citing *State v. Warledo*,⁸⁴² the court "examine[d] the comments in the context of the trial record as a whole," finding "beyond reasonable doubt" that the jury would not have reached a different conclusion in the absence of the prosecutor's misconduct.⁸⁴³ Thus, the court found the six indirect references to the defendant's silence to be harmless error under the circumstances of the case.⁸⁴⁴

3. Plea Agreements as Evidence

Evidence of plea agreements or statements made during plea negotiations are generally inadmissible under the Federal Rules of Evidence.⁸⁴⁵ Statements made by another party during a change of plea hearing are also inadmissible, according to the Tenth Circuit in *United States v. Lopez-Medina*, because such statements constitute hearsay.⁸⁴⁶

834. *Id.* at 834–35.

835. *Id.* at 835.

836. *Id.* at 834.

837. *Id.* at 835–36.

838. *Id.* at 836–37.

839. *Id.* at 836.

840. *Id.* at 836–37.

841. *Id.* at 836.

842. 190 P.3d 937, 952 (Kan. 2008) ("When a defendant claims that a prosecutor committed reversible misconduct, the prejudicial nature of alleged errors is analyzed in the context of the trial record as a whole." (citation omitted)).

843. *Madkins*, 219 P.3d at 836.

844. *Id.*

845. FED. R. EVID. 410.

846. No. 08-4055, 2010 WL 569944, at *13 (10th Cir. Feb. 19, 2010).

Two brothers, Lopez-Medina and Lopez-Ahumado, were charged with possession of methamphetamine with the intent to distribute.⁸⁴⁷ At Lopez-Ahumado's change of plea hearing, he pled guilty to knowingly aiding and abetting Lopez-Medina "in jointly possessing, with intent to distribute . . . methamphetamine . . ." ⁸⁴⁸ Lopez-Medina went to trial,⁸⁴⁹ where he argued that the guilty party, Lopez-Ahumado, had already been convicted.⁸⁵⁰ The government argued that if Lopez-Medina could admit evidence of Lopez-Ahumado's plea, the State should be allowed to counter with evidence that the factual basis of the plea stipulated to was aiding and abetting Lopez-Medina in the possession of methamphetamine.⁸⁵¹ The trial court allowed the government to admit testimony of the factual basis of the plea,⁸⁵² and on appeal, Lopez-Medina argued that this violated his right to confrontation because his brother's statements at the change of plea hearing were testimonial.⁸⁵³ The appellate court agreed with Lopez-Medina, concluding that the factual basis of the plea was inadmissible "unless Lopez-Ahumado was unavailable and Lopez-Medina had a prior opportunity for cross-examination," which was not the case.⁸⁵⁴

4. Evidence from Third Parties

The Kansas Supreme Court held in *State v. Marsh* that generally, third-party evidence comports with section 60-407(f) of the Kansas Statutes, which states that "all relevant evidence is admissible" unless otherwise prohibited.⁸⁵⁵ The *Marsh* Court explained, "[W]hile evidence of the motive of a third party to commit the crime, standing alone, is not relevant, such evidence may be relevant if there is other evidence connecting the third party to the crime."⁸⁵⁶

The Kansas Supreme Court clarified the third-party evidence rule in *State v. Krider*,⁸⁵⁷ where it interpreted *Marsh* as mandating a "totality of the facts and circumstances" test, with evidence of motive as "a

847. *Id.* at *2.

848. *Id.*

849. *Id.*

850. *Id.* at *3.

851. *Id.*

852. *Id.* at *5.

853. *Id.* at *13.

854. *Id.*

855. 102 P.3d 445, 455 (Kan. 2004); KAN. STAT. ANN. § 60-407(f) (2008).

856. *Marsh*, 102 P.3d at 456.

857. 202 P.3d 722 (Kan. 2009).

component of this totality that may be relevant if there is other evidence connecting the third party to the crime.”⁸⁵⁸ The court examined the totality of the circumstances when the defendant in a murder case pointed to the possible motive of the victim’s husband, Cook, who would benefit from insurance money. Additionally, the defendant argued that Cook had an opportunity to plant the evidence at the scene of the crime because he worked as a first-aid officer at the defendant’s place of employment.⁸⁵⁹ The court found that the district court did not err in finding the evidence inadmissible under Kansas’ third-party evidence rule, as it was “nothing more than mere speculation and conjecture and [did] not connect the third party to the crime.”⁸⁶⁰ Therefore, a defendant’s demonstration of a third party’s possible motive and a connection to the scene of the crime did not adequately demonstrate a connection to the crime itself.

a. Eyewitness Identification

The reliability of eyewitness identification is an issue for the jury, and expert witnesses may not attack the credibility or reliability of such testimony.⁸⁶¹ It is within the province of the jury to evaluate the truthfulness of testimony,⁸⁶² and furthermore, one witness may not give an opinion regarding the accuracy of another witness’s testimony.⁸⁶³

In *LaPointe v. State*, the Kansas Court of Appeals considered an ineffective assistance of counsel claim by a defendant in a robbery case.⁸⁶⁴ *LaPointe*’s attorney failed to object to the State’s line of questioning when a detective testified as to the reliability of two eyewitnesses who identified different men as the robber in a photo lineup.⁸⁶⁵ The detective stated he was confident in the identification of one witness who linked the defendant to the crime because she was not under stress when she saw the robber.⁸⁶⁶ He then noted four factors supporting the unreliability of the other witness, who identified someone other than the defendant: (1) the witness spent “a very long time” looking at the photos; (2) the witness remarked that “the individual’s face in the

858. *Id.* at 729 (citing *State v. Adams*, 124 P.3d 19, 28 (Kan. 2005)).

859. *Id.*

860. *Id.*

861. *LaPointe v. State*, 214 P.3d 684, 695 (Kan. Ct. App. 2009).

862. *Id.* (citing *State v. Elnicki*, 105 P.3d 1222, 1227 (Kan. 2005) (citation omitted)).

863. *Id.* at 694 (citing *State v. Giles*, 4 P.3d 630, 635 (Kan. Ct. App. 2000)).

864. *Id.* at 687–88.

865. *Id.* at 694.

866. *Id.*

photograph was fatter than that of the robber”); (3) the witness was under stress at the time of the robbery; and (4) the witness saw the robber with a bandana covering part of his face.⁸⁶⁷

While the court noted that the detective’s official position would give his testimony “more credit than other witnesses,”⁸⁶⁸ it emphasized that the testimony would be inadmissible whether it came from an expert witness or a lay witness.⁸⁶⁹ Because the identity of the robber was the primary issue at trial and defense counsel failed to object to the improper line of questioning, the court remanded the case for an evidentiary hearing on the defendant’s ineffective assistance of counsel claim.⁸⁷⁰

b. Witness Psychological Examinations

To decide whether a defendant may compel the psychological examination of a victim, Kansas courts consider first whether there is evidence to corroborate the victim’s accusations, then examine several factors:

- (1) whether the victim demonstrates mental instability;
- (2) whether the victim demonstrates a lack of veracity;
- (3) whether similar charges by the victim against others are proven to be false;
- (4) whether the defendant’s motion for a psychological evaluation of the victim appeared to be a fishing expedition;
- (5) whether anything unusual results following the questioning of the victims understanding of telling the truth; and
- (6) whether there are any other reasons why the victim should be evaluated.⁸⁷¹

Ultimately, the decision to order a complaining witness to undergo a psychiatric examination is under the discretion of the trial court.⁸⁷²

Kansas case law similarly recognizes judicial discretion to order or deny a psychological examination of a non-complaining witness.⁸⁷³ In *State v. Cook*, the Kansas Supreme Court upheld the trial court’s decision not to order a psychological examination of the State’s key witness when

867. *Id.* at 695.

868. *Id.* at 696.

869. *Id.* at 694–95.

870. *Id.* at 696.

871. *State v. Price*, 61 P.3d 676, 681–82 (Kan. 2003); *see also, e.g., Overton v. State*, No. 99,007, 2009 WL 743175, at *9 (Kan. Ct. App. Mar. 13, 2009) (citation omitted); *State v. Frost*, No. 98,433, 2009 WL 2371007, at *10 (Kan. Ct. App. July 31, 2009) (citation omitted); *State v. Sprung*, No. 99,704, 2009 WL 1591397, at *8–9 (Kan. Ct. App. June 5, 2009) (citations omitted).

872. *State v. Cook*, 135 P.3d 1147, 1161 (Kan. 2006) (citing *Price*, 61 P.3d at 679).

873. *See id.* at 1161–63.

it determined that the defendant did not offer compelling reasons to require the examination.⁸⁷⁴

5. Cross Examination: Scope, Testimonial Hearsay, and Forensic Science Reports

The Sixth Amendment of the United States Constitution provides that persons accused of crimes “shall enjoy the right . . . to be confronted with the witnesses against him.”⁸⁷⁵ Similarly, section 10 of the Kansas Constitution Bill of Rights guarantees criminal defendants the right “to meet the witness face to face.”⁸⁷⁶ According to the United States Supreme Court, “[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination.”⁸⁷⁷ The scope of a particular cross examination falls generally under the discretion of the trial court.⁸⁷⁸ This discretion is limited in that courts may not prohibit the elicitation of all “critically relevant” testimony on a specific aspect of the defendant’s theory of the case.⁸⁷⁹

In *Crawford v. Washington*, the United States Supreme Court concluded that the admission of testimonial hearsay statements violates the Confrontation Clause, which “applies to ‘witnesses’ against the accused—in other words, to those who ‘bear testimony.’”⁸⁸⁰ The Court defined a testimonial statement as “[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.”⁸⁸¹ Testimonial statements of absent witnesses are admissible only when two elements are met: (1) “the declarant is unavailable”; and (2) “the defendant has had a prior opportunity to cross-examine” the declarant.⁸⁸²

On June 25, 2009, the United States Supreme Court determined in *Melendez-Diaz v. Massachusetts* that forensic science reports are testimonial under *Crawford*.⁸⁸³ *Melendez-Diaz* was convicted of a drug crime after the court admitted into evidence a laboratory certificate stating that the substance he allegedly possessed contained cocaine.⁸⁸⁴

874. *Id.* at 1163.

875. U.S. CONST. amend. VI.

876. KAN. CONST. Bill of Rights § 10.

877. *Davis v. Alaska*, 415 U.S. 308, 315–16 (1974) (citation omitted).

878. *Manley v. Rings*, 564 P.2d 482, 485 (Kan. 1977).

879. *State v. Atkinson*, 80 P.3d 1143, 1150 (Kan. 2003).

880. 541 U.S. 36, 51 (2004).

881. *Id.*

882. *Id.* at 58.

883. 129 S. Ct. 2527, 2532 (2009).

884. *Id.* at 2531.

The Kansas Supreme Court applied *Melendez-Diaz* in *State v. Laturner*.⁸⁸⁵ At issue were portions of section 22-3437(3) of the Kansas Statutes which require that notice be given to parties against whom forensic evidence will be admitted, and only allow parties to object “within [ten] days upon receiving the adversary’s notice of intent to proffer the certificate.”⁸⁸⁶ If parties fail to object within this time period, they automatically waive the right to object to the admission of the evidence.⁸⁸⁷ Laturner objected to the admission of forensic evidence upon receiving notice, but the district court denied his objections and convicted him of possession of drug paraphernalia and methamphetamine.⁸⁸⁸ Laturner appealed, and the Kansas Supreme Court found the statute unconstitutional insofar as it is applied in a case implicating the Confrontation Clause because it places too great of a burden upon the defendant.⁸⁸⁹ The entire statute was not deemed unconstitutional because section 22-3438 provides for the severance of invalid provisions.⁸⁹⁰

Though Kansas found its burden-shifting statute unconstitutional under *Melendez-Diaz*, the United States Supreme Court recently held that Virginia’s similar notice-and-demand statute comports with *Melendez-Diaz* in *Briscoe v. Virginia*.⁸⁹¹ This decision may prompt the Kansas Supreme Court to re-examine the constitutionality of section 22-3437. In *State v. Leshay*, the Kansas Supreme Court upheld the validity of section 2902(a) of the Kansas Statutes, which allows for the admissibility of forensic reports prepared by the Kansas Bureau of Investigation in a preliminary hearing.⁸⁹² In *Leshay*, the court found that “the Confrontation Clause does not apply to laboratory reports admitted at a preliminary examination,”⁸⁹³ because “[t]here is no constitutional right

885. 218 P.3d 23, 25 (Kan. 2009).

886. KAN. STAT. ANN. § 22-3437(3) (2009).

887. *Id.*

888. *Laturner*, 218 P.3d at 25.

889. *Id.* at 39–40.

890. *Id.* at 39 (quoting KAN. STAT. ANN. § 22-3438 (2009) (“If any provision of this act or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application. To this end the provisions of this act are severable.”)).

891. 130 S. Ct. 1316 (2010); *see also* VA. CODE ANN. § 19.2–187.1 (West Supp. 2009) (“Such objection [of defendant to the admission into evidence of a certificate of analysis] shall be filed with the court hearing the matter, with a copy to the attorney for the Commonwealth, no more than 14 days after the certificate and notice were filed with the clerk by the attorney for the Commonwealth or the objection shall be deemed waived.”).

892. *State v. Leshay*, 213 P.3d 1071, 1076 (Kan. 2009).

893. *Id.*

to allow the accused to confront witnesses against him at the preliminary hearing.”⁸⁹⁴

6. Proof Beyond a Reasonable Doubt

In a criminal case, the prosecution has the burden to prove every element of an offense beyond a reasonable doubt.⁸⁹⁵ On appeal, when the sufficiency of evidence in a criminal case is challenged, the court “reviews all the evidence in the light most favorable to the prosecution to determine whether the court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt.”⁸⁹⁶ The Tenth Circuit requires substantial evidence to meet this burden, but that evidence need not overcome every other reasonable hypothesis.⁸⁹⁷ In some cases, circumstantial evidence alone is sufficient to prove elements beyond a reasonable doubt.⁸⁹⁸ If the prosecution relies completely on circumstantial evidence, the “evidence must be sufficient to convince a rational factfinder that the defendant [is] guilty beyond a reasonable doubt.”⁸⁹⁹

D. Actions by Prosecutors and Judges at Trial

1. Prosecutors

Within constitutional limits, the government has discretion to decide which charges to bring in a particular case as long as the prosecutor believes the charges can be proven beyond a reasonable doubt.⁹⁰⁰ There are two requirements for a defense of discriminatory prosecution: first, a defendant must show that other similarly situated people are generally not prosecuted for similar conduct, and second, he must show that he has been intentionally targeted for prosecution based on arbitrary criteria.⁹⁰¹ For example, in *State v. Gant*, the prosecution charged the defendant with felony murder, but a codefendant was offered and accepted a

894. *Id.* at 1074–75 (citing *State v. Sherry*, 667 P.2d 367, 375–76 (Kan. 1983) (citation omitted)).

895. *See State v. Crum*, 184 P.3d 222, 230 (Kan. 2008).

896. *State v. Trautloff*, 217 P.3d 15, 21 (Kan. 2009); *see also United States v. Phillips*, 583 F.3d 1261, 1264 (10th Cir. 2009); *State v. Ulate*, 219 P.3d 841, 856 (Kan. Ct. App. 2009).

897. *Phillips*, 583 F.3d at 1264.

898. *State v. Belt*, No. 98,875, 2008 WL 4471921, at *3 (Kan. Ct. App. Oct. 3, 2008).

899. *Id.*

900. *United States v. Bradshaw*, 580 F.3d 1129, 1135–36 (10th Cir. 2009).

901. *State v. Gant*, 201 P.3d 673, 679–80 (Kan. 2009).

reduced plea.⁹⁰² The court held that this did not constitute discriminatory prosecution because the defendant did not present any evidence of discrimination concerning the plea agreements, and “[a]n allegation of discriminatory prosecution grounded only on speculation and lacking evidence in the record supporting the claim fails to meet a defendant’s burden to show prejudicial error.”⁹⁰³ This case provides a good example of the distinction between selective prosecution, which the state is free to practice, and discriminatory prosecution, which it is not.

The Due Process Clause requires prosecutors to “comport with prevailing notions of fundamental fairness . . . [which] requires that criminal defendants be afforded a meaningful opportunity to present a complete defense.”⁹⁰⁴ In Kansas, courts employ a two-step analysis for claims of prosecutorial misconduct:

First, the court must determine whether the prosecutor’s statements were outside the wide latitude for language and manner a prosecutor is allowed when discussing the evidence; second, it must determine whether the comments constitute plain error, that is, whether the statements were so gross and flagrant as to prejudice the jury against the accused and deny him or her a fair trial.⁹⁰⁵

Allegations of prosecutorial misconduct often result from statements made by prosecutors.⁹⁰⁶ For example, in *State v. Morningstar*, the prosecutor made several allegations in the closing argument, including the accusation that the defendant left the victim alone in a bathtub.⁹⁰⁷ The defendant did not contemporaneously object, but argued on appeal that this statement amounted to misconduct because the prosecutor stated

902. *Id.* at 679.

903. *Id.* at 680 (citing *State v. Costovero*, 874 P.2d 1173, 1182 (Kan. 1994); *State v. Bailey*, 834 P.2d 1353, 1355 (Kan. 1992)).

904. *United States v. Montgomery*, No. 03-20127-KHV, 2009 WL 3809809, at *15 (D. Kan. Nov. 13, 2009).

905. *State v. Scott*, 183 P.3d 801, 821 (Kan. 2008) (citing *State v. Tosh*, 91 P.3d 1204, 1208 (Kan. 2004)).

906. *See, e.g.*, *State v. McReynolds*, 202 P.3d 658, 663–64, 668 (Kan. 2009) (holding that a prosecutor’s statement during voir dire that “any person accused, whether they’re guilty or not” had a right to a jury trial was not out-of-bounds because, even though such a statement could undermine the presumption of innocence, the statement as a whole clearly shifted the burden of proof to the prosecution); *State v. Richmond*, 212 P.3d 165, 181 (Kan. 2009) (concluding that a closing argument asking if a witness could make up his story was not impermissible); *State v. Bejarano*, 202 P.3d 39, 44 (Kan. Ct. App. 2009) (explaining that a prosecutor is not allowed to personally interject his belief of a child victim’s veracity, but is allowed to explain consistencies in testimony as long as the ultimate decision is left up to the jury); *State v. Mendoza*, 207 P.3d 1072, 1079–80 (Kan. Ct. App. 2009) (allowing a prosecutor to use the phrase “sudden passion” in the definition of voluntary manslaughter).

907. *State v. Morningstar*, 213 P.3d 1045, 1051–52 (Kan. 2009).

facts not in evidence.⁹⁰⁸ The court held that an immediate objection was not required,⁹⁰⁹ but the defendant's argument failed under the two-part test because "the statements at issue did not exceed the wide latitude given prosecutors during closing arguments and the statements were not plain error."⁹¹⁰ The closing statement summarized evidence that the defendant violently injured the victim's genitals and did not take the victim to a hospital,⁹¹¹ so it is likely that the additional minor accusation would not be unduly prejudicial.

By contrast, in *State v. Decker*, the prosecutor claimed in his closing argument that the defendant was no longer presumed innocent, then stated that the "[c]ase is in. Evidence is in."⁹¹² The court concluded that a rational juror could infer that the presumption of innocence no longer applies after the evidentiary portion of the trial is complete, and therefore, "the prosecutor exceeded the limits of approved rhetoric."⁹¹³ Another example of unfair practices by the government is entrapment by estoppel. This claim arises when the prosecutor "affirmatively misleads a party as to the state of the law and that party proceeds to act on the misrepresentation"⁹¹⁴

2. Trial Judges

A district judge is called on to exercise judgment and "render a decision based upon what is fair in the circumstances and guided by the rules and principles of law."⁹¹⁵ The Tenth Circuit reasoned that it is possible for two judges to look at an identical record and come to opposite conclusions, and for the appellate court to affirm both.⁹¹⁶

A judge does not have to give a requested instruction, but the appellate court will reverse a conviction if prejudice results from a judge's refusal to do so.⁹¹⁷ For example, the District of Kansas concluded that "failure to instruct on venue, *when requested*, is reversible

908. *Id.* at 1051.

909. *Id.*

910. *Id.*

911. *Id.*

912. *State v. Decker*, 202 P.3d 669, 675–76 (Kan. 2009).

913. *Id.* at 676.

914. *United States v. Lovern*, 590 F.3d 1095, 1104 (10th Cir. 2009).

915. *United States v. Hutchinson*, 573 F.3d 1011, 1024 (10th Cir. 2009) (quoting *Shook v. Bd. of County Comm'rs*, 543 F.3d 597, 603 (10th Cir. 2008)).

916. *Id.* at 1030 (quoting *United States v. Williams*, 81 F.3d 1434, 1437 (7th Cir. 1996)).

917. *United States v. Turner*, 553 F.3d 1337, 1347 (10th Cir. 2009) (stating "[w]e reverse only if prejudice results from a court's refusal to give a requested instruction").

error unless it is beyond a reasonable doubt that the jury's verdict on the charged offense necessarily incorporates a finding of proper venue."⁹¹⁸

In contrast, admissibility of evidence is reviewed under the abuse of discretion standard.⁹¹⁹ For example, the admission of photographs in a homicide case is within a trial court's discretion.⁹²⁰ The determination of whether the trial court abused its discretion is based on whether the evidence was relevant and whether the prejudicial nature of the evidence outweighs its probative value.⁹²¹ For evidence of other crimes or civil wrongs, "the court must determine whether the [evidence] 'has a legitimate and effective bearing on the decision of the case.'"⁹²² A judge has discretion over his cases, and that discretion is abused "when no reasonable person would take the view adopted by the district judge."⁹²³ A district court's discretion is limited when a constitutional or statutory right is involved.⁹²⁴ Under such circumstances, the district judge is under a greater need to articulate his reasons for any discretionary decisions.⁹²⁵

To determine whether a judge must recuse himself in a criminal case, the appellate court asks whether "sufficient factual grounds exist to cause a reasonable, objective person, knowing all relevant facts, to question the judge's impartiality."⁹²⁶ *In re Rafter Seven Ranches L.P.* held that a bankruptcy judge's adverse rulings did not merit recusal because the actions did not "display 'deep-seated and unequivocal antagonism that would render fair judgment impossible.'"⁹²⁷ In another case, the Tenth Circuit held that adverse rulings alone did not form appropriate grounds for disqualification.⁹²⁸

An *Allen*-type instruction, also called a hammer instruction or a deadlocked jury instruction, is sometimes given to the jury after they

918. *United States v. Wesley*, 649 F. Supp. 2d 1232, 1236 (D. Kan. 2009) (quoting *United States v. Miller*, 111 F.3d 747, 751 (10th Cir. 1997)).

919. *See State v. Wells*, 221 P.3d 561, 568 (Kan. 2009).

920. *State v. Warledo*, 190 P.3d 937, 945 (Kan. 2008) (citing *State v. Bryant*, 179 P.3d 1122 (Kan. 2008)).

921. *Wells*, 221 P.3d at 567-68; *Warledo*, 190 P.3d at 945.

922. *State v. Hollingsworth*, 221 P.3d 1122, 1128 (Kan. 2009) (quoting *State v. Garcia*, 169 P.3d 1069, 1079 (Kan. 2007)).

923. *State v. Robison*, 222 P.3d 500, 504 (Kan. 2010) (quoting *State v. Ortega-Codelan*, 194 P.3d 1195, 1201 (Kan. 2008)).

924. *State v. Gant*, 201 P.3d 673, 678 (Kan. 2009).

925. *Id.*

926. *United States v. Erickson*, 561 F.3d 1150, 1169 (10th Cir. 2009) (quoting *United States v. Pearson*, 203 F.3d 1243, 1277 (10th Cir. 2000)).

927. *In Re Rafter Seven Ranches L.P.*, 414 B.R. 722, 740 (B.A.P. 10th Cir. 2009) (quoting *Liteky v. United States*, 510 U.S. 540, 556 (1994)).

928. *Lipari v. U.S. Bancorp NA*, 345 Fed. App'x 315, 317 (10th Cir. 2009).

announce a deadlock.⁹²⁹ The Kansas Court of Appeals explained that this approach is not recommended and may lead to prejudicial error.⁹³⁰ In *State v. Ellmaker*, the district court issued an *Allen*-type instruction before its deliberation, telling the jury that “another trial would be a burden on both sides.”⁹³¹ The defendant challenged the instruction, arguing that “this language is misleading and inaccurate because another trial is not a burden to either party.”⁹³² On appeal, the court concluded that this instruction was in error because it was given before deliberations.⁹³³ However, it was not clearly erroneous and did not merit a reversal because the same verdict would have been rendered even if the challenged statement was excluded.⁹³⁴

E. Potential Trial Actions

1. Motion for Acquittal

If the defendant moves for a judgment of acquittal, the district judge reviews the record “to determine whether, viewing the evidence in the light most favorable to the government, a reasonable jury could have found the defendant guilty of the crime beyond a reasonable doubt.”⁹³⁵ Judgments of acquittal resolve some or all of the factual elements of the case, and the law protects defendants from double jeopardy by preventing the prosecution from appealing these judgments.⁹³⁶

2. Submission of the Case to a Jury

Under Kansas law, when a jury trial is requested, the jury decides all issues of fact unless the parties or their attorneys file motions for a bench trial, or if the court decides by motion or on its own “that a right of trial

929. See *Duncan v. West Wichita Family Physicians, P.A.*, 221 P.3d 630, 634 (Kan. Ct. App. 2010) (analyzing whether the district court erred in giving an *Allen*-type instruction after the jury suggested its dead lock).

930. *Id.* at 634–35.

931. *State v. Ellmaker*, 221 P.3d 1105, 1115 (Kan. 2009). See also *State v. Jallow*, No. 100,089, 2009 WL 4931240, at *1 (Kan. Ct. App. Dec. 11, 2009) (holding that a jury instruction given to the jury before its deliberation including the words “another trial would be a burden on both sides” was an error).

932. *Ellmaker*, 221 P.3d at 1115.

933. *Id.* at 1115–16.

934. *Id.*

935. *United States v. Riley*, 292 Fed. App'x 717, 724 (10th Cir. 2008) (quoting *United States v. Harris*, 369 F.3d 1157, 1163 (10th Cir. 2004)).

936. *City of Wichita v. Bannon*, 209 P.3d 207, 211 (Kan. Ct. App. 2009).

by jury of some or all of those issues does not exist under the constitution or statutes.⁹³⁷

A motion for judgment as a matter of law, or a motion for a directed verdict, may be granted when the evidence—taken in the light most favorable to the nonmoving party—leaves no basis for a verdict in favor of that party.⁹³⁸ The motion can be made at any time before the case is submitted to the jury, and must state why the moving party is entitled to judgment as a matter of law.⁹³⁹ A motion for judgment notwithstanding the verdict is similar to the motion for judgment as a matter of law. In fact, the test for determining the two motions is the same.⁹⁴⁰ In order for a party to obtain a judgment notwithstanding the verdict, he must make a timely motion for judgment as a matter of law.⁹⁴¹ However, both of these motions should be made sparingly and cautiously.⁹⁴²

3. Mistrial

The trial court has discretion to terminate a trial for several different reasons, including physical impossibility of completion, legal defects, prejudicial conduct, hung juries, false statements of jurors on voir dire, or a pending determination of the defendant's competency.⁹⁴³ A motion for mistrial is judged on an abuse-of-discretion standard.⁹⁴⁴ This means that a defendant must show substantial prejudice in order to win an appeal against a district court's denial of a motion for mistrial.⁹⁴⁵ As a result, defendants face great difficulties in obtaining successful results in these appeals.

In *State v. Dixon*, an expert witness changed her testimony, causing the defendant to move for a mistrial.⁹⁴⁶ The district court denied the defendant's motion, and the Kansas Supreme Court upheld the denial because the discrepancy was relatively minor and reconcilable.⁹⁴⁷ In

937. KAN. STAT. ANN. § 60-239 (2005).

938. *Lewis v. R & K Ranch, L.L.C.*, 204 P.3d 642, 645 (Kan. Ct. App. 2009); *see also* KAN. STAT. ANN. § 60-250 (2005).

939. KAN. STAT. ANN. § 60-250(a)(2) (2005).

940. *Brown v. United Methodist Homes for the Aged*, 815 P.2d 72, 76 (Kan. 1991).

941. *Roitz v. Brooks*, 619 P.2d 1169, 1170 (Kan. Ct. App. 1980).

942. *See Fisher v. Sears, Roebuck & Co.*, 485 P.2d 1309, 1311 (Kan. 1971) (stating that “[s]uch motions should be sparingly and cautiously granted”).

943. KAN. STAT. ANN. § 22-3434(1)(a)–(f) (2007).

944. *State v. Ulate*, 219 P.3d 841, 853 (Kan. Ct. App. 2009).

945. *State v. Ransom*, 207 P.3d 208, 222 (Kan. 2009).

946. *State v. Dixon*, 209 P.3d 675, 683 (Kan. 2009).

947. *Id.* at 684.

another case, a defendant moved for a mistrial because a detective made reference to “gang officers,” after the State agreed it would not offer any gang evidence at trial.⁹⁴⁸ The court found that the judge did not abuse his discretion because the statements “did not create an unduly prejudicial impression that [the defendant] was involved in a gang or gang activity,” and the judge emphatically admonished the jury to dispel any weak association.⁹⁴⁹ Even if the judges in the two previous cases granted the defendants’ motions for mistrial, the appellate court likely still would not find an abuse of discretion.

VI. SENTENCING

“A ‘sentence’ is ‘the punishment imposed on a criminal wrongdoer.’”⁹⁵⁰ It does not include non-punitive expenses, such as court costs, docket and booking fees, criminal fees, or indigency application fees.⁹⁵¹ Sentencing occurs “when the defendant appears in open court and the judge orally states the terms of the sentence.”⁹⁵²

Any fact, other than a prior conviction, that increases a sentence beyond the prescribed statutory maximum must be submitted to a jury and proven beyond a reasonable doubt.⁹⁵³ The defendant is otherwise deprived of his constitutional right to a jury trial.⁹⁵⁴ Kansas appellate courts have shown great deference to trial courts on sentencing issues.⁹⁵⁵

948. *Ransom*, 207 P.3d at 215.

949. *Id.* at 222.

950. *State v. Phillips*, 210 P.3d 93, 98 (Kan. 2009) (citing BLACK’S LAW DICTIONARY 1393 (8th ed. 2004)).

951. *Id.* at 98–101 (ruling that they were “costs” rather than part of judgment or sentence).

952. *Abasolo v. State*, 160 P.3d 471, 475 (Kan. 2007) (quoting *State v. Moses*, 607 P.2d 477, 480 (Kan. 1980)).

953. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

954. *Id.*

955. *See, e.g., State v. Appleby*, 221 P.3d 525, 555 (Kan. 2009) (noting that a trial court that imposed a sentence of life imprisonment without the possibility of parole for fifty years for capital murder did not abuse its discretion in weighing the aggravating and mitigating circumstances); *State v. Ballard*, 218 P.3d 432, 437 (Kan. 2009) (noting that a trial court’s denial of defendant’s request for a downward dispositional departure to probation was not an abuse of discretion in prosecution for aggravated indecent liberties with a child); *State v. Thomas*, 199 P.3d 1265, 1269 (Kan. 2009) (noting that trial court’s denial of downward durational or dispositional departure sentence on conviction by no contest plea to two counts of aggravated indecent liberties with a child under the age of fourteen was not an abuse of discretion).

A. Determining a Sentence

Kansas employs a two-dimensional sentencing grid based on crime severity and criminal history.⁹⁵⁶ Plugging the relevant numbers into the grid produces a range of sentences; the trial court may deliver any sentence within that range.⁹⁵⁷ Such a sentence is not subject to appeal.⁹⁵⁸ Separate grids exist for drug and non-drug crimes.⁹⁵⁹ Certain homicide or sexual felonies are “off-grid” offenses and require a sentence of life imprisonment.⁹⁶⁰ The “identical offense doctrine” used by Kansas courts requires that, “when two crimes have identical elements but are classified differently for purposes of imposing a penalty,” the defendant convicted of either crime should receive the lesser sentence.⁹⁶¹

1. Crime Severity Levels

A crime’s severity is ranked from one to ten, with one assigned to the most severe crimes.⁹⁶² Off-grid offenses like premeditated first-degree murder carry a penalty of life imprisonment.⁹⁶³ Typically, the defendant must serve twenty-five years before becoming eligible for parole.⁹⁶⁴ A sentencing court may extend the mandatory sentence to forty or fifty years if it finds sufficient aggravating circumstances that outweigh the mitigating factors.⁹⁶⁵ Weighing “aggravating and mitigating circumstances is not a numbers game. ‘One aggravating circumstance can be so compelling as to outweigh several mitigating circumstances,’ and vice versa.”⁹⁶⁶

Prisoners serving “Hard 40” or “Hard 50” sentences are not eligible for probation or any modification of this sentence.⁹⁶⁷ Additionally, they

956. KAN. STAT. ANN. § 21-4704(c) (2009).

957. *See id.* § (e) (“The sentencing judge shall select the center of the range in the usual case and reserve the upper and lower limits for aggravating and mitigating factors insufficient to warrant a departure.”).

958. *Id.* § (o).

959. *See* KAN. STAT. ANN. § 21-4705 (2007).

960. KAN. STAT. ANN. § 21-4706(c)–(d) (2007).

961. *State v. Cooper*, 179 P.3d 439, 441 (Kan. 2008) (citing *State v. Nunn*, 768 P.2d 268, 284 (Kan. 1989)).

962. KAN. STAT. ANN. § 21-4707 (2009).

963. § 22-3717(b).

964. *Id.*

965. § 21-4635(b).

966. *State v. Appleby*, 221 P.3d 525, 557 (Kan. 2009) (citing *State v. Englehardt*, 119, P.3d 1148, 1170 (Kan. 2005)).

967. *See* KAN. STAT. ANN. § 21-4635 (2009).

are ineligible for good-time credits.⁹⁶⁸ The Kansas Supreme Court repeatedly upheld the constitutionality of Hard 40 and 50 sentences.⁹⁶⁹

2. Criminal History

Section 21-4709 of the Kansas Statutes assigns a criminal history score based on prior convictions.⁹⁷⁰ The prosecution must prove prior convictions by a preponderance of the evidence.⁹⁷¹ These prior convictions may inflate a sentence in two ways: by increasing the defendant's criminal history score or as an aggravating circumstance.⁹⁷² The Kansas Court of Appeals recently held that juvenile adjudications may be considered in determining a criminal history score, even though these types of prior convictions are not proven beyond a reasonable doubt.⁹⁷³ Courts may also consider prior convictions despite the presence of a diversion agreement.⁹⁷⁴

3. Consecutive and Concurrent Sentences

Defendants regularly plead guilty in exchange for the prosecution's recommendation that they serve concurrent sentences.⁹⁷⁵ A defense attorney must be diligent, however, as he is required to advise the defendant if current law precludes the trial court from making the sentences concurrent.⁹⁷⁶ In the absence of a statutory provision expressly requiring concurrent or consecutive sentences, appellate courts are reluctant to question a trial judge's sentence.⁹⁷⁷ In *State v. McMullen*, the defendant was convicted of two violations of Jessica's Law.⁹⁷⁸ Sentenced to concurrent life sentences, McMullen argued that the mandatory minimum sentences (in this case, twenty-five years each)

968. *See id.*

969. *E.g.*, *State v. Albright*, 153 P.3d 497 (Kan. 2007); *Appleby*, 221 P.3d at 558; *State v. Conley*, 11 P.3d 1147, 1157–60 (Kan. 2000); *State v. Wilkerson*, 91 P.3d 1181, 1190–91 (Kan. 2004). *See also infra* Part VI.C.

970. KAN. STAT. ANN. § 21-4709 (2009).

971. § 21-4711(d).

972. *See* § 21-4704(d).

973. *State v. Dale*, 220 P.3d 1102, 1105 (Kan Ct. App. 2009) (citing *State v. Hitt*, 42 P.3d 732, 740 (Kan. 2002)).

974. *State v. Shelinbarger*, 108 P.3d 445, 448 (Kan. Ct. App. 2005).

975. *See, e.g.*, *Johnson v. State*, 221 P.3d 1147, 1149 (Kan. Ct. App. 2009).

976. *Wilkinson v. State*, 195 P.3d 278, 281–82 (Kan. Ct. App. 2008).

977. *E.g.*, *State v. McMullen*, 221 P.3d 92, 98 (Kan. 2009).

978. *Id.* Jessica's Law is KAN. STAT. ANN. § 21-4643 (2009).

should run concurrently.⁹⁷⁹ “Of course, the statute says no such thing. To the contrary, in multiple conviction cases the sentencing judge has the discretion to run the individual sentences either concurrently or consecutively.”⁹⁸⁰ The Kansas Supreme Court upheld the sentence even though a second-time offender would receive a lesser penalty for a single offense—a single, Hard 40 sentence.⁹⁸¹ The decision reflects the amount of deference appellate courts extend to trial courts on sentencing issues.

B. Ability to Modify a Sentence: Corrections, Guideline Departures, and Modifications

A trial court may not change its own sentence retroactively.⁹⁸² This rule bars the court even if it purports to reserve the right to modify the sentence.⁹⁸³ An appellate court may review sentences in excess of the presumptive sentence if it finds the evidence does not support the trial court’s findings of fact and reasons for departure from the presumptive sentence.⁹⁸⁴ However, an appellate court may not review a sentence within the presumptive guidelines.⁹⁸⁵ It likewise may not review a sentence, approved on the record by the trial court, that results from an agreement between the defendant and the prosecution.⁹⁸⁶

Kansas courts do not have jurisdiction to increase legally imposed sentences.⁹⁸⁷ A court may correct any illegal sentence at any time.⁹⁸⁸ A sentence is illegal if: (1) it is imposed by a court without jurisdiction, (2) it does not conform to the relevant statute, or (3) it is ambiguous.⁹⁸⁹ However, a district court may grant both dispositional and durational departures from recommended sentences.⁹⁹⁰ The Kansas Supreme Court held in *State v. Ballard* that trial judges have broad discretion in findings of fact that may justify a departure.⁹⁹¹ Ballard’s sentence was upheld because “reasonable minds could agree with [the] sentencing court’s

979. *McMullen*, 221 P.3d at 98.

980. *Id.*

981. *Id.*

982. *State v. Miller*, 926 P.2d 652, 660 (Kan. 1996).

983. *State v. Trostle*, 201 P.3d 724, 727–28 (Kan. Ct. App. 2009).

984. KAN. STAT. ANN. § 21–4721(d) (2009).

985. *Id.* § (c).

986. *Id.*

987. *See generally* § 22–3504.

988. *Id.*

989. *Trotter v. State*, 200 P.3d 1236, 1246 (Kan. 2009) (quoting *State v. Edwards*, 135 P.3d 1251, 1254 (Kan. 2006)).

990. *State v. Ballard*, 218 P.3d 432, 437–38 (Kan. 2009).

991. *Id.* at 437.

determination.⁹⁹² Lastly, a defendant's financial resources are not taken into account when he petitions for a fine lower than the statutory minimum.⁹⁹³ This serves the interests of justice (i.e., perpetrators of the same offense are assessed equal penalties) and prevents time-consuming investigation into a defendant's personal life.

C. Constitutional Challenges

Appellate courts have unlimited review powers over constitutional questions, including sentence challenges on Section 9 "cruel and unusual" grounds.⁹⁹⁴ Courts apply the three-pronged *Freeman* test for determining whether a sentence violates the Kansas Constitution.⁹⁹⁵ The three factors to be weighed are: (1) the nature of the offense and the defendant's character, with particular attention paid to danger presented to society; (2) the comparison with past sentences in the same jurisdiction for more serious crimes; and (3) the comparison of penalties in other jurisdictions for the same offense.⁹⁹⁶

A recent Kansas Supreme Court decision upheld the constitutionality of Hard 50 sentences even when the sentence was based on aggravating factors not alleged in the State's complaint.⁹⁹⁷ The defendant contended that *Apprendi v. New Jersey* and section 22-3201(c) of the Kansas Statutes⁹⁹⁸ required the trial court to confine its sentencing analysis to facts alleged by the State.⁹⁹⁹ The court concluded that the statutory limitation does not apply when the trial court does not extend the *maximum* sentence, i.e., life imprisonment.¹⁰⁰⁰ In this case, the trial court only increased the mandatory *minimum* sentence, and thus the Kansas Supreme Court held that it did not violate *Apprendi*.¹⁰⁰¹

992. *Id.*

993. *State v. Raschke*, 219 P.3d 481, 489–90 (Kan. 2009).

994. *State v. Gracey*, 200 P.3d 1275, 1280 (Kan. 2009). Cruel and unusual punishment is forbidden by KAN. CONST. Bill of Rights § 9.

995. *State v. Freeman*, 574 P.2d 950, 956 (Kan. 1978).

996. *Id.*

997. *State v. Ellmaker*, 221 P.3d 1105, 1121 (Kan. 2009).

998. *Id.* at 1119–21; Section 22-3201(c) requires that a complaint "allege facts sufficient to constitute a crime or specific crime subcategory in the crime seriousness scale." KAN. STAT. ANN. § 22-3201(c) (2009).

999. *Ellmaker*, 221 P.3d at 1120–21.

1000. *Id.* at 1121.

1001. *Id.*

D. Retroactivity of Statutes

A convict's sentence is subject to the statutes in place at the moment the sentence is handed down.¹⁰⁰² Absent a specific provision to the contrary, new sentencing statutes do not apply retroactively.¹⁰⁰³ For example, an inmate sentenced prior to the enactment of the Kansas Sentencing Guidelines Act was bound by the previous statute's rules on parole and good time credits.¹⁰⁰⁴

VII. POST-TRIAL ISSUES

A. Appeals

Grounds for appeal, if not raised at trial, may lead to reversal only if the appellate court finds "clear error."¹⁰⁰⁵ An error is clear if a "real possibility" exists that the jury would have returned a different verdict without the error.¹⁰⁰⁶ "When the sufficiency of the evidence is challenged . . . the standard of review is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt."¹⁰⁰⁷ A court may grant a judgment of acquittal if the evidence is "insufficient to sustain a conviction."¹⁰⁰⁸ This operates the same, in practice, as an attack on the sufficiency of the evidence.¹⁰⁰⁹

Multiple trial errors, while not reversible individually, may be reversible when considered together in the totality of the circumstances.¹⁰¹⁰ Appellant convicts often raise this issue but rarely succeed.¹⁰¹¹

Rather than appeal, a defendant might also motion for a new trial. A district court may grant a new trial if it serves "the interests of

1002. *State v. Davis*, 200 P.3d 443, 444–46 (Kan. 2009).

1003. *See, e.g.*, KAN. STAT. ANN. § 21-4704(a) (2009) (indicating the statute applies "in felony cases for crimes committed on or after July 1, 1993").

1004. *Davis*, 200 P.3d at 444–46.

1005. *State v. Simmons*, 148 P.3d 525, 536 (Kan. 2006).

1006. *Id.* at 532. Compare this to the more permissive language in the following sentence in the text.

1007. *State v. Gutierrez*, 172 P.3d 18, 22 (Kan. 2007).

1008. KAN. STAT. ANN. § 22-3419 (2009).

1009. *State v. Torrance*, 922 P.2d 1109, 1115 (Kan. Ct. App. 1996).

1010. *State v. Ackward*, 128 P.3d 382, 400 (Kan. 2006).

1011. *See, e.g., id.*; *State v. Fewell*, 184 P.3d 903, 918–19 (Kan. 2008).

justice.”¹⁰¹² These motions are typically considered when new evidence comes to light during trial.¹⁰¹³ The court will not grant a new trial if reasonable diligence would have uncovered the evidence sooner.¹⁰¹⁴ Appellate courts are required to show no deference to a lower court’s ruling on a motion for new trial.¹⁰¹⁵

B. Additional Post-Conviction Remedies

A prisoner must move to vacate or modify a sentence within one year of the final order from his direct appeal.¹⁰¹⁶ The court is required to entertain the first such motion from a prisoner, but not any subsequent motions.¹⁰¹⁷ Possible grounds for a motion to vacate or modify a sentence are: (1) lack of jurisdiction, (2) the sentence “was not authorized by law or is otherwise open to collateral attack,” or (3) serious infringement on the prisoner’s constitutional rights.¹⁰¹⁸

A prisoner claiming the right to be released may file a state Habeas Corpus petition.¹⁰¹⁹ The scope of Habeas review is much narrower than direct appeal.¹⁰²⁰ “Mere trial errors are to be corrected by direct appeal, but trial errors affecting constitutional rights may be raised even though the error could have been raised on appeal, provided there were exceptional circumstances excusing the failure to appeal.”¹⁰²¹ A prisoner must file a section 60-1507 petition “within one year of: (i) [t]he final order of the last appellate court in this state to exercise jurisdiction on a direct appeal . . . or (ii) the denial of a petition for writ of certiorari to the United States Supreme Court”¹⁰²²

In *Baker v. State*, the Kansas Court of Appeals held that the one-year time limit starts to run when the prisoner’s opportunity for direct appeal expires.¹⁰²³ The Court of Appeals reversed the trial court, which dismissed Baker’s section 60-1507 petition as untimely because it was

1012. KAN. STAT. ANN. § 22-3501 (2009).

1013. *See, e.g.*, *State v. Krider*, 202 P.3d 722, 733 (Kan. Ct. App. 2009).

1014. *Wenrich v. Employers Mut. Ins. Co.*, 132 P.3d 970, 977 (Kan. Ct. App. 2006).

1015. *Trotter v. State*, 200 P.3d 1236, 1251 (Kan. 2009).

1016. KAN. STAT. ANN. § 60-1507(f) (2009).

1017. *Id.* § (c).

1018. *Bellamy v. State*, 172 P.3d 10, 15 (Kan. 2007) (citing KAN. STAT. ANN. § 60-1507(b) (2007)).

1019. KAN. STAT. ANN. § 60-1507(d) (2009).

1020. *See* KAN. SUP. CT. R. 183(c).

1021. *Id.*

1022. KAN. STAT. ANN. § 60-1507(f) (2009).

1023. 219 P.3d 827, 828 (Kan. Ct. App. 2009).

filed more than a year after the Kansas Supreme Court's ruling on his case.¹⁰²⁴ However, Baker filed the petition less than a year after the trial court's resentencing (pursuant to the Kansas Supreme Court's order), so the petition was held to be valid.¹⁰²⁵ The Court of Appeals reasoned that Baker could have appealed his new sentence.¹⁰²⁶ The section 60-1507(f) clock begins to run¹⁰²⁷ only after the prisoner exhausts such opportunities, i.e. ten days passed since his resentencing.¹⁰²⁸

Motions for state Habeas relief filed without an attorney's assistance are construed liberally.¹⁰²⁹ Presumably, the rationale behind this rule is to give non-lawyers more latitude than lawyers in drafting such motions.

If the appellate court denied motions for post-conviction relief, a state prisoner exhausted all other state remedies, and he alleges violations of federal law, he may apply for federal Habeas Corpus relief.¹⁰³⁰ A prisoner's reasonable confusion about state post-conviction procedures may constitute "good cause" to file a federal petition without exhausting all state remedies.¹⁰³¹ Prisoners seeking state post-conviction remedies should file a protective petition in federal court to ensure that the one-year clock does not expire while pursuing state remedies.¹⁰³²

As technology improved, Kansas codified an additional post-conviction remedy. A prisoner convicted of rape or first-degree murder may petition the sentencing court for DNA testing.¹⁰³³ The court must order such testing if it determines "that testing may produce noncumulative, exculpatory evidence relevant to the claim" that the petitioner was incorrectly convicted or sentenced.¹⁰³⁴ If the new test results favor the petitioner, the court may resentence or discharge the petitioner, vacate the judgment against him, or order a new trial.¹⁰³⁵ If the results are inconclusive, the court may grant those same remedies if

1024. *Id.* at 829.

1025. *Id.* at 830.

1026. *Id.*

1027. KAN. STAT. ANN. § 22-3608 (2009).

1028. *Baker*, 219 P.3d at 829-30.

1029. *Bruner v. State*, 88 P.3d 214, 217 (Kan. 2004). For example, although a prisoner did not directly ask to withdraw his plea, the court may construe it as such if it was the prisoner's intent. *Wilkinson v. State*, 195 P.3d 278, 281 (Kan. 2008).

1030. 28 U.S.C. § 2254(a)-(b) (2009). The statute, like its Kansas counterpart, is subject to a one-year time limit. 28 U.S.C. § 2244(d) (2009).

1031. *Pace v. DiGuglielmo*, 544 U.S. 408, 416 (2005).

1032. *Id.*

1033. KAN. STAT. ANN. § 21-2512(a) (2009).

1034. *Id.* § (c).

1035. *Id.* § (f).

the petitioner shows a “substantial question of innocence.”¹⁰³⁶ Such a motion cannot be denied solely because the convict pleaded guilty.¹⁰³⁷

There has been little Kansas case law dictating what post-conviction DNA testing, if any, is available to defendants convicted of crimes not mentioned in section 21-2512.¹⁰³⁸ However, defense counsel have raised two noted equal-protection challenges to the statute—one successful, one not.

In *State v. Salas*, the court declined to extend section 21-2512 to allow petitions for post-conviction DNA testing from second-degree murder convicts.¹⁰³⁹ Because the statute applies only to convicts of first-degree murder and rape, the trial court denied Salas’ petition for post-conviction DNA testing.¹⁰⁴⁰ Salas challenged the statute’s constitutionality on equal-protection grounds, relying primarily on a successful challenge five years earlier in *State v. Denney*.¹⁰⁴¹

In *Denney*, the Kansas Supreme Court allowed post-conviction DNA testing for an aggravated sodomy convict because the crime was so similar to rape.¹⁰⁴² Denney was convicted for “penetrating his victims’ anuses with his male sex organ,” while the Kansas rape statute applies only to vaginal penetration.¹⁰⁴³ The court held that the elements of Denney’s crime were “arguably indistinguishable” from rape.¹⁰⁴⁴ The statute, insofar as it treated rape convicts and aggravated sodomy convicts differently, was therefore unconstitutional.¹⁰⁴⁵ The court extended section 21-2512 to aggravated sodomy convicts.¹⁰⁴⁶

That argument failed in *Salas*. The Kansas Supreme Court found that first-degree murder’s premeditation requirement sufficiently distinguished it from second-degree murder, and Salas’ equal-protection argument therefore failed.¹⁰⁴⁷

One cannot quarrel with the *Denney* decision, as it would be absurd to create any sort of legal distinction between vaginal and anal rape. *Salas* is a fair interpretation of section 21-2512, but the statute has the

1036. *Id.*

1037. *State v. Smith*, 119 P.3d 679, 683 (Kan. 2005).

1038. *LaPointe v. State*, 214 P.3d 684, 705 (Kan. Ct. App. 2009).

1039. 210 P.3d 635, 637 (Kan. 2009).

1040. *Id.*

1041. *Id.* at 637, 639.

1042. *State v. Denney*, 101 P.3d 1257, 1265–66 (Kan. 2004).

1043. *Id.* at 1265.

1044. *Id.*

1045. *Id.* at 1266.

1046. *Id.* at 1269.

1047. *State v. Salas*, 210 P.3d 635, 639–40 (Kan. 2009).

2010]

CRIMINAL PROCEDURE SURVEY

1423

apparent flaw of rewarding prisoners who have committed more serious crimes with an additional post-conviction remedy. Presumably, the purpose of narrowing the statute is to limit the risk of duplicative cases to situations where the defendant's entire life is at stake—i.e., he could be sentenced to death or life imprisonment. *Salas* suggests that, even if a prisoner is sentenced to life for another crime (e.g., for second-degree murder plus aggravating factors), his petition for post-conviction DNA testing would be denied summarily. If such a case presents itself before a Kansas court, it should distinguish *Salas* and allow testing.