Kansas Law Review Criminal Procedure Survey*

I. INTRODUCTION

This Survey provides an overview of important topics in Kansas criminal procedure. It is intended to illuminate recent developments in the law based on United States Supreme Court and Kansas precedents. In keeping with the recent trend of this Survey to a more narrative style, additional commentary analyzing the public policy implications of a decision or the soundness of its reasoning is included for particularly important or interesting recent decisions.

II. POLICE INVESTIGATION

A. Introduction to the Fourth Amendment

The Fourth Amendment to the U.S. Constitution, made applicable to the states through the Fourteenth Amendment, provides:

> 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 states that "[t]he right of the people to be secure in their persons and property against unreasonable searches and seizures shall be inviolate."[2] The Kansas Supreme Court has emphasized that the Fourth Amendment of the U.S. Constitution and section 15 of the Kansas Constitution's Bill of Rights provide identical protection.[3] Kansas has the option of construing the Kansas Constitution as providing more protection than the federal Constitution, but it has not done so.[4] When a defendant files a motion to suppress evidence, the state bears the burden of proof to demonstrate that a search or seizure that led to the discovery of the evidence in question was lawful.[5]

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1. U.S. CONST. amend. IV.
2. KAN. CONST. Bill of Rights §15.
3. State v. Anderson, 136 P.3d 406, 410 (Kan. 2006).
4. State v. Thompson, 166 P.3d 1015, 1027 (Kan. 2007).
5. State v. Ibarra, 147 P.3d 842, 844 (Kan. 2006).

B. Scope of the Fourth Amendment

1. Limits to the Fourth Amendment's Scope

The Fourth Amendment applies exclusively to actions taken by the government, and does not apply to the actions of private persons or entities.[6] Additionally, the Fourth Amendment only applies to "searches" or "seizures."[7] Government conduct that cannot be characterized as either a search or a seizure does not invoke the protections of the Fourth Amendment. Furthermore, the Fourth Amendment does not forbid all searches and seizures, but only "unreasonable searches and seizures."[8] Reasonableness is the "'touchstone of the Fourth Amendment'" and it is "measured in objective terms by examining the totality of the circumstances."[9]

2. Searches and Seizures

A search within the meaning of the Fourth Amendment occurs when a person's reasonable expectation of privacy has been infringed.[10] A cognizable privacy interest consists of two elements: (1) a subjective expectation of privacy that (2) society is willing to accept as reasonable.[11] Whatever a person knowingly exposes to the public is not protected by the Fourth Amendment, while that which a person seeks to keep private—even in areas accessible to the public—may be constitutionally protected.[12] The Kansas Supreme Court has "recognized that the Fourth Amendment right to protection from unreasonable searches is based upon the individual's right of privacy, and that one does not have standing to challenge a search where there is no expectation of freedom from intrusion."[13] The United States Supreme Court has stated that the "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place, but upon whether the person who claims the protection of the Amendment

6. State v. Windes, 776 P.2d 477, 480 (Kan. Ct. App. 1989).
7. U.S. CONST. amend. IV.
8. Terry v. Ohio, 392 U.S. 1, 9 (1968).
9. Ohio v. Robinette, 519 U.S. 33, 39 (1996) (quoting Florida v. Jimeno, 500 U.S. 248, 250 (1991)).
10. State v. McMillin, 927 P.2d 949, 951 (Kan. Ct. App. 1996).
11. State v. Timley, 975 P.2d 264, 266 (Kan. Ct. App. 1999).
12. Katz v. United States, 389 U.S. 347, 351 (1967).
13. State v. Whitehead, 622 P.2d 665, 669 (Kan. 1981).

has a legitimate expectation of privacy in the invaded place."[14] Therefore, the right to be free from unreasonable searches by the government is a personal privacy right.

Property is seized under the Fourth Amendment when there is a meaningful interference with a person's possessory interest in that property.[15] On the other hand, a person is seized under the Fourth Amendment when "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 authority."[16] A person can be seized within the meaning of the Fourth Amendment without being placed under arrest.[17]

a. Traffic and Vehicular Stops as Searches

i. Reasonable Suspicion

The Supreme Court of Kansas recognizes that a traffic stop is a seizure under the Fourth Amendment.[18] In order to stop a vehicle, a law enforcement officer must have a reasonable suspicion that criminal activity is taking place, has taken place, or is about to take place.[19] Such criminal activity includes traffic violations. The officer's subjective intent for stopping the vehicle is irrelevant as long as there are reasonable and articulable facts prior to the stop suggesting the occupants of the vehicle may be engaged in illegal activity.[20] This objective standard is based on the totality of the circumstances and requires more than a mere hunch.[21] Therefore, if an officer does not have reasonable and articulable suspicion of illegal activity, a traffic stop is an unlawful seizure within the Fourth Amendment.

In *State v. Greever*, the Kansas Supreme Court addressed the issue of reasonable suspicion in a traffic stop.[22] In *Greever*, an officer was stopped at a stop sign at a "T" intersection[23] when Greever pulled behind

14. Rakas v. Illinois, 439 U.S. 128, 143 (1978).
15. United States v. Jacobsen, 466 U.S. 109, 113 (1984).
16. State v. Morris, 72 P.3d 570, 576–77 (Kan. 2003).
17. State v. Thompson, 166 P.3d 1015, 1024 (Kan. 2007).
18. *Id.*
19. State v. DeMarco, 952 P.2d 1276, 1282 (Kan. 1998).
20. Whren v. United States, 517 U.S. 806, 813 (1996).
21. *DeMarco*, 952 P.2d at 1282.
22. 183 P.3d 788 (Kan. 2008).
23. A "T" intersection is one in which there are only three roads leading away from the intersection. When approaching the intersection from the 'stem of the T' the driver must turn either

him talking on a cell phone.[24] Greever did not activate his turn signal until after he stopped at the intersection. The officer attempted to follow Greever to issue him a ticket for failure to properly use a turn signal; however, the officer lost him in traffic.[25] When the officer found Greever, he was parked on a side street talking on a cell phone. The officer pulled behind the car, activated his emergency lights, and approached the driver's side of the vehicle. The officer noticed the odor of marijuana and believed he observed drug paraphernalia as Greever searched for his insurance and registration.[26] The officer then asked Greever to exit the vehicle, conducted a pat-down search, and found a large bag of marijuana in Greever's pocket.[27]

At trial, Greever moved to suppress the evidence found during the search, stating that the officer lacked reasonable suspicion to stop the vehicle; therefore, both the stop and the subsequent search were illegal.[28] The district court found that Greever's encounter with the officer was voluntary and thus not a seizure, and that the odor of marijuana provided reasonable suspicion to conduct the pat-down search.[29] Greever was convicted of possession of marijuana. A divided Court of Appeals reversed the conviction, holding that Greever was seized when he saw the emergency lights and "'submitted to [the officer's] show of authority by not fleeing.'"[30] The majority then evaluated whether the officer had reasonable suspicion that a traffic violation had been committed, which would have allowed him to stop Greever. The court found that Greever had complied with the law, and that K.S.A. 8-1548(b)[31] did not provide the officer "a reasonable suspicion to conduct a traffic stop" based on the facts in this case.[32]

The Kansas Supreme Court reviewed the case to determine if Greever was seized within the meaning of the Fourth Amendment and, if he was seized, to determine if the officer had reasonable suspicion to

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right or left because the road does not continue across the intersection. In this case, the officer and Greever were approaching the intersection from the 'stem of the T,' so had no option to go straight; both were required to turn.

24. *Greever*, 183 P.3d at 791.

25. *Id.*

26. *Id.* at 792.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* at 793 (citing State v. Greever, 150 P.3d 918 (Kan. Ct. App. 2007)).

31. K.S.A. 8-1548(b) states that "[a] signal of intention to turn or move right or left when required shall be given continuously during not less than the last one hundred (100) feet traveled by the vehicle before turning." KAN. STAT. ANN. § 8-1548(b) (2001).

32. *Greever*, 183 P.3d at 793.

affect the seizure.[33] The court first determined that Greever was seized. The court noted that a 2003 Kansas decision had held "that the activation of emergency lights was a sufficient show of authority to communicate to a citizen that he or she is not free to leave the scene."[34] Because the officer activated his emergency lights and Greever submitted to that show of authority by remaining at the scene and complying with the officer's requests, Greever reasonably believed he was not free to leave, and was, therefore, seized within the meaning of the Fourth Amendment.[35]

The court then addressed whether the officer had reasonable suspicion at the time of the encounter to believe that Greever had committed a traffic violation. The Kansas Court of Appeals had based its decision on the legislative intent of K.S.A. 8-1548(b). That court determined that the intention of the law was to give drivers traveling at high rates of speed a warning when other drivers intended to change their direction of travel.[36] Accordingly, the appellate court found that Greever had not violated the intent of the law because he had signaled his lane change in a manner to give other drivers sufficient warning of his intentions. In fact, the Kansas Court of Appeals determined that Greever's turn signal gave "probably 5 to 10 times more warning to other motorists than the required notice at highway speeds."[37]

A divided Kansas Supreme Court reversed the Kansas Court of Appeals, affirmed the district court, and remanded to the appellate court for a determination of whether the pat-down search was lawful.[38] The Kansas Supreme Court based its decision on the appellate court's consideration of legislative intent. The court stated that a determination of legislative intent is not necessary when the plain language of the statute is unambiguous, which it determined K.S.A. 8-1548 was in this case.[39] The court found that the plain language of K.S.A. 8-1548 prescribes an absolute liability offense.[40] The "principle of substantial compliance does not apply when the traffic infraction is an absolute

33. *Id.* at 795.

34. *Id.* at 796 (citing State v. Morris, 72 P.3d 570 (Kan. 2003)).

35. *See id.* at 796–97.

36. *Id.* at 793.

37. *Id.* (citing State v. Greever, 150 P.3d 918 (Kan. Ct. App. 2007)).

38. *Id.* at 799–800.

39. *See id.* at 798–99.

40. *Id.* at 798. "An absolute liability offense . . . does not require any criminal intent. The only proof required to convict an individual of an absolute liability offense is that the individual engaged in the prohibited conduct." *Id.* (citing State v. Hopper, 917 P.2d 872, 875 (Kan. 1996)).

liability offense."[41] The officer observed Greever violate the statute and that gave him the requisite reasonable suspicion to stop Greever for the violation.

This case does not change the law in Kansas but merely clarifies the minimum level of reasonable suspicion required to conduct an investigatory detention. It also explicitly affirms that the officer's subjective intentions are irrelevant when analyzing whether a traffic infraction supports the vehicle stop. The majority conceded that the traffic stop in *Greever* was probably a pretext to allow the officer to investigate other criminal activity in which the driver might have been involved.[42] However, it noted that as long as the officer has articulable reasonable suspicion of criminal activity, then the officer's subjective motives for making the stop are not to be considered.[43] This raises concerns about the ability of officers to profile drivers and target those whom the officer subjectively believes may be involved in some kind of criminal activity. This concern was expressed in the dissenting opinion.

Justice Johnson, in his dissent, expressed concern "about expanding the circumstances under which law enforcement officers are legally permitted to engage in profiling to select targets of investigatory detentions."[44] Justice Johnson noted that the majority holding reflects the United States Supreme Court decision in *Whren v. United States*, which explicitly took the officer's subjective motives or intentions out of the Fourth Amendment analysis of reasonable suspicion for traffic stops.[45] He pointed out that the holdings in these cases allow officers to target individuals of a particular profile "for seizure to investigate any crime perceived to be prevalent among the particular group, so long as the officer can identify a preceding traffic violation, no matter how innocuous or esoteric the violation."[46]

Justice Johnson makes a valid point in his dissent. Officers can target and then follow any individual motorist and simply wait for the driver to violate a traffic law. Indeed, motorists are unlikely to be aware of every "innocuous or esoteric" traffic rule. Furthermore, motorists may become nervous when being followed by an officer and inconsequentially violate a law similar to the violation in *Greever*. If the officer determines that the driver signaled his turn only 50 feet from the

41. *Id.* at 799.
42. *Id.*
43. *Id.*
44. *Id.* at 800 (Johnson, J., dissenting).
45. *Id.* (citing Whren v. United States, 517 U.S. 806 (1996)).
46. *Id.*

intersection instead of 100 feet, then he can detain the driver and investigate for illegal activity. As an alternative to the current test that completely ignores the officer's subjective motives or intentions, Justice Johnson suggested that a better rule would "require that the officer's belief in the existence of the pretextual traffic infraction be *objectively* reasonable under the totality of the circumstances."[47]

ii. Investigatory Detention

Once an officer has lawfully stopped a vehicle, the detention "must be temporary and last no longer than is necessary to effectuate the purpose of the stop."[48] It must be sufficiently limited in both scope and duration.[49] Kansas appellate courts have defined this to mean that an officer can request the driver's license and registration; run a computer check; issue a citation; and take steps reasonably necessary to ensure officer safety.[50] "If no information raising a reasonable and articulable suspicion of illegal activity is [discovered during this time] . . . the motorist must be allowed to leave without further delay."[51] However, when the encounter ceases to be a detention, it can become consensual if the driver voluntarily remains and answers an officer's questions.[52] Once the encounter becomes consensual, it is no longer a seizure within the meaning of the Fourth Amendment, and the scope, duration, and purpose of the encounter are no longer subject to Fourth Amendment analysis.[53]

The Kansas Supreme Court addressed the limits on the scope of investigatory detentions in *State v. Smith*.[54] *Smith* examined whether *Muehler v. Mena*, which held that law enforcement officers could ask questions unrelated to the purpose of a search when executing a residential search warrant, altered the longstanding Kansas rule that a law enforcement officer violates the Fourth Amendment when he asks a passenger in a vehicle stopped for a traffic violation to consent to a search that is unrelated to the purpose of the stop.[55]

47. *Id.*

48. Florida v. Royer, 460 U.S. 491, 500 (1983).

49. *Id.*

50. State v. Thompson, 166 P.3d 1015, 1024 (Kan. 2007).

51. *Id.*

52. State v. DeMarco, 952 P.2d 1276, 1282 (Kan. 1998) (citing United States v. Mendez, 118 F.3d 1426, 1429–30 (10th Cir. 1997)).

53. *Thompson*, 166 P.3d at 1023.

54. 184 P.3d 890 (Kan. 2008).

55. *Id.* at 893 (citing Muehler v. Mena, 544 U.S. 93 (2005)).

On September 22, 2005, Lacey Smith was a passenger in a vehicle that was being operated with a broken taillight.[56] Officer Nick Carter observed the vehicle and began to follow it.[57] However, the driver parked the vehicle on the side of the street before the officer could initiate a stop.[58] Officer Carter stopped his vehicle behind the car and activated his emergency lights.[59] The driver exited the vehicle and approached Officer Carter, who spoke with him about the reason for the stop.[60] The officer discovered that the car also had an expired illegal tag.[61] The driver explained that it was his girlfriend's car and he knew nothing about the tag.[62] During the conversation between the officer and the driver, Smith exited the vehicle and sat down on some nearby steps.[63] The officer recognized Smith and knew she was not the person who owned the vehicle.[64] Officer Carter claimed that he had no interaction with Smith other than to acknowledge her presence.[65]

A second officer, Cory Gale, arrived on the scene to provide backup to Officer Carter.[66] Officer Gale stated that he also recognized Smith.[67] After determining that Smith was a passenger in the vehicle, Officer Gale approached Smith.[68] At trial, Officer Gale stated that he had received information about Smith sometime before the traffic stop that led him to suspect that she possessed drugs.[69] Officer Gale asked Smith "how she was doing and if he could look inside her purse."[70] She consented to the search in which Officer Gale, after discovering methamphetamine, arrested her.[71] The interaction between Smith and Officer Gale was completed before the interaction between Officer Carter and the driver.[72]

56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 893–94.
68. *Id.* at 894.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*

Smith was charged with felony possession of methamphetamine and possession of drug paraphernalia.[73] She filed a motion to suppress the evidence seized during Officer Gale's search of her purse.[74] At the hearing, "the State conceded that Officer Gale did not have reasonable suspicion to search Smith's purse" but argued that reasonable suspicion was not necessary because Smith consented to the search.[75] The district court determined that Smith was "lawfully seized but the questions Officer Gale asked her at the beginning of the encounter exceeded the scope of the stop . . . . [and] that Smith's consent was given during the seizure [at which point] there was not a 'sufficient attenuation of a seizure to justify the search.'"[76] The district court granted Smith's motion to suppress.[77]

The district court then granted the State's request for an interlocutory appeal and the Court of Appeals reversed the district court decision.[78] The Court of Appeals stated that prior to the United States Supreme Court's decision in *Mena*, Officer Gale's questions would have rendered the seizure illegal because the questions were unrelated to the purpose of the stop and therefore outside the permissible scope of a traffic violation investigatory detention.[79] However, the court concluded that "*Mena* permits officers to question a person during a lawful detention about matters unrelated to the reason for the detention."[80] "Therefore, the panel found Gale could question Smith about matters unrelated to the purpose of the stop . . . so long as the questions did not increase the duration of the stop," which in this case they did not because Smith was arrested and removed to the police station prior to the completion of the traffic stop concerning the driver.[81] "[T]he Court of Appeals held that Smith's consent provided the legal basis for the search" and therefore her motion to suppress should be denied.[82]

The Kansas Supreme Court considered three issues: (1) was Smith seized?[83]; (2) did Officer Gale exceed the scope of the detention making

73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.*
82. *See id.* at 894–95.
83. *Id.* at 895–98.

the search unlawful?[84]; and (3) was Smith's consent to search her purse valid?[85] In considering the second issue, the court analyzed the impact of the *Mena* decision on Kansas law.[86]

On the first issue, the court determined that Smith was seized.[87] Although Kansas recognizes that a traffic stop is a seizure under the Fourth Amendment, the court noted that a traffic stop is analyzed as an investigatory detention rather than an arrest.[88] In this case, the officer blocked the car in its parking space and activated the emergency lights, which the court has found indicates to a reasonable person that they are not free to leave.[89] Smith exited the vehicle but remained near the car "in a passive submission to the show of authority."[90] Thus, under the totality of these circumstances, Smith was seized within the meaning of the Fourth Amendment.[91]

The court then examined the scope of the detention.[92] The court stated that the rule in Kansas has been that during a traffic stop, officers may ask for a driver's license, registration, and other questions that are incident to a traffic stop.[93] The officer may not extend the duration of the traffic stop or ask questions not related to the reason for the stop unless other information "raising a reasonable and articulable suspicion of illegal activity is found during the time period necessary to perform . . . tasks incident to a traffic stop."[94] Other investigatory questions are not allowed.[95]

In *Mena*, the defendant "alleged the Fourth Amendment was violated when law enforcement officers detained her while they executed a search warrant in the house she occupied."[96] During the detention, officers asked her about her immigration status.[97] Mena argued that this was outside the scope of the search, which was for weapons and evidence of gang activity.[98] The United States Supreme Court found that officers

84. *Id.* at 898–902.
85. *Id.* at 902.
86. *Id.* at 898–902.
87. *Id.* at 896–97.
88. *Id.* at 895.
89. *Id.* at 896.
90. *Id.*
91. *Id.* at 896–97.
92. *Id.* at 898–902.
93. *Id.* at 897.
94. *Id.*
95. *See id.*
96. *Id.* at 899 (citing Muehler v. Mena, 544 U.S. 93, 95 (2005)).
97. *Id.*
98. *Id.* at 898–99 (citing *Mena*, 544 U.S. at 100).

may generally ask individuals questions during a detention without having a particularized suspicion of the individual, and that such questioning will not constitute an additional seizure under the Fourth Amendment.[99] The *Mena* decision made no reference to its application to traffic stops.

In *Smith*, the Kansas Supreme Court noted that *Mena* has led the Tenth Circuit to adopt a broader approach to law enforcement questioning during investigatory stops.[100] In *United States v. Wallace*, the Tenth Circuit held that "'there is no Fourth Amendment issue with respect to the content of the questions' if the stop's duration is not extended."[101] In fact, the Kansas Court of Appeals relied on this line of decisions when it found that the *Mena* decision altered longstanding law in Kansas.[102] Ultimately, the Kansas Supreme Court distinguished the Tenth Circuit cases and *Mena*, finding that in those cases the "officers asked questions and developed a reasonable suspicion of criminal activity because of the answers."[103] In *Smith*, no such development of suspicion had occurred; rather, the officer simply asked for consent to search.[104] In addition, the court noted that there is a separate line of Tenth Circuit cases in which the courts recognized a distinction in cases like this where the search was based simply on a question of "may I search?"[105] In holding that the search of Smith's purse violated the Fourth Amendment, the Kansas Supreme Court explicitly declined to extend the holding in *Mena* to investigatory detentions and particularly to traffic stops.[106] It held:

> [T]he Court of Appeals erred in ruling that *Mena* allows law enforcement officers to expand the scope of a traffic stop to include a search not related to the purpose of the stop, even if a detainee has given permission for the search. Rather, we continue to adhere to our longstanding rule that consensual searches during the period of a detention for a traffic stop are invalid under the Fourth Amendment to the United States Constitution and § 15 of the Kansas Constitution Bill of Rights.[107]

99. *Id.* at 899 (citing *Mena*, 544 U.S. at 100–01).
100. *Id.* at 898.
101. *Id.* (quoting United States v. Wallace, 429 F.3d 969, 974 (10th Cir. 2005)).
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *See id.* at 902.
107. *Id.*

The *Smith* case does not purport to change the law in Kansas. However, the Kansas Supreme Court has never interpreted section 15 of the Kansas Constitution Bill of Rights as providing more protection than the Fourth Amendment to the U.S. Constitution, and *Smith* may be interpreted to do just that. The Kansas Court of Appeals noted cases in which *Mena* was used in traffic stops to allow questions unrelated to the purpose of the detention. Although the Kansas Supreme Court attempted to distinguish those cases, the distinction is slight. Furthermore, in *Smith* the court stated that *Mena* will not be applied to expand the permissible scope of questioning by law enforcement officers during any investigatory detentions in Kansas.[108] This broad holding provides protection to Kansas residents that is seemingly greater than the protection afforded to them by the Fourth Amendment.

b. Standing to Object to a Search or Seizure

The general rule in Kansas is that a person must have an individual expectation of privacy in the area searched to have standing to object to a search of that area.[109] The burden is on the defendant to show an expectation of privacy. "[O]vernight guests have expectations of privacy in a host's home."[110] Similarly, in a hotel or motel room, the person registered, those having a relationship to the person, and overnight guests have a privacy interest in the room.[111] However, that expectation of privacy is lost when the keys are returned to the hotel after checkout.[112] Only those individuals with a personal expectation of privacy in a room have standing to object to a search of that room.[113]

Furthermore, only the driver or owner of a vehicle may object to a search of the vehicle.[114] Because people do not have standing to object to the invasion of another's privacy rights, a passenger in a car does not have standing to challenge the search of the vehicle, unless the search is the result of an illegal traffic stop.[115] Passengers in a vehicle are seized within the meaning of the Fourth Amendment during a traffic stop because a reasonable occupant in a car would understand the officer's actions to be a display of authority directed at everyone in the vehicle

108. *Id.*
109. State v. Bartlett, 999 P.2d 274, 277 (Kan. Ct. App. 2000).
110. State v. Yardley, 978 P.2d 886, 889 (Kan. 1999) (citation omitted).
111. State v. Gonzalez, 85 P.3d 711, 714 (Kan. Ct. App. 2004).
112. *Id.* (citing State v. Chiles, 595 P.2d 1130, 1137 (Kan. 1979)).
113. *Id.* at 713–14.
114. State v. Edwards, 415 P.2d 231, 233 (Kan. 1966).
115. State v. Epperson, 703 P.2d 761, 770 (Kan. 1985).

and would not feel free to leave without police permission.[116] Because they are seized, passengers have standing to challenge the legality of the traffic stop.[117] Thus, the passenger can object to the act of being seized, but cannot object to the search.

C. Arrest

1. Kansas Statute

Kansas statutes provide that a person is "considered to be under arrest when he or she is physically restrained or . . . submits to the officer's custody."[118] A person can be seized under the Fourth Amendment without being placed under arrest, which makes the encounter an investigatory detention.[119] The officer's subjective belief of whether a person is under arrest is irrelevant.[120] The test of whether an arrest has occurred is based on "what a reasonable person would believe under the totality of the circumstances surrounding the incident."[121]

2. Probable Cause

In Kansas, a police officer may arrest a person without a warrant if the officer has probable cause to believe the person is committing or has committed a crime.[122] If a person challenges the arrest, the burden is on the State to prove probable cause existed.[123] "Probable cause is the reasonable belief that a specific crime has been or is being committed and that the defendant committed the crime."[124] Whether probable cause to arrest exists is determined by the totality of the circumstances available to the officer at the time of arrest.[125] The existence of probable cause must be "determined by practical considerations of everyday life on which a reasonable person acts and not on the hindsight of legal technicians."[126] Information obtained after the arrest, or attempted arrest,

116. Brendlin v. California, 127 S.Ct. 2400, 2406–07 (2007).
117. *Id.* at 2407.
118. State v. Hill, 130 P.3d 1, 7 (Kan. 2006).
119. *Id.*
120. *Id.* at 8.
121. *Id.* (citing State v. Morris, 72 P.3d 570, 576–77 (Kan. 2003)).
122. KAN. STAT. ANN. § 22-2401(c) (2007).
123. State v. Strauch, 718 P.2d 613, 620 (Kan. 1986).
124. *Hill*, 130 P.3d at 9.
125. State v. Anderson, 136 P.3d 406, 411–12 (Kan. 2006).
126. State v. Peterson, 696 P.2d 387, 392 (Kan. 1985).

cannot be factored into whether probable cause existed at the time of the arrest or attempted arrest.[127]

D. Search Warrants

Under Kansas law, a magistrate judge must have probable cause to issue a search warrant. When determining whether sufficient probable cause exists to issue a warrant, a magistrate must "make a practical, commonsense decision whether, based on all the circumstances in the affidavit, including the veracity and basis of knowledge of any person supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."[128]

Such a determination is a subjective decision and it can be a tough call—both for the issuing judge and for an appellate court reviewing the judge's decision. For example, in *State v. Bottom*, the Kansas Court of Appeals struggled to determine whether a magistrate judge had sufficient evidence to support a finding that probable cause existed.[129] In *Bottom*, a detective interviewed the grandparents of a five-year-old girl who claimed to have been abused.[130] The grandparents told the detective that the girl's father had spanked her and other young girls with a board.[131] The grandparents had photos showing a child's severely bruised bottom.[132] The grandparents claimed the spankings had occurred while the girl stayed with her father earlier that year.[133]

Two days later, a Department of Social and Rehabilitation Services (SRS) worker interviewed the child at the Wamego, Kansas police station.[134] The girl told the SRS worker that her father had spanked her and another girl with a paddle that he called the "Booty Buster."[135] When asked to draw a picture of the paddle, she drew something resembling a ping-pong paddle.[136] She said her father had broken the

127. *Anderson*, 136 P.3d at 413.

128. State v. Bottom, 190 P.3d 283, 288 (Kan. Ct. App. 2008) (citing State v. Hicks, 147 P.3d 1076, 1080 (Kan. 2006)).

129. *Id.* at 291 (calling the issue of the sufficiency of the evidence on which the warrant-issuing judge relied a "close question").

130. *Id.* at 286.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

paddle while using it on the girls.[137] She also stated that her father had made a second "Booty Buster" paddle and spanked her with that too.[138]

After several failed attempts to contact the father, and based solely on this tip, a magistrate judge granted the detective's request for a search warrant to search the father's home for evidence of child abuse, including the paddle and any photos.[139] While executing the search warrant in Bottom's home, detectives found a paddle marked "BB II."[140] Detectives also saw drugs and an electronic scale in plain view.[141] Based on that information, they applied for and were issued a second search warrant to search for evidence of drug crimes.[142] The father was charged with various drug crimes and child endangerment based on evidence gathered during the two searches.[143] The father moved to suppress the evidence, arguing that the first search warrant was based on information that was too old, or "stale," and that but for the erroneously issued first search warrant, officers could not have obtained the second search warrant.[144]

The trial court determined the information contained in the affidavit for the first search warrant indeed was "stale," and, therefore, could not provide the probable cause required for the issuance of a warrant.[145] On appeal, the Kansas Court of Appeals noted that reviewing courts should be highly deferential toward the judges that issue search warrants.[146] However, the court struggled with this case despite this deferential standard of review.

The court articulated four factors for determining whether information relied on to obtain a search warrant is "stale":

> "The first is whether the criminal activity is continuous. The second is the time between the issuance of the warrant and the alleged criminal activity relied upon to establish probable cause. The third is the use of present or past tense verbs in the affidavit supporting a search warrant.

137. *Id.*
138. *Id.*
139. *Id.* at 287.
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* at 287–88.
146. *Id.* at 288.

> Finally, the court looks at the likelihood the contraband would be removed from the location of the proposed search."[147]

Here, the court determined that some facts weighed against issuing a search warrant. These facts included that there was only one specific spanking incident listed in the affidavit and that Bottom knew the police were investigating, and hence may have removed any evidence.[148] On the other hand, the fact that Bottom had told a social worker that he used a paddle to spank his daughter for lying and the fact that he had made a second paddle after the first broke were factors that showed the criminal behavior was continuous.[149] These facts, therefore, supported an inference that evidence still may have been in his home.[150]

After weighing these factors for and against concluding that the underlying evidence to support the search warrant was "stale," the court ultimately declined to answer what it called "a close question."[151] Instead, the court held that the evidence should be admissible under the "good-faith exception" to the exclusionary rule.[152]

E. Exceptions to the Warrant Requirement

1. Generally

In Kansas, a warrantless search is automatically considered unreasonable unless it falls within a recognized exception to the search warrant requirement.[153] There are eight generally recognized exceptions to the warrant requirement in Kansas: "consent; search incident to a lawful arrest; stop and frisk; probable cause plus exigent circumstances; the emergency doctrine; inventory searches; plain view or feel; and administrative searches of closely regulated businesses."[154]

147. *Id.* at 290 (quoting State v. Hemme, 806 P.2d 472 (Kan. Ct. App. 1991)).
148. *Id.* at 291.
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* (citing United States v. Leon, 468 U.S. 897 (1984)).
153. *See, e.g.*, State v. Fitzgerald, 192 P.3d 171, 173 (Kan. 2008); State v. Mendez, 66 P.3d 811, 817 (Kan. 2003).
154. *Fitzgerald*, 192 P.3d at 173 (citing State v. Rupnick, 125 P.3d 541, 547 (Kan. 2005)).

2. Consent

No warrant to search is required if consent is given.[155] There are two conditions required for consent to be valid: "(1) There must be clear and positive testimony that consent was unequivocal, specific, and freely given and (2) the consent must have been given without duress or coercion, express or implied."[156]

a. Implied Consent

Kansas courts have held that consent may not be implied.[157] Instead, the person officers wish to search must have "'unequivocally, specifically, freely, and intelligently consented' to the officers' . . . [search, rather than] 'merely submit[ted] to lawful authority.'"[158] In *State v. Poulton*, officers went to Poulton's home on November 20, 2003, to serve an arrest warrant on a third party.[159] When Poulton opened the door, officers asked if they could enter.[160] Poulton complied.[161] Once inside, officers observed guns and drug paraphernalia in plain view.[162] Based on that information, they requested and obtained a search warrant to search the home for evidence of drug crimes.[163] During the execution of the search warrant, law enforcement collected substantial evidence, including "baggies of methamphetamine, drug paraphernalia, and items commonly used in manufacturing methamphetamine."[164]

On December 27, 2003, officers returned to Poulton's residence with an arrest warrant for four individuals, including Poulton, based on evidence collected during the November search.[165] While executing the arrest warrant, officers again saw a gun and drug evidence in plain view, again requested and received a search warrant, and again seized drug evidence.[166]

155. State v. Thompson, 166 P.3d 1015, 1025–26 (Kan. 2007).

156. *Id.* at 1026.

157. State v. Poulton, 152 P.3d 678, 685 (Kan. Ct. App. 2007), *rev'd on other grounds*, 179 P.3d 1145 (Kan. 2008).

158. *Id.* (quoting State v. Jones, 106 P.3d 1, 7 (Kan. 2005)).

159. *Id.* at 681.

160. *Id.* at 682.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 682–83.

Poulton was charged with eight drug-related crimes stemming from the November search. In a separate case, he was charged with eight additional drug crimes, contributing to a child's misconduct, and endangering a child—all stemming from the December incident.[167] At trial, Poulton argued the evidence from the November search should be suppressed because law enforcement did not have a search warrant, and Poulton claimed he did not grant consent.[168] The trial court found that the officers had "implied consent" to enter the home, and therefore declined to suppress the evidence.[169] The two cases were eventually consolidated, and Poulton was convicted of various drug crimes as well as endangerment of a child.[170]

On appeal, the Kansas Court of Appeals held that "[t]he fact that Poulton acquiesced or impliedly consented in the officers' entry does not meet the standard for voluntary consent."[171] Poulton further argued that the evidence gathered during the December search should be suppressed because officers never would have been at his residence that day if the November search had not occurred.[172] Therefore, he argued, the evidence collected during the December search was "fruit of the poisonous tree."[173]

The Kansas Court of Appeals held that Poulton had not granted a valid consent to search.[174] Therefore, the court reversed his convictions based on the initial search.[175] However, because Poulton failed to raise the poisonous fruit argument at trial, the appellate court refused to consider that argument.[176] Accordingly, the appellate court affirmed Poulton's convictions in connection with the evidence gathered during the December search.[177]

Poulton appealed to the Kansas Supreme Court, where the court affirmed the appellate court's ruling that the "implied consent" prior to the November search was invalid.[178] However, the high court disagreed with the appellate court's conclusion that Poulton was barred from

167. *Id.* at 683.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at 685.
172. *Id.* at 687.
173. *Id.*
174. *Id.* at 685.
175. *Id.* at 687.
176. *Id.*
177. *Id.*
178. State v. Poulton, 179 P.3d 1145, 1148 (Kan. 2008).

raising the "fruit of the poisonous tree" argument concerning the evidence gathered in connection with the December search.[179] The Supreme Court, therefore, vacated and remanded the remaining counts for consideration of whether the evidence gathered during the December search was "fruit of the poisonous tree."[180]

b. Scope

Even if a person's consent to a search is voluntary and explicit, the search must remain within the scope permitted by the person granting consent. For example, in *Poulton*, even if Poulton *had* given valid consent to law enforcement to enter his home, the court determined that his consent only extended to enter the front room.[181] He did not grant officers permission to conduct a search of his home.[182] Officers had come to the home to search for a parole violator, Lisa Lamuz.[183] When Poulton told the officers that he would get Lamuz[184] and began heading toward the back of the home, one officer grabbed his arm and told Poulton that he would get Lamuz.[185]

The Kansas Court of Appeals held that "[t]he scope of a warrantless search based on consent is controlled by the suspect."[186] The appellate court held that even if Poulton had granted consent to enter the home, he limited that consent by telling the officers that he would get Lamuz and by walking toward the area of the home where she was located.[187] The officer who grabbed Poulton's arm and told Poulton that he would get Lamuz "clearly exceeded the scope of Poulton's consent."[188]

3. Probable Cause and Exigent Circumstances

Another exception to the warrant requirement occurs when law enforcement officers have probable cause coupled with exigent

179. *Id.* at 1148–49.
180. *Id.* at 1149.
181. *Poulton*, 152 P.3d at 685–86.
182. *Id.* at 685.
183. *Id.* at 681.
184. *Id.* at 685.
185. *Id.* at 685–86.
186. *Id.* at 685 (citing Florida v. Jimeno, 500 U.S. 248, 252 (1991) ("A suspect may of course delimit as he chooses the scope of the search to which he consents.")).
187. *Id.*
188. *Id.* at 685–86.

circumstances.[189] It is important to note that neither element standing alone is sufficient to justify a search without a warrant.[190]

In *State v. Mell*, Officer Richard Howard went to George and Nancy Mell's home to serve an arrest warrant on their daughter, Kayla, for a probation violation.[191] Nancy met Officer Howard on the porch and told him her daughter was not home.[192] As Howard was leaving, Nancy engaged him in conversation.[193] When Nancy noticed Howard glancing toward the backyard, she asked, "'Are those what I think they are?'"[194] Howard indicated he did not know what she was talking about, to which she replied "'the weeds . . . by the fence.'"[195] While Howard could see weeds by the fence, he could not identify the plants from the sidewalk.[196] Without being asked, Howard walked into the yard, where he observed eight or nine marijuana plants, mixed in with other weeds and covered with straw.[197] Howard then called for narcotics investigators.[198]

Detective Aaron Procaccini, a member of the drug unit, responded to the scene and identified eleven marijuana plants in the area where Nancy had directed Howard's attention.[199] Based on his own observations, Procaccini decided to apply for a search warrant of the Mells' residence because he believed marijuana or chemicals to grow marijuana might be inside.[200] However, before applying for the warrant, Procaccini entered the home.[201] He testified that he was unsure if there were other people inside the home, and worried that any evidence inside could be destroyed.[202] Before he entered, Nancy told him no one else was home.[203] She did not consent to Procaccini's entry.[204] Immediately upon entering the home, Procaccini smelled burning marijuana and observed drug paraphernalia in plain view.[205] Procaccini found no one inside, and

189. State v. Mell, 182 P.3d 1, 9 (Kan. Ct. App. 2008).
190. *Id.*
191. *Id.* at 4.
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.* at 5.
198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*

immediately left to apply for the search warrant.[206] On his affidavit, he mentioned the plants he observed in the yard, the smell of marijuana in the home, and the drug paraphernalia he observed in plain view.[207]

Upon executing the search warrant, law enforcement seized marijuana and drug paraphernalia inside the home and the marijuana plants growing in the yard.[208] George and Nancy ultimately were charged with "cultivation of marijuana, possession of methamphetamine, possession of marijuana," failure to comply with Kansas drug tax stamp laws, and possession of drug paraphernalia.[209]

Before trial, the Mells moved to suppress the evidence obtained as a result of the search.[210] They argued that the yard was part of the curtilage of their home, and that the officers intruded upon their reasonable expectation of privacy by entering the yard.[211] They also argued that there was no probable cause or exigent circumstances to enter the home without a warrant and that there were insufficient grounds to issue a search warrant.[212]

The trial court granted the motion to suppress.[213] The trial court concluded that the portion of the Mells' yard in question was part of the curtilage of their home and that Howard was unable to determine the weeds in question were marijuana from his vantage point on the sidewalk.[214] The trial court, therefore, eliminated the evidence of marijuana in the yard from the affidavit supporting the application of the search warrant.[215] The trial court also concluded there were no exigent circumstances to support the drug unit officer's warrantless sweep through the house.[216] Without the evidence of the marijuana plants in the yard and the evidence gathered during the brief warrantless search of the house, the trial court determined a magistrate would not have issued the search warrant.[217]

206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.* at 5–6.
212. *Id.*
213. *Id.* at 6.
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*

The appellate court held that the portion of the yard in question was not part of the Mells' curtilage.[218] Therefore, it concluded the Mells had no reasonable expectation of privacy in that area, and, thus, the trial court had erred in excising that evidence from the affidavit filed in support of the search warrant application.[219]

The court then turned to the warrantless entry of the home and analyzed whether the officers had probable cause and whether exigent circumstances were present.[220] Probable cause to search "requires the presence of information which would lead a reasonably prudent person to believe that a crime has been or is being committed and that evidence of the crime may be found on a particular person, in a specific place, or within a specific means of conveyance."[221] In *Mell*, the court determined that "a real question exist[ed regarding] whether there was probable cause."[222] The court noted that "no nexus was shown between the marijuana plants and the Mells' residence" and that "there was no evidence that the Mells' residence was used for criminal activity."[223]

The court reserved the bulk of its analysis regarding the warrantless entry of the home for the consideration of whether there were exigent circumstances. Whether exigent circumstances exist is determined by considering the totality of the circumstances given the particular facts that exist in a specific situation.[224] When an officer "reasonably believes there is a threat of imminent loss, destruction, removal, or concealment of evidence or contraband," it creates exigent circumstances.[225] However, "[e]xigent circumstances do not include situations where *only a mere possibility* exists that evidence could be destroyed or concealed."[226]

In determining whether exigent circumstances exist, the court considered a non-exclusive list of seven factors:

> (1) the gravity or violent nature of the offense to be charged; (2) whether the suspect is reasonably believed to be armed; (3) a clear showing of probable cause; (4) strong reasons to believe the suspect is in the premises; (5) a likelihood that the suspect will escape if not

218. *Id.* at 7–9.
219. *Id.*
220. *Id.* at 9.
221. *Id.* (citing State v. Mayberry, 807 P.2d 86, 95 (Kan. 1991)).
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.* (citing State v. Houze, 930 P.2d 620, 622 (Kan. Ct. App. 1997)).
226. *Id.* (emphasis added) (citing State v. Hardyway, 958 P.2d 618, 627 (Kan. 1998)).

> swiftly apprehended; (6) the peaceful circumstances of the entry; and (7) the possible loss or destruction of evidence.[227]

The court took each item in turn. First, it held that the crime in question—cultivation and/or possession of marijuana—was non-violent.[228] Second, the court found no reason to believe officers would be in harm's way upon executing a search warrant because there was no evidence that Nancy was armed and the situation had unfolded peacefully.[229] Nancy's refusal to allow the officer to enter her home also did not create exigent circumstances.[230]

Third, there must be a clear showing of probable cause.[231] The drug unit officer's "belief that evidence of a crime was actually within the home was based on mere speculation, as he only observed marijuana plants growing in the yard and had no actual knowledge that evidence existed inside the home . . . ."[232]

Fourth, the court considered whether officers had reason to believe a suspect was inside the residence. The court found this to be unsupported by the facts, because Nancy told the officer no one was inside, and he had "no independent knowledge that anybody else was inside the home."[233]

Fifth was the relative likelihood that a subject will escape if law enforcement does not swiftly intervene. The court found this to be unsupported because Nancy was outside her home, standing with the officers.[234] Further, the officers "could have easily secured the perimeter of the house while they obtained a search warrant if they believed other suspects were inside the house."[235]

Sixth was the only factor the court found to be supported by the circumstances—the officer's entry into the residence was peaceful.[236]

Finally, the court held that the seventh factor—the possible loss or destruction of evidence—was not supported by the evidence.[237] The court noted that there was no information specifically known by

227. *Id.* (citing State v. Platten, 594 P.2d 201, 206 (Kan. 1979)).
228. *Id.* at 10.
229. *Id.*
230. *Id.* (citing State v. Schur, 538 P.2d 689, 694 (Kan. 1975)).
231. *Id.*
232. *Id.*
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.* at 11.
237. *Id.*

Procaccini that would indicate drugs or other evidence was in the home at all, let alone that whatever evidence might be inside could be destroyed while police waited for a search warrant.[238] The court emphasized that "exigent circumstances do not include situations where only a mere possibility exists that evidence could be destroyed or concealed."[239]

Ultimately then, the court held that there was "a real question" as to whether there was probable cause.[240] Further, regardless of whether there was probable cause, the court held that there were no exigent circumstances to justify entering the home without a search warrant.[241] The court went on to say that without the evidence gleaned via the unconstitutional warrantless entry into the home, a magistrate judge would have been left only with the plants in the yard to justify issuing a search warrant.[242] The court held that, although the plants would give rise to "suspicion," they alone would not give rise to probable cause that there were also drugs inside the home.[243] The court therefore remanded the case to be tried again without the evidence gathered in the Mells' home.[244]

4. The Emergency Aid Doctrine

Another exception to the warrant requirement is the Emergency Aid Doctrine. Under this doctrine, police may enter without a warrant if two conditions are met:

> First, the police must have reasonable grounds to believe that an emergency is at hand and that their assistance is needed immediately for the protection of life or property. Second, there must be a reasonable basis, essentially probable cause, to associate the emergency with the area or place to be searched.[245]

In *State v. Jeffery*, police responded to Jeffery's apartment on New Year's Eve, 2005, after receiving reports that he had attempted to kill

238. *Id.*
239. *Id.* (citing State v. Hardyway, 958 P.2d 618, 627 (Kan. 1998)).
240. *Id.* at 9.
241. *Id.* at 11.
242. *Id.* at 18.
243. *Id.*
244. *Id.* at 19.
245. State v. Jeffery, 173 P.3d 1156, 1158 (Kan. Ct. App. 2008) (citing State v. Geraghty, 163 P.3d 350 (Kan. 2007)).

himself by cutting his wrists and hanging himself.[246] Upon officers' arrival, Jeffery initially would not open the door at all, then opened it with the security chain attached, and finally opened it all the way.[247] At that point, officers rushed inside and subdued Jeffery with the intent, police later testified, of taking him for a mental-health evaluation.[248] But, before placing him under arrest, officers conducted a walk-through of his apartment.[249]

Officers attempted to justify the search as falling under the Emergency Aid Doctrine, saying they were looking for either any person who might be injured or any weapons that Jeffery might use to hurt himself or others.[250] While walking through the apartment, officers found marijuana and drug paraphernalia in plain view, resulting in various drug charges.[251]

The appellate court held that, because Jeffery was handcuffed just inside the front door, there was no further threat that could give rise to an emergency.[252] Although contraband was found in the home, "there simply was no *immediate* need for assistance that called for officers to search the rest of the apartment after subduing Jeffery in the entryway."[253] The court noted officers could not possibly remove everything in the home with which Jeffery could injure himself, as that ranged from kitchen knives to belts and bed sheets.[254] Furthermore, because they planned to take him to a mental-health facility as allowed under Kansas law, "[t]here was no emergency need to clear Jeffery's apartment of items that he might use to harm himself when he returned from the mental-health evaluation."[255] The court also held that the police officers' concern regarding the possibility that others might have been injured in Jeffery's residence was unfounded because "the officers did not possess knowledge of any facts that either indicated the presence of anyone else in the apartment or that Jeffery had tried to harm anyone else."[256]

246. *Id.* at 1157.
247. *Id.*
248. *Id.*
249. *Id.*
250. *Id.* at 1157–58.
251. *Id.* at 1157.
252. *Id.* at 1158.
253. *Id.* (citing State v. Pseudae, 908 A.2d 809 (N.H. 2006)).
254. *Id.*
255. *Id.*
256. *Id.*

The court held that the evidence gathered during the unlawful search should have been suppressed, and therefore remanded the case with instructions to set aside Jeffery's conviction.[257]

5. Search Incident to a Lawful Arrest

When law enforcement officers lawfully arrest someone, they may search that person without first obtaining a search warrant.[258] The Kansas Legislature has outlined three purposes for allowing this exception to the warrant requirement:

> When a lawful arrest is effected a law enforcement officer may reasonably search the person arrested and the area within such person's immediate presence for the purpose of (a) [p]rotecting the officer from attack; (b) [p]reventing the person from escaping; or (c) [d]iscovering the fruits, instrumentalities, or evidence of a crime.[259]

However, the court re-emphasized recently that a search incident to arrest is *not* lawful when the underlying arrest is warrantless and is not supported by probable cause.[260]

6. Inventory Search

Inventory searches occur when law enforcement officers catalogue the contents of a pocket, bag, or vehicle following an arrest. Such warrantless searches are lawful when employed for three general purposes: "(1) the protection of the owner's property while it remains in police custody; (2) the protection of the police against claims of lost or stolen property; and (3) the protection of the police from hazardous objects contained within a criminal defendant's personal property."[261] The primary consideration when analyzing the lawfulness of an inventory search is reasonableness.[262] However, because there is no precise definition of what constitutes a reasonable inventory search,

257. *Id.* at 1159.

258. KAN. STAT. ANN. § 22-2501 (2005).

259. *Id.*

260. State v. Wagner, 179 P.3d 1149, 1157 (Kan. Ct. App. 2008).

261. State v. McCormick, 159 P.3d 194, 205 (Kan. Ct. App. 2007) (citing State v. Shelton, 93 P.3d 1200, 1204 (Kan. 2004)).

262. *Id.*

courts must balance governmental interests against the invasion of personal privacy rights.[263]

7. Plain View and Plain Feel

Officers may seize any evidence they observe in plain view when they are in any place they have a lawful right to be.[264] However, if officers observe evidence after gaining unconstitutional warrantless entry, "then the evidence may not be used in court."[265]

Recall that in *Jeffery*,[266] law enforcement officials noticed drug paraphernalia in plain view when they walked through Jeffery's apartment after responding to a call that he was suicidal.[267] However, because the court held that no exceptions to the warrant requirement applied, the law enforcement officers were not in a place they had the right to be.[268] The court held that the items police discovered, therefore, did not fall under the plain view exception.[269]

The so-called "plain feel" exception is essentially the same concept, except it applies to situations where an officer feels rather than sees evidence.[270] The plain feel and plain view exceptions have three requirements: "'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.'"[271] The third requirement "has been interpreted to mean that the officer must have probable cause to believe that the object is evidence of a crime."[272]

263. *Id.* (citing Pool v. McKune, 987 P.2d 1073, 1078 (Kan. 1999)).

264. State v. Jeffery, 173 P.3d 1156, 1158 (Kan. Ct. App. 2008) (citing State v. Horn, 91 P.3d 517, 526–27 (Kan. 2004)).

265. *Id.* (citing Wong Sun v. United States, 371 U.S. 471, 484–85 (1963); State v. Reno, 918 P.2d 1235 (Kan. 1996)).

266. *See supra* text accompanying notes 245–57.

267. *Jeffery*, 173 P.3d at 1157.

268. *Id.* at 1158.

269. *Id.* at 1159.

270. State v. Lee, 156 P.3d 1284, 1290 (Kan. 2007).

271. *Id.* (quoting State v. Wonders, 952 P.2d 1351, 1359 (Kan. 1998)).

272. *Id.*

F. Administrative Searches and Seizures

Kansas recognizes administrative searches as one of the valid exceptions to the search warrant requirement.[273] Under the Fourth Amendment, a search warrant is generally required for a search to be deemed reasonable, unless a valid exception applies.[274] In 2008, the Kansas Supreme Court affirmed administrative searches as a valid exception to the search warrant requirement in *State v. Fitzgerald*, stating that the "recognized exceptions to the warrant requirement for searches and seizures include . . . administrative searches of closely regulated businesses."[275]

As laid out in the most recent treatment of administrative searches in the Tenth Circuit, the three-factor test and "special needs" situation still applies in Kansas.[276] In *United States v. Herrera*, the court determined that because the owner or operator of a commercial vehicle or premises does business in a "closely regulated" industry, his expectation of privacy is lessened during an administrative search.[277] However, the court stated that such situations are "special needs," and only apply to times "where the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened."[278] Furthermore, the court laid out a three-part test to determine whether the administrative search is reasonable under the Fourth Amendment.[279] First, the regulatory scheme must be founded upon a substantial governmental interest.[280] Second, the regulatory scheme should be made so as to further the governmental interest.[281] Third, the inspection program or regulatory scheme must provide a "constitutionally adequate substitute for a warrant."[282] As the court explained, this last requirement simply means that the regulatory inspection must follow the two basic functions of a warrant: (1) it must advise the owner of the vehicle/premises that the search is being

273. *See* State v. Fitzgerald, 192 P.3d 171, 173 (Kan. 2008) (recognizing administrative searches as a valid exception to the warrant requirement).

274. *Id.*

275. *Id.*

276. *See* United States v. Herrera, 444 F.3d 1238, 1244 (10th Cir. 2006) (citing New York v. Burger, 482 U.S. 691, 700 (1987)).

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

282. *Id.*

conducted pursuant to the law and is limited in scope; and (2) the regulatory inspection must limit the discretion of the administrative officers.[283]

In 2008, the Kansas Court of Appeals declined to decide whether the administrative exception applied to a search performed by a state Wildlife and Parks officer.[284] In *State v. Thomas*, the defendant was the passenger in a vehicle that ran a stop sign and was pulled over by a Wildlife and Parks officer.[285] After checking for a driver's license and registration, the officer observed two fishing poles and a tackle box in the bed of the pickup.[286] He then asked both occupants for their fishing licenses, which only the driver was able to produce.[287] The officer testified that the occupants were acting nervous and he asked if he could search the vehicle for any illegal fish or items.[288] As the occupants left the vehicle, the officer detected the smell of burnt marijuana, and a subsequent search of the vehicle turned up marijuana in a plastic bag.[289]

On appeal, the defendant argued that the search was the result of a warrantless regulatory or administrative search.[290] The appellate court rejected this argument and stated:

> [T]he facts in the present case are uncontroverted that Officer Nielson specifically asked for Wilson's consent to search the vehicle and only entered the vehicle after consent was given and he had smelled burnt marijuana. Accordingly, this is not a case which requires us to consider whether or not [the administrative search exception] empowers Wildlife and Parks officers to conduct regulatory or administrative searches of vehicles, and whether such authority, if it is provided, complies with the Fourth Amendment.[291]

G. Exclusionary Rule

The good-faith exception to the exclusionary rule was first recognized by the United States Supreme Court in *United States v. Leon*.[292] The Court held that when officers act in "reasonable reliance on

283. *Id.*
284. State v. Thomas, No. 98,516, 2008 WL 2186359, at *3 (Kan. Ct. App. May 23, 2008).
285. *Id.* at *1.
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.* at *3.
291. *Id.* at *4.
292. 468 U.S. 897 (1984).

a search warrant issued by a detached and neutral magistrate but ultimately found to be unsupported by probable cause," their reliance does not bar the use of the evidence obtained with the search warrant in the prosecutor's case in chief.[293] In order for the good-faith exception to apply, the officers must possess an objectively reasonable belief that the warrant was properly issued.[294] In order for courts to better determine what is an objectively reasonable belief, the Court illustrated four scenarios in which an officer's belief would not be objectively reasonable: (1) the magistrate issuing the warrant was deliberately misled by false information; (2) the magistrate wholly abandoned his or her detached or neutral role; (3) there was so little indicia of probable cause contained in the affidavit—in other words, the affidavit was so "bare bones"—that it was entirely unreasonable for the officer to believe the warrant was valid; or (4) the warrant so lacked specificity that officers could not determine the place to be searched or the items to be seized.[295] Between the affidavits that are considered "bare bones" (lack any indicia of probable cause) and the affidavits that have a significant substantial basis for determining probable cause, lie the affidavits to which the good-faith exception applies.[296] They do not provide the substantial basis for probable cause; rather, they have some indicia of probable cause and provide the basis for the requisite objectively reasonable belief in the validity of the warrant.[297]

The most recent significant change in Kansas law regarding the good-faith exception came in the Kansas Supreme Court's 2007 decision in *State v. Hoeck*. Before *Hoeck*, Kansas courts had misinterpreted *Leon* and only applied the good-faith exception to warrants that "'provide the magistrate with a substantial basis for determining the existence of probable cause.'"[298] In *Hoeck*, the court disapproved of this application of the good-faith exception. There, the court determined that the warrant used to obtain the evidence from Hoeck's house fell within the middle of the continuum of probable cause—it fell short of a "substantial basis" for probable cause, but provided just enough indicia of probable cause to give the officer an objectively reasonable belief that the warrant was issued correctly.[299] The court ultimately overruled precedent in earlier

293. *Id.* at 900, 913.
294. *Id.* at 922–23 n.24.
295. *Id.* at 923.
296. State v. Hoeck, 163 P.3d 252, 259 (Kan. 2007) (citing *Leon*, 468 U.S. at 922).
297. *Id.*
298. *Id.* at 261 (quoting State v. Doile, 769 P.2d 666, 672 (Kan. 1989)).
299. *Id.* at 265–66.

decisions that applied the "test of whether there is a substantial basis for the determination of probable cause to . . . the determination of whether the good faith exception to the Fourth Amendment exclusionary rule applies."[300] Since *Hoeck*, Kansas courts' application of the good-faith exception has become more consistent with the holding in *Leon*.

H. Police Interrogation

The Kansas Supreme Court recently revisited the issue of what constitutes a police interrogation. They again defined the distinctions between an investigatory interrogation, which does not require the reading of Miranda rights, and custodial interrogations in which Miranda rights are required to be given. In *State v. Morton*, the defendant worked for a taxpayer-funded organization and was in charge of making purchases of government surplus property, which is subject to strict usage requirements, including a ban on personal use.[301] Morton was suspected of using the property purchased for the organization for her own personal use and was subject to investigation by the Government Services Administration (GSA).[302] The GSA agent contacted the defendant and asked to meet with her to do a follow-up interview in order to ask her questions that were not covered by the local police department.[303] Morton agreed to meet with him at the local police station; at the station, she was not read her Miranda rights.[304] Morton was later charged with one count of making a false statement based on her interview with the GSA agent.[305] The defendant's account of the investigation by the GSA agent differed from the agent's account of the events. Morton maintained that before the interview, she asked the agent if she needed to bring her attorney, to which he replied, "[n]o, no, it's not that kind of interview. Some people bring their attorneys but it's nothing you'll need an attorney for."[306] The agent denied making any such statement and emphasized that he did not believe she was in custody and that is why he did not read her the Miranda rights.[307] Before trial, Morton moved to have her testimony to the GSA agent suppressed

300. *Id.* at 253.
301. 186 P.3d 785, 788 (Kan. 2008).
302. *Id.*
303. *Id.* at 789.
304. *Id.*
305. *Id.*
306. *Id.*
307. *Id.* at 790.

because she was not read her Miranda rights.[308] The state argued that Miranda rights were not required because she was not in official custody.[309]

After the trial court granted the motion to suppress on the Miranda grounds, the state filed an interlocutory appeal and the Kansas Court of Appeals reversed, stating that Morton was not in custody for Miranda purposes.[310] The Kansas Supreme Court reemphasized the factors for determining whether there is a custodial or police interrogation:

> "'(1) when and where the interrogation occurred; (2) how long it lasted; (3) how many police officers were present; (4) what the officers and defendant said and did; (5) the presence of actual physical restraint on the defendant or things equivalent to actual restraint such as drawn weapons or a guard stationed at the door; (6) whether the defendant is being questioned as a suspect or a witness; (7) how the defendant got to the place of questioning, that is, whether he came completely on his own in response to a police request or was escorted by police officers; and (8) what happened after the interrogation-whether the defendant left freely, was detained, or was arrested.'"[311]

As laid out by the court in *State v. Jones*, the factors are to be considered in light of the individual circumstances of the case and not mechanically applied. Some factors might be present while others are not, likewise, some factors might have more weight or importance than others.[312] The Kansas Supreme Court accepted Morton's account of the events, but determined that a reasonable person would not have believed that she was in custody and unable to leave or terminate the interview because the officer told Morton she was free to go at anytime and she was not under restraint.[313]

The Kansas Supreme Court also recently dealt with the issue of police interrogation in the context of a suspect invoking his right to counsel. In *State v. Warledo*, the defendant was convicted by a jury of arson and premeditated first-degree murder after making inculpatory statements while in police custody and after allegedly requesting to speak with his attorney.[314] The pertinent events relating to police interrogation and right to seek counsel occurred after the defendant had been arrested

308. *Id.* at 789.
309. *Id.*
310. *Id.* at 790.
311. *Id.* at 791 (citation omitted) (quoting State v. Jones, 151 P.3d 22, 31 (Kan. 2007)).
312. *Id.* at 791–92.
313. *Id.* at 796.
314. 190 P.3d 937, 943 (Kan. 2008).

and brought into the police station. He was placed in the interrogation room, alone, for approximately thirty to forty minutes.[315] During this time, there was a camera recording the room, but according to the police, no one was monitoring it.[316] Upon later review of the videotape, the defendant could be seen muttering to himself and then loudly stating, "'I need to call a lawyer. Where's my lawyer?'"[317] On appeal, Warledo argued that he was denied his due process rights because the police officers questioned him without his attorney as he had requested.[318]

The Kansas Supreme Court affirmed the trial court's decision not to exclude the statements made after his "request" for counsel.[319] The court reemphasized several requirements for invoking the Miranda right to counsel. In general, invoking the right to counsel "'requires, at a minimum, 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.'"[320] The suspect must do two things in order for the request to be valid. First, the suspect must articulate his desire for counsel in a manner that can be reasonably construed by the officer to be a request for counsel.[321] Second, the suspect must make a request for counsel to help him or her with the present interrogation and not with any subsequent hearings or proceedings.[322] In this case, the court ruled that because there were no police officers monitoring the video at the time it was being recorded, and there were no police officers present in the room, he was not making the request in a manner that anyone could grant it for him.[323] Therefore, his subsequent inculpatory statements did not violate his Miranda right to counsel, because that right was not properly invoked.[324]

I. Eyewitness Identification

When determining whether eyewitness identification should be excluded, Kansas has historically followed a two-step procedure followed by an evaluation of the totality of the circumstances, which

315. *Id.*
316. *Id.*
317. *Id.* at 943.
318. *Id.* at 946.
319. *Id.*
320. *Id.* (quoting McNeil v. Wisconsin, 501 U.S. 171, 178 (1991)).
321. *Id.* at 947.
322. *Id.*
323. *Id.*
324. *Id.*

includes an eight-part analysis. First, the court must determine whether the procedure for identifying the suspect was "impermissibly suggestive."[325] Second, if the procedure was suggestive, the court must use the analysis factors to determine if the "impermissibly suggestive procedure led to a substantial likelihood of misidentification."[326] The factors considered in the analysis should include:

> 1. The witness' opportunity to view the criminal at the time of the crime;
> 2. The witness' degree of attention;
> 3. The accuracy of the witness' prior description;
> 4. The level of certainty demonstrated by the witness at the confrontation;
> 5. The length of time between the crime and the confrontation;
> 6. The witness' capacity to observe the event, including his or her mental and physical acuity;
> 7. The spontaneity and consistency of the witness' identification and the susceptibility to suggestion; and
> 8. The nature of the event being observed and the likelihood that the witness would perceive, remember, and relate it correctly.[327]

The Kansas Court of Appeals had the opportunity to apply the *Corbett* two-step analysis in *State v. Gwenapp*.[328] On appeal, Gwenapp challenged his conviction and sentence for attempted aggravated robbery on the grounds that the eyewitness identification procedure was unnecessarily suggestive and therefore should have been excluded from evidence.[329]

The victim in *Gwenapp*, Mr. Morrison, was walking back to his retirement community with his wife after visiting the local Dairy Queen when he felt someone reach into his back pocket.[330] He turned around and was confronted by a dark-haired, dark-eyed man with a bandana partially covering his face, holding what appeared to be a small gun, and asking for Mr. Morrison's money.[331] Mr. Morrison's wife screamed, which startled the stranger, causing him to drop the gun, and Mr. Morrison swung at him with his bag of ice cream.[332] The stranger then

325. State v. Corbett, 130 P.3d 1179, 1190 (Kan. 2006).
326. *Id.*
327. *Id.* at 1191.
328. Nos. 98,254, 98,255, 2008 WL 3916001, at *3 (Kan. Ct. App. Aug. 22, 2008).
329. *Id.*
330. *Id.* at *1.
331. *Id.*
332. *Id.*

pushed Mr. Morrison into a ditch.[333] Mr. Morrison told police that he noticed the man was wearing a white shirt, black pants, and appeared to be running toward a white car in the area.[334] At the same time, Ms. Gleysteen, who lived across the street from the crime scene, was in her backyard when she heard Mrs. Morrison's scream.[335] She saw the white car and the man run past her yard with the white shirt and black pants.[336] Later, while writing her statement in the police cruiser, the police informed her that they believed they had located the white car and possibly the suspect.[337] Ms. Gleysteen ultimately identified, without prompting, the white car she had seen as well as the suspect, who turned out to be Mr. Gwenapp.[338] At the time, as the court pointed out, the weather conditions were cloudy and slightly rainy, but visibility was not impaired.[339]

The court of appeals used both the *Corbett* two-step procedure and the accompanying eight-step analysis to determine that the trial court did not err by refusing to exclude the identification of Gwenapp. In particular, the court found that the eyewitness procedure used in this case was not unnecessarily suggestive because Gwenapp was not handcuffed or illuminated by the police during the procedure.[340] Although the court did not need, at that point, to go on to the second step of the analysis, it did so in order to bolster its ruling.[341] Of particular importance was the court's finding that the identification of Gwenapp was spontaneous and without suggestion from the police officer.[342] Further, the court found that Ms. Gleysteen's identification of the man who ran by her porch and the identification of Gwenapp were consistent and accurate.[343] In short, the court found that there was no substantial likelihood of misidentification.[344]

333. *Id.*
334. *Id.*
335. *Id.*
336. *Id.*
337. *Id.* at *2.
338. *Id.*
339. *Id.*
340. *Id.* at *4.
341. *Id.*
342. *Id.* at *5.
343. *Id.*
344. *Id.*

J. Right to Counsel

1. Right to Counsel of Choice

The right of a criminal defendant to the assistance of counsel is a fundamental right guaranteed by the U.S. Constitution.[345] Coupled with this right to counsel is the requirement that the government shall afford the criminal defendant a fair opportunity to secure counsel of his own choosing.[346] Kansas has codified this requirement in K.S.A. 22-4503(b), which states that "[i]f the defendant asks to consult with counsel of the defendant's own choosing, the defendant shall be given a reasonable opportunity to do so."[347]

In *State v. Kirkpatrick*, the court addressed whether a defendant loses his right to counsel of his choosing after the defendant asks for, and receives, a court-appointed attorney, then three days prior to trial requests a continuance to hire private counsel.[348] The district court denied the defendant's motion for a continuance to seek private counsel and the Kansas Supreme Court affirmed.[349]

In *Kirkpatrick*, the district court appointed Kirkpatrick's counsel shortly after his arrest.[350] Dissatisfied with his appointed counsel's unsuccessful attempt to negotiate a plea deal, Kirkpatrick orally moved for a continuance in order to attempt to hire private counsel of his choosing.[351] The motion came over five months after the district court had appointed Kirkpatrick's counsel and just three days prior to trial.[352] The district court denied Kirkpatrick's oral motion based upon the late timing of the request and Kirkpatrick appealed.[353]

Kansas courts had never addressed *Kirkpatrick*'s specific fact scenario.[354] Kirkpatrick argued that because the alleged error implicated a federal constitutional right, the court should review the district court's decision using a "harmless error analysis."[355] However, the Kansas

345. U.S. CONST. amend. VI; State v. Kirkpatrick, 184 P.3d 247, 259 (Kan. 2008) (citing Kimmelman v. Morrison, 477 U.S. 365, 374 (1986)).

346. *Kirkpatrick*, 184 P.3d at 259 (citing Powell v. Alabama, 287 U.S. 45, 53 (1932)).

347. KAN. STAT. ANN. § 22-4503(b) (2000).

348. *Kirkpatrick*, 184 P.3d at 259–60.

349. *Id.* at 261.

350. *Id.* at 259.

351. *Id.*

352. *Id.* at 259–60.

353. *Id.* at 259.

354. *Id.* at 260.

355. *Id.*

Supreme Court rejected this argument and instead applied an abuse of discretion standard of review.[356] In determining whether the trial court abused its discretion, the court "balance[d] carefully the presumption in favor of the defendant's right to trial counsel of choice and the public's interest in the prompt, effective, and efficient administration of justice."[357]

The Kansas Supreme Court ultimately found that the district court had not abused its discretion in denying the motion based primarily upon the fact that Kirkpatrick did not seek the continuance until three days before the trial and more than five months after the court had appointed counsel.[358] The court found the fact that Kirkpatrick never asserted an inability to work with his appointed counsel or that his counsel was incompetent persuasive.[359] The court also took into account Kirkpatrick's failure to provide the name of another attorney willing to represent him.[360] Kirkpatrick had only stated that he wanted to *try* to hire private counsel.[361] After taking into account all of these facts, the Kansas Supreme Court held that the district court did not abuse its discretion in denying Kirkpatrick's motion for a continuance, and was, therefore, justified in denying Kirkpatrick his right to counsel of choice under these circumstances.[362]

The Kansas Supreme Court's holding in *Kirkpatrick* is reasonable. While a criminal defendant has an absolute constitutional right to the effective assistance of counsel,[363] the United States Supreme Court and Kansas statutes only afford the defendant a fair and reasonable opportunity to hire counsel of the defendant's choice.[364] In this case, Kirkpatrick clearly had a fair opportunity to hire private counsel of his choice. If the court allowed defendants to change their minds at any time, including on the eve of trial, there would potentially be widespread abuse and defendants could use this right to delay trial and further tie up an already congested court system. Furthermore, Kirkpatrick's reason for wanting new counsel in this case seems unreasonable. Kirkpatrick was dissatisfied with his appointed counsel's inability to secure a plea deal. However, the result would not have been different if the court had

356. *Id.* at 261.
357. *Id.* at 260.
358. *Id.* at 261.
359. *Id.*
360. *Id.* at 260.
361. *Id.*
362. *Id.*
363. U.S. CONST. amend. VI.
364. Powell v. Alabama, 287 U.S. 45, 53 (1932); KAN. STAT. ANN. § 22-4503(b) (2000).

allowed Kirkpatrick to hire private counsel, because "a defense attorney does not possess the power to determine what type of plea offer, if any, the State will make in a given case."[365] Therefore, the court's decision in *Kirkpatrick* strikes a reasonable balance between the defendant's right to counsel of choice and the public's interest in prompt, effective, and efficient administration of justice.

2. Right to Appointment of New Counsel

In reviewing a district court's decision to refuse appointment of new counsel, Kansas courts apply an abuse of discretion standard that asks whether any reasonable person would take the view adopted by the district court.[366] In order to warrant the appointment of new counsel, a defendant must show justifiable dissatisfaction with his appointed counsel.[367] Justifiable dissatisfaction occurs when there is a conflict of interest, an irreconcilable conflict, or a complete breakdown in communications between the defendant and his appointed attorney.[368] When the district court becomes aware of a possible conflict of interest between an attorney and a defendant, the court has a duty to inquire further.[369] Ultimately, however, "'[a]s long as the trial court has a reasonable basis for believing the attorney-client relation has not deteriorated to a point where appointed counsel can no longer give effective aid in the fair presentation of a defense, the court is justified in refusing to appoint new counsel.'"[370]

In *State v. Bryant*, the Kansas Supreme Court held that the mere filing of disciplinary complaints by the defendant against his appointed counsel was not enough to establish a conflict of interest.[371] The defendant in the case, Bryant, was upset with a perceived lack of communication between himself and his attorney.[372] Furthermore, Bryant complained that his attorney had failed to consult with him regarding trial strategy and that his attorney did not abide by his decisions regarding how to conduct the defense.[373] These grievances led Bryant to file multiple complaints against his attorney with the

365. *Kirkpatrick*, 184 P.3d at 261.
366. State v. Bryant, 179 P.3d 1122, 1133 (Kan. 2008).
367. *Id.*
368. *Id.* (citing State v. McGee, 126 P.3d 1110 (Kan. 2006)).
369. *Id.* at 1136 (citing State v. Vann, 127 P.3d 307 (Kan. 2006)).
370. *Id.* at 1134 (alteration in original) (citation omitted).
371. *Id.* at 1136.
372. *Id.* at 1134.
373. *Id.*

Disciplinary Administrator for the State of Kansas and with another unknown agency.[374] These grievances also led Bryant to file, *pro se*, a written motion to change counsel.[375] The district court denied Bryant's motion to change counsel and the Kansas Supreme Court, applying an abuse of discretion standard, upheld the district court's decision.[376]

The Kansas Supreme Court held that the mere filing of a disciplinary complaint does not establish a conflict and that the district court must investigate whether the complaint actually creates a conflict.[377] Whether an actual conflict exists depends upon the nature of the complaint.[378] The Kansas Supreme Court found that the district court satisfied its duty to conduct an investigation by asking Bryant open-ended questions during two separate hearings in an attempt to learn what was bothering him.[379] The court's questions made no specific inquiry into the nature or status of the disciplinary complaints[380] and the Supreme Court acknowledged that the district court should have "[made] specific queries . . . about the nature of the disciplinary complaints, instead of simply asking Bryant to specify why [his attorney] should not continue as his counsel."[381] The Supreme Court, nevertheless, found that the district court had not abused its discretion in denying Bryant's motion.[382] In reaching its conclusion, the Supreme Court relied on the district court's finding that Bryant did not provide a sufficient reason for concluding that a conflict existed[383] and the fact that Bryant's counsel had informed the court that the Disciplinary Administrator dismissed one of the complaints, concluding that it had no basis.[384]

Clearly it would be a bad idea to hold that the mere filing of a disciplinary complaint is per se evidence of a conflict of interest. If this were the case, a defendant could change counsel anytime it wanted by filing a frivolous complaint. There are certain cases, however, where the filing of a disciplinary complaint would create a conflict of interest, and that is why the requirement that the court investigate such complaints is so important.

374. *Id.* at 1134–35.
375. *Id.* at 1134.
376. *Id.* at 1137.
377. *Id.* at 1136–37.
378. *Id.* at 1137.
379. *Id.*
380. *Id.* at 1136.
381. *Id.* at 1137.
382. *Id.*
383. *Id.*
384. *Id.* at 1136.

In *Bryant*, it was obvious to the court from Bryant's answers to its open-ended questions that no conflict existed; however, the court should have, nonetheless, investigated the complaints more thoroughly than it did. The court did not specifically inquire about the disciplinary complaints themselves. Instead, it questioned Bryant on why he needed new counsel. Bryant filed multiple complaints with multiple agencies, and it is possible that the court could have missed a legitimate complaint that Bryant failed to articulate in his oral responses to the court's questions, especially when the questions did not specifically address the complaints. Furthermore, the court never even inquired as to the status of one of Bryant's complaints. Bryant's counsel informed the court of the Kansas Disciplinary Administrator's decision to dismiss Bryant's complaint, but the court never looked into the status of the complaint that Bryant had filed with the unknown agency. While it seems unlikely that a legitimate complaint creating a conflict of interest existed in this case, it would be dangerous to allow this type of relaxed investigation to qualify as meeting the court's duty to investigate, especially if the nature of the complaint truly determines whether a legitimate conflict exists.

3. Right to Proceed Pro Se

The Sixth Amendment, as made applicable to the states by the Fourteenth Amendment, guarantees that a defendant in a state criminal trial has an independent constitutional right to self-representation.[385] A criminal defendant who wishes to proceed pro se must first make a "knowing and intelligent" waiver of his right to counsel.[386] A "knowing and intelligent" waiver "requires that the defendant be informed on the record of the dangers and disadvantages of self-representation."[387] It is often said that the defendant must make the choice with "eyes open."[388] The courts, however, must "indulge every reasonable presumption against waiver" and "the right to self-representation can be waived by mere failure to assert it."[389] Even if a criminal defendant decides to waive his right to counsel, the State may "appoint 'standby counsel,' even over the defendant's objection, to assist the pro se defendant in his

385. State v. Vann, 127 P.3d 307, 315 (Kan. 2006) (citing Faretta v. California, 422 U.S. 806 (1975)).

386. *Id.*

387. *Id.* at 315–16 (quoting State v. Graham, 46 P.3d 1177 (Kan. 2002)).

388. *Id.* at 316.

389. *Id*. (quoting State v. Lowe, 87 P.2d 1334 (Kan. Ct. App. 1993)).

or her defense."[390] If the court denies a criminal the right to proceed pro se, such deprivation is not viewed as "harmless error," and the defendant is automatically entitled to a new trial.[391]

4. Right to Counsel in Probation Revocation Hearing

The United States Supreme Court has held that the Sixth Amendment does not convey an absolute right to counsel in all probation revocation hearings.[392] Rather, "'the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority charged with responsibility for administering the probation and parole system.'"[393] Kansas law, however, provides defendants with a statutory right to representation by counsel at probation revocation hearings.[394] But, because there is a high probability that defendants will cause delay by procrastinating in the hiring of counsel, the trial court may, after a reasonable period of time, order the defendant to appear on a certain day with counsel.[395] If the defendant shows up without counsel, the court shall appoint counsel to represent the defendant and reschedule the hearing for a date that allows the newly appointed counsel adequate time to prepare.[396]

K. Effective Assistance of Counsel

The Sixth Amendment to the U.S. Constitution provides a criminal defendant with a "right to effective assistance of counsel."[397] In order to establish a claim of ineffective assistance of counsel, a criminal defendant must establish two things: (1) that the counsel's performance was so deficient that it fell below the standard required by the Sixth Amendment; and (2) that the counsel's deficient performance prejudiced the defense in a way that would prevent a fair trial.[398] In deciding a case

390. *Id.* at 315.

391. *Id.* at 316.

392. State v. Young, 128 P.3d 1004, 1007 (Kan. Ct. App. 2006) (citing Gagnon v. Scarpelli, 411 U.S. 778 (1973)).

393. *Id.* (quoting *Gagnon*, 411 U.S. at 790).

394. *Id.* K.S.A. 22-3716(b) provides that during a probation hearing "[t]he defendant shall have the right to be represented by counsel and shall be informed by the judge that, if the defendant is financially unable to obtain counsel, an attorney will be appointed to represent the defendant." KAN. STAT. ANN. § 22-3716(b) (2000).

395. *Young*, 128 P.3d at 1008 (citing State v. Weigand, 466 P.2d 331 (Kan. 1970)).

396. *Id.*

397. Wilkins v. State, 190 P.3d 957, 967 (Kan. 2008).

398. McHenry v. State, 177 P.3d 981, 984 (Kan. Ct. App. 2008).

of ineffective assistance of counsel, the "court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[399]

McHenry v. State illustrates how unreasonable an attorney's conduct must be in order for a court to consider it ineffective. In *McHenry*, the State was appealing the district court's decision to grant McHenry's 60-1507 motion[400] based upon the finding that McHenry had not received effective assistance of counsel.[401] On appeal, the Kansas Court of Appeals applied the same standard of review used when a defendant appeals the denial of a 60-1507 motion: the appellate court must determine "whether the factual findings of the district court are supported by substantial competent evidence" and whether they are sufficient to support its conclusions of law.[402]

In his motion, McHenry made several complaints including his counsel's failure to investigate the prosecution's witnesses.[403] His motion pointed out "startling" inconsistencies in the statements made by the prosecution's witnesses during trial, including whether one of the witnesses drank alcohol and whether one of the witnesses really attended a bingo game on the night of a blizzard.[404] Furthermore, one of the witnesses had charges filed against her for a crime involving dishonesty that McHenry's counsel did not unveil.[405] McHenry also claimed that he had provided his counsel with the names of witnesses who overheard the victim tell her mother that McHenry was innocent, but his counsel chose not to have them to testify.[406] In fact, McHenry alleged that his counsel did not even attempt to contact or investigate these individuals.[407] Because of McHenry's counsel's failure "to investigate the prosecution's witnesses in order to discover 'inconsistencies and fabrications'" in their testimony, and because McHenry's counsel chose not to call or even investigate the witnesses McHenry had provided him, the district court

399. *Wilkins*, 190 P.3d at 967 (citing State v. Gleason, 88 P.3d 218, 233 (Kan. 2004)).

400. A 60-1507 motion is a motion by a defendant who is currently held in custody under sentence which attacks the grounds of the sentence. KAN. STAT. ANN. § 60-1507(a) (2005).

401. *McHenry*, 177 P.3d at 984.

402. *Id.*

403. *See id.* at 983 ("[T]he district court concluded that there was a lack of thorough investigation, citing inconsistencies in testimony of the State's witnesses.").

404. *Id.* at 984.

405. *Id.* at 985.

406. *Id.* at 984.

407. *Id.* at 985.

held that McHenry's counsel failed to provide effective assistance of counsel.[408]

The State, in its appeal, contended that the assistance provided by McHenry's counsel was effective and that his failures to "delve into minute disagreements during the trial" or to call McHenry's witnesses were "reasonable strategy."[409] The Kansas Court of Appeals recognized that "'[s]trategic choices made [by counsel] after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable, and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'"[410] The court then concluded that although McHenry's counsel could have proceeded without investigating some of the smaller details of the case, his failure to investigate any of the prosecution's witnesses and his failure to contact any of McHenry's witnesses rendered the representation ineffective.[411] The court held that in a case where there is no physical evidence, and where the trial is largely dependent upon the credibility of the witnesses of both sides, the failure to investigate the prosecution's witnesses "fell below an objective standard of reasonableness" and was prejudicial to the defendant.[412] The court, therefore, upheld the district court's decision.[413]

The court's decision to grant McHenry's 60-1507 motion was reasonable. It would be extremely difficult for any reasonable person to view McHenry's counsel's failure to investigate the prosecution's witnesses as effective trial strategy. McHenry's counsel himself acknowledged that his failure to investigate was the result of "work[ing] for a public defender's office with limited investigative resources."[414] In this case, the prosecution's witnesses had serious credibility issues and McHenry's counsel could have discovered the claim of dishonesty filed against one of the witnesses by a simple search of the public records. It is this failure to conduct even the most preliminary and basic investigation that makes *McHenry* a reasonable decision. This failure to investigate cannot rightly be deemed "trial strategy" and does not meet the required standard of reasonableness. The same is true with the

408. *Id.* at 985–86.
409. *Id.* at 984.
410. *Id.* at 986 (quoting State v. Gleason, 88 P.3d 218, 233 (Kan. 2004)).
411. *Id.*
412. *Id.*
413. *Id.*
414. *Id.*

failure to contact any of McHenry's witnesses. If a client gives his counsel the name of a person who potentially can exonerate him, a reasonable counsel should, at the very least, contact that individual to determine his or her credibility and value as a witness. The failure to conduct this initial step does not satisfy Sixth Amendment requirements.

It is also easy to see how such a failure to investigate would prejudice the defendant at trial. As the court stated, this case involved very little physical evidence and the jury was going to decide the case based on the testimony of witnesses. If McHenry's counsel had done an adequate job, he would have been able to offer evidence to discredit one of the prosecution's main witnesses. Similarly, if McHenry's counsel investigated McHenry's suggested witnesses and put them on the stand, the jury would have heard the persuasive testimony of a witness who overheard the victim saying that McHenry was innocent. The failure of McHenry's counsel to perform the most basic tasks in preparation for trial deprived McHenry of potentially his most persuasive evidence. Therefore, the court's determination that McHenry did not receive a fair trial was reasonable.

III. PRETRIAL ISSUES

A. The Formal Charge—the Complaint, Information, and Indictment

The complaint is a "plain and concise written statement of the essential facts constituting the crime charged . . . ."[415] A complaint is sufficient if it contains enough information that "it would be fair to require the defendant to defend" the charges therein.[416] Furthermore, the complaint is sufficient even if an essential element is missing or if there is a technical defect.[417] On appellate review, the focus on whether the defendant is able to defend is known as the common-sense rule, and in applying the common-sense rule, the court takes into account the entire record.[418]

In *State v. Edwards*, the defendant was convicted of aiding a felon and being a felon in possession of a firearm.[419] The defendant appealed his conviction, arguing that the charging document was fatally flawed

415. KAN. STAT. ANN. § 22-3201(b) (2006).

416. State v. Edwards, 179 P.3d 472, 478 (Kan. Ct. App. 2008) (citing Swenson v. State, 169 P.3d 298, 305 (Kan. 2007)).

417. *Id.*

418. *Id.*

419. *Id.* at 474.

relating to the charge of aiding a felon because the complaint failed to establish the felony committed by the individual he was convicted of aiding.[420] The defendant claimed the underlying felony was an essential element of the charge as opposed to a mere technical defect.[421] Based on a common-sense approach, the Kansas Court of Appeals found the defendant was not prejudiced in his ability to prepare a defense.[422] The court determined that it was sufficient, for the purposes of the defendant's ability to mount a defense, that the complaint stated that the defendant was aiding a felon, regardless of what crime rendered the person a felon.[423]

The result in *Edwards* was appropriate because what was important to the defendant was the status of the person he was aiding, not what act gave him that status. The defendant was able to defend against his own acts. A defendant can challenge the status of the allegedly aided person—a strategy that would not be hampered without the underlying felony being in the complaint—because the actual felony committed by the person aided would be discoverable. However, a common-sense rule does have the potential to unduly prejudice a defendant because it heavily relies on a judge's subjectivity. Common-sense rules carry an underlying risk of error because common sense varies between individuals. However, whether a defendant's rights have been violated will most likely become apparent during the trial. Furthermore, because the entire record is reviewed on appeal, the check of appellate review decreases the possibility that a defendant will be prejudiced by an insufficient complaint.

In addition to the complaint, the formal charge can come in the form of an indictment by a grand jury or information.[424] In *State v. Wilson*, the defendant was convicted of felony theft.[425] The information carefully detailed the items stolen and only listed a twenty-seven-inch television and a fifteen-inch television.[426] At trial, evidence of the value of the stolen items ranged from $300 to $2500 and included various items, but it was unclear whether the evidence pertained to any large screen

420. *Id.* at 477–78.

421. *Id.* at 478.

422. *See id.* (noting the "defendant has not shown any harm to his rights" based on the charging document).

423. *Id.*

424. *See, e.g.*, State v. Wilson, No. 98,154, 2008 WL 3005152, at *1 (Kan. Ct. App. Aug. 1, 2008) (noting charge by formal information).

425. *Id.*

426. *Id.*

television sets.[427] The defendant challenged the conviction on the grounds that the State failed to prove the market value of the items or the specifics of what was listed on the charging document, and that the ending instructions expanded the information.[428] The Kansas Court of Appeals held that the expansion of the information during the instructions was reversible error, and that given the expansion there was insufficient evidence to uphold a conviction.[429] Given the unclear evidence and the expanded instructions, the defendant was reversibly prejudiced.[430]

The decision in *Wilson* was correct. It is important that at trial both the jury instructions and the case against the defendant match what he was informed of by the charging document. Since the purpose of the charging document is to allow the defendants to mount an adequate defense, if they are convicted of something other than what they are prepared to defend, the purpose of the charging document is lost. This excludes lesser included offenses, which are deemed included in the greater charge and can be explained to the defendant by his counsel. Although a robbery charge involving a couple of televisions may seem trivial, and the harm of expanded instructions fairly minor (though not minor to that defendant), the principle behind the reversal is sound. Allowing the State to expand the charges in any case, be it a small robbery or a violent crime, would undermine the foundation of the adversary system and the constitutional guarantee of a fair trial.

B. The Initial Appearance

K.S.A. 22-2901 mandates that, following arrest, the accused is to be taken before a court "without unnecessary delay."[431] The purpose of the initial appearance is to balance the needs of effective law enforcement in investigating an alleged crime with the personal and constitutional rights of a defendant.[432] At the initial appearance, the accused is made aware of his or her rights, which decreases the chance of improper action by the State without the accused being aware of procedural safeguards.[433] The

427. *Id.*
428. *Id.* at *1–*3.
429. *Id.* at *3–*4.
430. *Id.* at *4.
431. KAN. STAT. ANN. § 22-2901(1) (2007).
432. State v. Wakefield, 977 P.2d 941, 948 (Kan. 1999).
433. *Id.*

failure to bring an accused before a magistrate is not a denial of due process unless it prejudices the defendant's right to a fair trial.[434]

In *State v. Scott*, the defendant was convicted of "capital murder . . . , premeditated first-degree murder . . . , aggravated burglary, criminal possession of a firearm, and felony theft."[435] The defendant argued on appeal that incriminating statements made during interrogation should be suppressed because the state failed to give the defendant a timely first appearance on the firearms charge.[436] The defendant claimed that the denial was a violation of his constitutional rights.[437] Specifically, the defendant claimed that had he been given a timely first appearance, he would have been appointed counsel on the firearms charge, and that the appointed counsel would have advised him to remain silent regarding all charges brought against him.[438]

The Kansas Supreme Court found that although there was a violation of K.S.A. 22-2901 when the defendant was not promptly arraigned, this violation was not the cause of the subsequent confession, which was made voluntarily without regard to detention.[439] The court stated: "Although it may be speculated Scott might not have confessed had he been appointed counsel, the failure to appoint him counsel did not cause the confession."[440]

Considering the totality of the circumstances, the court seemingly made the correct decision regarding the conviction in this case. However, on its face, it is troubling that the court found the defendant, if afforded his right to counsel at what should have been his earliest appearance, might not have confessed.[441] But regardless of what might have happened, the court focused on what *caused* the confession.[442] The court seemed to be searching for a way to uphold the defendant's conviction; in doing so, it created an ambiguous distinction between what might have been and what was caused, which could in the future allow for the denial of timely initial appearances.

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

435. 183 P.3d 801, 812 (Kan. 2008).

436. *Id.* at 817–18.

437. *Id.* at 818.

438. *Id.* at 819.

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.*

C. Bail

According to the Kansas Constitution's Bill of Rights, "[a]ll persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident or the presumption great."[443] This normally takes the form of a bond and has the purpose of assuring that the defendant is at future proceedings.[444]

The bond is posted because most criminals "do not receive the 'Get out of jail free' card found in Monopoly game sets."[445] Bond is posted in the form of a sufficient amount of cash being put forth with the understanding that if the conditions of release are not met, the amount is forfeited.[446] The amount of the bond is at the discretion of the judge, but is generally proportional to the severity of the crime and the defendant's criminal history.[447] K.S.A. 22-2807 requires the forfeiture of the bond when release conditions are violated.[448] If a defendant does not have the necessary resources to post bond, it does not mean he is out of options.[449] A surety bond can be posted in which a third party posts the amount for the defendant, and if the defendant fails to meet the court's mandates, the third party is required to pay the amount.[450] However, the third party's duty to pay can be discharged following a material modification of the bond agreement.[451]

D. Preliminary Hearing

A preliminary hearing must be held within at least ten days of the defendant's arrest or personal appearance.[452] However, this requirement is not rigid and, if the ten-day period is not met, the court may still find that the defendant's statutory rights have not been violated.[453] Under K.S.A. 22-2902(3), a defendant may be held following a preliminary hearing if, at the end of the hearing, it is evident "that a felony has been

443. KAN. CONST. Bill of Rights § 9.
444. State v. Thammavong, No. 97,278, 2008 WL 762507, at *1 (Kan. Ct. App. Mar. 21, 2008).
445. *Id.*
446. *Id.*
447. Smith v. State, 955 P.2d 1293, 1301 (Kan. 1998).
448. KAN. STAT. ANN. § 22-2807(1) (2007).
449. *See Thammavong*, 2008 WL 762507, at *1 (discussing a third party surety bond).
450. *Id.*
451. *Id.* at *2 (citing First Nat'l Bank of Anthony v. Dunning, 855 P.2d 493, 495 (Kan. Ct. App. 1993)).
452. KAN. STAT. ANN. § 22-2902(2) (2006).
453. State v. Rush, No. 95,506, 2007 WL 1747871, at *1 (Kan. Ct. App. June 15, 2007).

committed and there is probable cause to believe the felony was committed by the defendant."[454] The probable cause necessary to hold a defendant after a preliminary hearing is one of reasonableness—if a person of ordinary prudence could think the defendant was guilty, the case should go to trial.[455] Cases can go to trial even if the evidence suggesting guilt is weak, because the probable cause standard is low and is viewed in the light most favorable to the state.[456]

In *State v. Hernandez*, the defendant, who was being charged with negligent endangerment of a child, was released and charges were dismissed after a preliminary hearing when the court found that there was not enough evidence to hold the defendant.[457] The State appealed, claiming that there was sufficient evidence.[458] However, the Kansas Court of Appeals affirmed the dismissal, citing insufficient evidence for the necessary element of showing a conscious disregard of the dangers to the children.[459] On its face, the burden for passing a preliminary hearing and moving forward to a trial seems small, but this case demonstrates that the preliminary hearing is more than a formality. A preliminary hearing is essential to avoid frivolous or weak lawsuits brought by the State, which is particularly important given an overcrowded prison system and judicial calendar.

The importance of a preliminary hearing is particularly evident in light of *State v. Vasquez*.[460] In *Vasquez*, the defendant waived his right to a preliminary hearing and pled guilty to attempted aggravated robbery and burglary.[461] Upon receiving a sentence that was greater than the defendant anticipated, he attempted to withdraw his plea.[462] Part of his argument on appeal was that he was ordered by his attorney to waive his preliminary hearing.[463] The Kansas Court of Appeals rejected his motion to set the plea agreement aside, citing that, during the plea, the defendant specifically stated that he understood what he was doing when he waived his right to a preliminary hearing.[464]

454. State v. Hernandez, 193 P.3d 915, 917 (Kan. Ct. App. 2008).
455. *Id.*
456. *Id.*
457. *Id.* at 916–17.
458. *Id.* at 917.
459. *Id.* at 918–19.
460. No. 99,492, 2008 WL 4916332, at *1 (Kan. Ct. App. Nov. 14, 2008).
461. *Id.*
462. *Id.*
463. *Id.*
464. *Id.* at *1–*2.

Although it is unfortunate that the defendant received a longer sentence than he expected, the holding by the court is appropriate because without a strict adherence to plea agreements, during which defendants espouse their knowledge of what they waive, the work of prosecutors to secure agreements will be in vain, and the trial process will be extended. However, in light of instances where the defendant, though claiming to understand what he is waiving, does not actually understand, courts should make as explicit as possible that the sentence may be longer than expected and that withdrawing a plea is rare. Though courts are required to do this, instances still occur, such as in *Vasquez*, where a defendant claims to have not understood.

E. Jurisdiction and Venue

Venue is an element of the crime, and evidence must be given as to where the crime occurred in order to establish the jurisdiction of the court.[465] Venue is a question of fact to be determined by the jury; however, the existence of jurisdiction is a question of law that is subject to unlimited judicial review on appeal.[466] K.S.A. 22-2602 states: "Except as otherwise provided by law, the prosecution shall be in the county where the crime was committed."[467] This statute mirrors the Kansas Constitution Bill of Rights, which also states that a prosecution shall be allowed in the county or district where the offense was committed.[468]

In *State v. Hunt*, the defendant was convicted of first-degree premeditated murder for killing his mother.[469] It was unclear where the murder took place because the attack commenced in Bourbon County, but the body was found in Crawford County.[470] The defendant was prosecuted in Crawford County.[471] On appeal, the defendant argued that the prosecution had not established where the crime occurred, and that this failure to establish venue, and through it jurisdiction, violated the defendant's constitutional rights.[472] Specifically, the defendant alleged that because the prosecution made statements during closing arguments alleging that the victim died in Bourbon County and the charging document alleged the murder took place in Crawford County, venue was

465. State v. Hunt, 176 P.3d 183, 189 (Kan. 2008).
466. *Id.*
467. KAN. STAT. ANN. § 22-2602 (2007).
468. KAN. CONST. Bill of Rights § 10.
469. *Hunt*, 176 P.3d at 187.
470. *Id.* at 187–88.
471. *Id.* at 189.
472. *Id.*

not properly established.[473] However, under K.S.A. 22-2611, if the cause of death and death occur in different counties, then prosecution is appropriate in either county.[474] The Kansas Supreme Court held that statements made during closing arguments do not trump the charging document, thus venue and jurisdiction were proper.[475]

The outcome in this case was appropriate. First, to allow seemingly offhand comments by prosecutors to outweigh the charging document would put an impossible burden on prosecutors to be mistake-free, and would allow defendants to subvert justice through minor prosecutorial missteps. This is especially true when trials extend over long periods of time during which the possibility of verbal mistakes by prosecuting attorneys is increased. Furthermore, because the Kansas statute allows for venue and jurisdiction in both the county of death and the county of the cause of death, a simple misstatement between the two is irrelevant and harmless.

F. Joinder and Severance

K.S.A. 22-3202(3) allows two or more defendants to be charged in the same criminal complaint, information, or indictment if they engaged in the same action that constituted the crime being charged.[476] Similarly, K.S.A. 22-3204 allows the defendants who have been jointly charged to be severed for the purpose of trial when requested by the defendant or by the State.[477] The language of the severance statute gives the court discretion in granting separate trials; however, a court should only grant separate trials if a defendant would be unduly prejudiced by a joint trial.[478]

In *State v. Reid*, the defendant was charged and convicted of first-degree premeditated murder and aggravated robbery.[479] Reid was tried with a co-defendant on the murder and aggravated robbery charges, and the co-defendant was acquitted.[480] During the trial, Reid made a motion for severance, which was denied, and he subsequently appealed the denial.[481] In arguing that he was prejudiced, Reid claimed that the co-

473. *Id.* at 190.
474. KAN. STAT. ANN. § 22-2611 (2007).
475. *Hunt*, 176 P.3d at 190.
476. § 22-3202(3).
477. *Id.* § 22-3204.
478. State v. Reid, 186 P.3d 713, 730 (Kan. 2008).
479. *Id.* at 720.
480. *Id.* at 730.
481. *Id.*

defendant's defense was antagonistic to his own.[482] In reaching its decision, the Kansas Supreme Court analyzed several factors to determine whether the trial court's failure to sever amounted to reversible prejudice.[483] The court determined that Reid was not prejudiced.[484] The court held that mere divergence in defenses is not enough; rather, the defenses must be so contradictory that a jury would convict merely on the inconsistency.[485]

Though in this case the result was appropriate, the court applies a difficult burden for defendants to meet. Even if co-defendants' defenses are not so divergent as to allow a jury to convict solely based on the divergence, a difference in defenses could be enough to tip the scales of justice against a defendant. A situation is conceivable where, absent a divergent defense, a defendant could be acquitted, but taken in conjunction with other evidence, the divergent defense could secure a conviction. This is especially true in a situation where each defendant is blaming the other. Therefore, the burden put on defendants to show prejudice in this manner may be too harsh and may prove too costly for certain defendants.

G. The Arraignment

The arraignment is the "formal act of calling the defendant before a court having jurisdiction to impose sentence for the offense charged, informing the defendant of the offense with which the defendant is charged, and asking the defendant whether the defendant is guilty or not guilty."[486] The requisites and sufficiency of arraignment in Kansas seem well settled, with few cases arising in the appellate courts.[487] The most recent case concerning the sufficiency of an arraignment was decided in 1998.[488]

Under K.S.A. 22-3402(1)–(2), the date of arraignment starts the clock for purposes of the Kansas Speedy Trial Statute.[489] There is a 90-day time limit from the time of arraignment for bringing a person to trial

482. *Id.*
483. *Id.* at 730–31.
484. *Id.* at 731.
485. *Id.*
486. KAN. STAT. ANN. § 22-2202(3) (2007).
487. *See, e.g.*, State v. Rosine, 664 P.2d 852 (Kan. 1983); State v. Taylor, 594 P.2d 262 (Kan. Ct. App. 1979).
488. State v. Ruff, 967 P.2d 742, 745 (Kan. 1998), *overruled on other grounds by* State v. Weaver, 78 P.3d 397, 401 (Kan. 2003).
489. § 22-3402(1)–(2).

when that person is "charged with a crime and held in jail solely by reason thereof" and a 180-day time limit from the time of arraignment if the defendant has been let out on bond.[490]

In *State v. Angelo*, the defendant argued that his trial did not commence within 90 days of arraignment as directed by the Speedy Trial Statute.[491] The case concerned a defendant who was held in a Missouri jail on separate charges and then transferred to a Kansas jail to face murder charges.[492] The court found that, while the 90 day limit is correct, it is only triggered when the defendant is being held in jail solely on account of the crime for which he is charged in that jurisdiction.[493] In a situation involving transfer across jurisdiction, the Agreement on Detainers, rather than the Kansas Speedy Trial Statute, sets time limits within which trial must commence.[494] The Agreement on Detainers states that, if a person has started a term of imprisonment and charges are filed against the person:

> [H]e shall be brought to trial within one hundred and eighty (180) days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint.[495]

Since the defendant was already serving time, the Speedy Trial Act was inapplicable,[496] and the date of arraignment was not the triggering date for determining when trial must commence. This case is important for clarifying the different statutes that govern when a defendant must be brought to trial, and the application of the statutes depends on whether the defendant is already serving a term for past convictions.

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490. *Id.*

491. 197 P.3d 337, 344 (Kan. 2008).

492. *Id.*

493. *See id.* (holding that "K.S.A. 22-3402 does not apply because Angelo was not in its custody 'solely' on the murder charges").

494. *Id.*

495. § 22-4401.

496. *See Angelo*, 197 P.3d at 345 ("Both detainers acts establish speedy trial deadlines for inmates separate from the one contained in K.S.A. 22-3402, which is simply inapplicable to Angelo under these circumstances.").

H. Guilty Pleas

K.S.A. 22-3210 establishes rules by which courts evaluate a criminal defendant's plea of guilty or nolo contendere (often called no contest).[497] A plea of guilty or nolo contendere can be made before or during trial when the defendant or counsel enters the plea in open court and there is a factual basis for the plea.[498] In felony cases, the court must also inform the defendant of the consequences of the plea, including sentencing guidelines, and determine that the plea has been made voluntarily and with understanding of the consequences.[499] K.S.A. 22-3210(a)(2) requires the judge accepting a felony guilty or nolo contendere plea to tell the defendant of the "consequences" of this action.[500] One consequence is the waiver of ability to appeal the conviction, while other consequences the judge must reveal at sentencing are: "(1) a right to appeal the severity level of the sentence exists; (2) any such appeal must be taken within 10 days; and (3) if the defendant is indigent, an attorney will be appointed for the purpose of taking any desired appeal."[501]

Motions to withdraw pleas are governed by K.S.A. 22-3210(d), which states that "[a] plea of guilty or nolo contendere, for good cause shown and within the discretion of the court, may be withdrawn at any time before sentence is adjudged."[502] The subsection also allows a court to permit the defendant to withdraw a plea after sentencing in order to correct "manifest injustice."[503] An appeals court can overturn a district court's denial of motion to withdraw a plea after sentencing only when there is an abuse of discretion.[504]

In *State v. Riis*, the Kansas Court of Appeals determined that the defendant was entitled to have the trial court conduct an in camera inspection of KBI and police records in order to determine if there might be relevant evidence within the records.[505] The case was remanded to the trial court for an in camera inspection of records and for reconsideration of the defendant's motion to withdraw his plea if the records were

497. § 22-3210.
498. *Id.* § 22-3210(a)(1), (4).
499. *Id.* § 22-3210(a)(2), (3).
500. *Id.* § 22-3210(a)(2).
501. State v. Patton, 195 P.3d 753, 766 (Kan. 2008) (citations omitted).
502. § 22-3210(d).
503. *Id.*
504. State v. Riis, 178 P.3d 684, 685 (Kan. Ct. App. 2008) (citing State v. Beauclair, 130 P.3d 40 (Kan. 2006)).
505. *Id.* at 684.

relevant to the defendant's defense theory.[506] The *Riis* case shows that courts are sympathetic to a defendant wishing to withdraw a plea after sentencing when the defendant has a valid reason, such as the possibility of new evidence, for raising an appeal to seek more discovery. This comports with the general principle, highlighted in *Brady v. Maryland*, that the role of the government is to establish justice, not merely to win the case at bar.[507] When more pertinent information can be made available to a criminal defendant, a court is likely to give the criminal defendant a strong chance to recover that information by withdrawing a plea.

As noted above, a defendant can withdraw a plea of guilty or nolo contendere after sentencing only to remedy manifest injustice.[508] This manifest injustice is difficult to prove, as shown through many recent unpublished Kansas appellate cases. For instance, in *State v. Harber*, the court recommended that judges consider "whether: (1) the defendant was represented by competent counsel; (2) the defendant was misled, coerced, mistreated, or unfairly taken advantage of; and (3) the plea was fairly and understandingly made."[509] The defendant must prove that the court abused its discretion in denying the motion to withdraw plea because reasonable people would agree that the decision was incorrect.[510] Where the defendant does not "bring forward any new evidence to support her motion to withdraw her plea," but instead attempts to recast old evidence in a new light, the defendant will lose the motion if she cannot rule out the state's explanation of the evidence.[511] The court will not reweigh evidence already evaluated by the trial court in making this determination.[512]

State v. Gillen attempted to clear up when appeals can be taken in the context of a guilty plea before a magistrate judge.[513] K.S.A. 22-3609a provides that "[a] defendant shall have the right to appeal from any judgment of a district magistrate judge."[514] The district court held that a defendant, under K.S.A. 22-3609a, cannot "appeal a conviction and

506. *Id.* at 687.

507. 373 U.S. 83, 88 n.2 (1963) (noting this principle in the realm of advocating on behalf of the federal government).

508. *See* § 22-3210(d).

509. No. 97,372, 2008 WL 4471380, at *5 (Kan. Ct. App. Oct. 3, 2008) (per curiam) (citing State v. Bey, 17 P.3d 322, 325 (Kan. 2001)).

510. *Id.*

511. *Id.* at *6.

512. *Id.*

513. 181 P.3d 564 (Kan. Ct. App. 2008).

514. KAN. STAT. ANN. § 22-3609a(1) (2007).

sentence from a district magistrate judge when the same is the result of a plea entered pursuant to plea negotiations."[515] The underlying rationale for the district court was that the defendant in the case was not "aggrieved" by a judgment of the magistrate judge because the plea was entered voluntarily, and the defendant must be aggrieved before taking an appeal from a district magistrate ruling.[516] The Court of Appeals, in overturning the district court, determined that a defendant does not need to file a motion in order to withdraw a plea before a magistrate judge prior to appealing in a district court.[517]

The court in *Gillen* justified this ruling because magistrate judges are often not trained lawyers and their criminal jurisdiction is limited to minor crimes and felony arraignments; therefore, appeal from their rulings should have relaxed standards.[518] In addition, the statutory language of section 22-3609a is clear that a right to appeal attaches to "any judgment of a district magistrate judge."[519] Given this clear statutory language, the court did not accept the district court's reading into the statute of a requirement that the defendant be aggrieved before taking an appeal.[520]

The Kansas Court of Appeals' statutory construction in *Gillen* seems valid. K.S.A. 22-3609a makes clear that "any" decision by a magistrate judge is directly appealable to a district judge. The word "any" modifies judgment, clearly showing the breadth of decisions from which a defendant can appeal a magistrate judge ruling. However, this ruling does seem to promote appeals after plea bargains at the magistrate judge level. The district court may have been trying to disrupt this incentive, but, as the appeals court pointed out, that is the job of the legislature, not the courts.

Notwithstanding the manifest injustice standard for withdrawing a plea under K.S.A. 22-3210(d), Kansas courts recognize separate grounds for allowing an appeal after the normal time limit for appeals has expired. These three exceptions to the normal requirement are known as *Ortiz* exceptions, from the name of the case in which they were first articulated.[521] In *State v. Patton*, the Kansas Supreme Court recognized that "fundamental fairness would allow a late appeal if a defendant (1)

515. *Gillen*, 181 P.3d at 566.

516. *Id.*

517. *Id.* at 570.

518. *See id.* at 569–70 ("An additional consideration is the lack of legal training/degree for a majority of district magistrate judges and their limited jurisdiction.").

519. *Id.* at 567 (quoting § 22-3609a(1)).

520. *Id.* at 570.

521. State v. Ortiz, 640 P.2d 1255 (Kan. 1982).

had not been informed of his or her right to appeal, (2) had not been furnished an attorney to perfect an appeal, or (3) had been furnished an attorney who failed to perfect an appeal."[522]

In *Patton*, the Kansas Supreme Court attempted to come to grips with the increasing role that the *Ortiz* exceptions have played in Kansas courts. The Court noted the limits of *Ortiz*:

> It did not endow criminal defendants with any additional constitutional rights. It did not impose affirmative duties on counsel or the court. It did not set up new requirements that must be met to prevent a late appeal. Arguments based on any of these approaches twist its intention and application.[523]

Rather, *Ortiz* reiterated the rule that defendants enjoy procedural due process rights on appeal, and if fundamental fairness is violated through one of three "exceptional circumstances," then an appropriate remedy is a late direct appeal.[524] The first *Ortiz* exception applies when "he or she has been denied basic procedural due process, i.e., timely and reasonable notice and an opportunity to be heard."[525] The second exception applies "only to defendants who were indigent when they desired to take a timely appeal," but not to a defendant who could afford to retain counsel.[526] Finally, "the third *Ortiz* exception may apply to retained counsel as well as appointed counsel" and requires that the defendant "demonstrate that, but for counsel's failure, he or she would have taken a timely direct appeal."[527]

In *Patton*, the Kansas Supreme Court attempted to rein in the overbroad use of the *Ortiz* exceptions by defining them as exceptional. The Court went to great lengths to clarify the application of these exceptions. While defendants have begun taking advantage of the exceptions more frequently, courts should be less likely to grant the appeals in the future after *Patton*. However, the value of *Patton* in limiting defendants' use of the *Ortiz* exceptions may be hampered by the result in the case, which granted a late appeal to the defendant based on the third *Ortiz* exception—"he was furnished an attorney who failed to perfect his direct appeal."[528] Attempts to use the *Ortiz* exceptions will

522. 195 P.3d 753, 758–59 (Kan. 2008) (quoting *Ortiz*, 640 P.2d at 1258).
523. *Id.* at 764.
524. *Id.* at 764–65.
525. *Id.* at 766.
526. *Id.* at 768.
527. *Id.* at 768–69.
528. *Id.* at 771.

probably increase in the future until appeals courts make it clear, by actions and not just words, that they are rarely granted.

I. Discovery

State prosecutors have a constitutional duty under the U.S. Constitution to disclose exculpatory evidence to a criminal defendant. In *Brady v. Maryland*, the United States Supreme Court established the rule that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[529] This rule is based on the rationale that "[s]ociety wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly."[530]

The *Brady v. Maryland* rule continues to be endorsed by Kansas courts.[531] There are three elements that a criminal defendant must prove in order to establish prosecutorial misconduct in withholding evidence: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued."[532] In *State v. Wilkins*, for instance, the defendant raised an appeal based on a *Brady* violation, arguing that the prosecutor withheld evidence on a grant of immunity given to a witness and the results of the same witness's polygraph tests.[533] The *Brady* rule can apply in three situations:

> "(1) 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 have not escaped the prosecutor's attention; (2) 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; and (3) where suppression was not deliberate and no request for evidence was made, but where hindsight discloses that it

529. 373 U.S. 83, 87 (1963).

530. *Id.*

531. *See, e.g.*, Wilkins v. State, 190 P.3d 957, 971 (Kan. 2008); State v. Adams, 124 P.3d 19, 26 (Kan. 2005).

532. *Wilkins*, 190 P.3d at 971–72 (quoting Banks v. Dretke, 540 U.S. 668, 691 (2004)).

533. *Id.* at 964.

> was so material that the defense could have put the evidence to significant use."[534]

In *Wilkins*, the district court denied relief on the *Brady* claim because the defense attorney knew of the immunity agreement and because polygraph results are inadmissible.[535] On appeal, the Kansas Court of Appeals determined that the prosecutor's suppression of the polygraph results was prejudicial and reversed the conviction.[536] The Kansas Supreme Court concluded that Wilkins could establish two elements of the *Brady* test: (1) that the polygraph result evidence was suppressed by the state; and (2) it would have been exculpatory by discrediting a prosecution witness.[537] Despite meeting two elements of the test, Wilkins was unable to show that the evidence was material and, therefore, prejudicial to him because polygraph results are inadmissible in Kansas and the results merely reinforced evidence already presented by the defense.[538] Thus, Wilkins was "not entitled to reversal of his convictions or retrial because of ineffective assistance of trial counsel and/or evidence withheld by the prosecutor" and the trial court's verdict was affirmed.[539]

It is difficult to prove a claim of inappropriate prosecutorial suppression of evidence in Kansas. Although the defendant does not need to show intent to suppress on the part of the State, it is necessary to prove that the missing evidence was both exculpatory and prejudicial to the defendant's case. Proving that lack of evidence is prejudicial requires a showing that there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[540] A reasonable probability standard is vague and gives the benefit of the doubt to the State because if the case is close, a reasonable probability of a different result would not be present.

K.S.A. 22-3212 contains the rules for discovery in a criminal proceeding.[541] Kansas's open file statute provides that the prosecuting attorney must allow the defendant to inspect or copy many kinds of evidence upon request.[542] Evidence covered under the open file statute

534. *Adams*, 124 P.3d at 26 (quoting State v. Kelly, 531 P.2d 60, 64–65 (Kan. 1975)).
535. *Wilkins*, 190 P.3d at 964.
536. *Id.* at 966.
537. *Id.* at 972.
538. *Id.* at 972–73.
539. *Id.* at 973.
540. *Id.* at 972 (quoting Haddock v. State, 146 P.3d 187, 211 (Kan. 2006)).
541. KAN. STAT. ANN. § 22-3212 (2007).
542. *Id.* § 22-3212(a).

includes statements of confessions, reports of examinations, recorded testimony before a grand jury, and memoranda of oral confessions made by the defendant.[543] The trial court may order sanctions if the open file rules are not obeyed, including ordering "such party to permit the discovery or inspection of materials not previously disclosed, grant a continuance, or prohibit the party from introducing in evidence the material not disclosed, or it may enter such other order as it deems just under the circumstances."[544] The prosecutor's duties under K.S.A. 22-3212, unlike under the *Brady* rule, are not an automatic safeguard for the defendant because, while *Brady* does not require an affirmative request by the defendant in order to call into question the suppression of evidence by the prosecutor, K.S.A. 22-3212 does require such a request.

J. Pretrial Motions and Pretrial Conference

1. Motions to Suppress and Motions in Limine

Pretrial motions to suppress evidence are an important part of a criminal proceeding. Pretrial motions to suppress evidence:

> shall be in writing and state facts showing wherein the search and seizure were unlawful. The judge shall receive evidence on any issue of fact necessary to determine the motion and the burden of proving that the search and seizure were lawful shall be on the prosecution.[545]

Suppression motions must be made "before or during any preliminary examination."[546] In order to require a hearing on the suppression of evidence, the defendant must show more than just a conclusory statement with no specific supporting facts.[547]

Kansas trial courts can grant pretrial motions in limine to prohibit inadmissible evidence.[548] Motions in limine can be granted when: (1) the evidence or testimony in question would be inadmissible at trial based on the rules of evidence; and (2) offering up the evidence would tend to prejudice the jury.[549] Courts use a two part test to evaluate alleged

543. *Id.*

544. *Id.* § 22-3212(g).

545. *Id.* § 22-3216(2).

546. *Id.* § 22-3216(4).

547. State v. Paden, No. 97,342, 2008 WL 440753, at *2 (Kan. Ct. App. Feb. 15, 2008) (per curiam).

548. State v. Quick, 597 P.2d 1108, 1112 (Kan. 1979).

549. State v. Copridge, 918 P.2d 1247, 1254 (Kan. 1996) (citing State v. Massey, 747 P.2d 802, 810 (Kan. 1987)).

violations of approved motions in limine: "'(1) Was there a violation of the order in limine and (2) if the order in limine is violated, did the testimony substantially prejudice the defendant? The burden is on the defendant to show substantial prejudice.'"[550]

In *State v. Crum*, the order in limine precluded evidence of the defendant's criminal record.[551] The appellant must show in the record where violations of the in limine order were made, and the party who obtained the order precluding introduction of evidence must object if evidence is introduced that violates the order.[552] Since the defendant in *Crum* did not object, and could not point to evidence in the record proving the violation, the district court was correct in not granting a mistrial. It is crucial that a defendant preserve a pretrial motion in limine on appeal by objecting to admission of evidence that violates the order.[553]

A pretrial motion to suppress is much more critical for both the defendant and the prosecutor than a motion in limine. While both of them can be made as pretrial motions, the order in limine is easier to circumvent because the witness offering testimony can come close to revealing information that is off limits, but a court will not reverse a conviction without substantial prejudice to the defendant. In addition, the defendant can lose the right to raise the issue of an in limine violation when the evidence is not objected to upon admission at trial. With a suppression order, the evidence is never admissible, and indeed the jury never hears the evidence at all. Additionally, some of the evidence rules are relaxed at a suppression hearing[554] while the rules of evidence are in force if the defense attorney is trying to enforce the in limine order through objections at trial.

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550. State v. Crum, 184 P.3d 222, 233 (Kan. 2008) (quoting State v. Gleason, 88 P.3d 218, 231 (Kan. 2004)).

551. *Id.* at 234.

552. *See id.* ("[E]ven if the proffered comment was actually made by the witness and even if Crum had preserved the issue for appeal, we would find that the jury would not necessarily have to infer from the comment that Crum had a prior record and that the district court would not abuse its discretion in refusing to grant a mistrial for that rather innocuous testimony.").

553. *See, e.g.*, State v. Drayton, 175 P.3d 861, 868 (Kan. 2008) (noting that the issue of violation of the in limine order had not been preserved for appeal because the defendant "did not object at trial").

554. *See* Elizabeth Phillips Marsh, *Does Evidence Law Matter in Criminal Suppression Hearings?*, 25 LOY. L.A. L. REV. 987, 999 (noting the relaxation of rules on hearsay during suppression motions).

2. Pretrial Conference

After an indictment or information is filed, "the court upon motion of any party or upon its own motion may order one or more conferences to consider such matters as will promote a fair and expeditious trial."[555] The goal of a pretrial conference is "to expedite processing and disposition of the litigation, minimize expense and conserve time."[556] A pretrial conference shall take action with respect to identifying issues and "exploring the possibilities of stipulations and settlement";[557] discovery plans and electronic discovery;[558] privilege claims;[559] and deadlines for motions and trial dates.[560] Admissions made by the defense attorney or the defendant cannot be used against the defendant unless the admissions are written and signed by the defendant and his attorney.[561]

IV. TRIAL RIGHTS

A. Speedy Trial

Defendants have both a statutory and a constitutional right—under the U.S. Constitution and the Kansas Constitution—to a speedy trial.[562] The constitutional right "attaches when one becomes accused and the criminal prosecution begins, usually by either an indictment, an information, or an arrest, whichever first occurs."[563] In Kansas, the statutory right is found in K.S.A. 22-3402, which reads:

> If any person charged with a crime and held to answer on an appearance bond shall not be brought to trial within 180 days after arraignment on the charge, such person shall be entitled to be discharged from further liability to be tried for the crime charged, unless the delay shall happen as a result of the application or fault of the defendant . . . .[564]

555. KAN. STAT. ANN. § 22-3217 (2007).
556. KAN. STAT. ANN. § 60-216(a) (Supp. 2008).
557. *Id.* § 60-216(b)(1).
558. *Id.* § 60-216(b)(4)–(5).
559. *Id.* § 60-216(b)(6).
560. *Id.* § 60-216(b)(8)–(9).
561. KAN. STAT. ANN. § 22-3217 (2007).
562. U.S. CONST. amend. VI; KAN. CONST. Bill of Rights § 10.
563. State v. Taylor, 594 P.2d 262, 266 (Kan. Ct. App. 1979).
564. § 22-3402(2).

Indeed, the prosecution carries the burden of ensuring a speedy trial.[565] In fact, a defendant is not charged with taking any action.[566] But there is a caveat; a defendant can waive the right to a speedy trial by requesting or agreeing to a continuance.[567]

In light of these guidelines, the Kansas courts use a four-part test developed by the United States Supreme Court to determine whether there has been a speedy trial violation.[568] The four factors are: (1) the length of delay, (2) the reason for the delay, (3) the defendant's assertion of his or her speedy trial right, and (4) prejudice to the defendant.[569] These factors, however, are not exhaustive. Courts must consider all relevant evidence.[570] However, a court will not conduct an analysis unless it first finds a delay in the trial that is "presumptively prejudicial" to the defendant.[571]

A recent Kansas Supreme Court case concerning the speedy trial clock is *State v. Mitchell*.[572] *Mitchell* dealt with the effect of a statutorily unauthorized interlocutory appeal on the speedy trial clock.[573] Mitchell was initially tried for first-degree murder.[574] At trial, the district court ruled the jury was unduly prejudiced by a stipulation that the defendant had "been adjudicated as a juvenile offender for discharging a firearm at an occupied vehicle."[575] On the same day as the court declared a mistrial, in September 2005, Mitchell was shot.[576] As a result of the time required to recover, Mitchell waived his speedy trial right.[577] In March 2007, when Mitchell finally went to trial, he agreed to stipulate to both a prior juvenile adjudication that would have been a felony if committed by an adult, and that he was in possession of a gun at the time of the offense.[578] The State, however, requested a more comprehensive stipulation that included details of the prior offense.[579] The court rejected

565. State v. Adams, 153 P.3d 512, 515–16 (Kan. 2007).
566. *Id.* at 516.
567. *Id.*
568. State v. Rivera, 83 P.3d 169, 173 (Kan. 2004) (citing Barker v. Wingo, 407 U.S. 514, 530 (1972)).
569. *Id.*
570. *Id.*
571. *Id.*
572. 179 P.3d 394 (Kan. 2008).
573. *Id.* at 395.
574. *Id.* at 396.
575. *Id.*
576. *Id.*
577. *Id.*
578. *Id.*
579. *Id.*

the separate stipulation for the jury but allowed it for the record.[580] As a result, the State was barred from introducing any specific evidence pertaining to Mitchell's prior offense.[581] The State filed an interlocutory appeal challenging the district court's ruling.[582] The interlocutory appeal caused the district court to suspend the proceedings pending the result of the appeal.[583] In reaction to the appeal, Mitchell objected and reasserted his right to a speedy trial.[584]

The Kansas Supreme Court ruled that it did not have statutory jurisdiction over the interlocutory appeal because the district court's decision to limit the stipulation did not "substantially impair the State's ability to prosecute the case."[585] Because the appeal was statutorily unauthorized, Mitchell argued that the State should be charged for the time elapsed on appeal.[586] After finding that Mitchell reasserted his speedy trial rights by filing his objection to the interlocutory appeal,[587] the court proceeded to determine whether *State v. Unruh* applied.[588] In *Unruh*, the court held that the time it takes to file an unauthorized interlocutory appeal should be charged to the State.[589] The court decided that *Unruh* did apply, and thus, the State was charged for the time.[590] The court found that even with the State's entitlement to an extra ninety days after Mitchell revoked his waiver, the speedy trial clock ran out in September 2007.[591] Thus, the first-degree murder charge against Mitchell was dismissed.[592]

State v. Mitchell is interesting because it demonstrates the heavy burden upon the State to ensure that a defendant's speedy trial rights are protected. Although *Mitchell* does not make new law on the speedy trial issue, it does show that a prosecutor must be very careful when determining how to proceed unilaterally in a trial. The prosecutor must be certain the interlocutory appeal is statutorily allowable. Or, perhaps, prosecutors should err on the side of pursuing appeals after a final judgment and avoid interlocutory appeals except in the most egregious

580. *Id.*
581. *Id.*
582. *Id.*
583. *Id.*
584. *Id.*
585. *Id.* at 400.
586. *Id.* at 401.
587. *Id.* at 402.
588. *Id.* (citing State v. Unruh, 946 P.2d 1369 (Kan. 1997)).
589. *Unruh*, 946 P.2d at 1374.
590. *Mitchell*, 179 P.3d at 402.
591. *Id.*
592. *Id.*

circumstances. For Mitchell, the only saving grace was the reassertion of his speedy trial rights. If he had failed to object to the interlocutory appeal in the manner that he did, it is likely he would have been put on trial. Therefore, although the burden is on the prosecution to observe the speedy trial clock, defendants cannot be complacent; rather, they must be cognizant of when and how they waive their speedy trial rights.

B. Trial by Jury

Over the years, the United States Supreme Court has illuminated how the Federal constitutional right to a jury trial—both under the Sixth and Fourteenth Amendments—operates in a state criminal case. The seminal decision was *Duncan v. Louisiana*, which held that the Sixth Amendment right to a jury trial applied to the states through the Due Process Clause of the Fourteenth Amendment.[593] In recognizing very real concerns with administering justice in an efficient manner if all defendants have the right to a jury trial, including those accused of petty offenses,[594] the majority in *Duncan* held that a jury trial is a fundamental right when the defendant is accused of a serious crime.[595] The Court in *Duncan* decided that the question of whether a crime is serious should turn on the potential sentence that the defendant could receive.[596] The Court recognized that petty offenses are generally those that carry a prison term of six months or less.[597]

In later cases, the Supreme Court refined its approach, indicating in *Baldwin v. New York* that even though many factors are considered, "the most relevant such criteria [is] the severity of the maximum authorized penalty."[598] For the Court, the potential term of incarceration indicated a judgment made by the legislature about the seriousness of the crime.[599] In recognizing this consideration, the *Baldwin* Court held that the potential for any prison term longer than six months entitled the defendant to a jury trial.[600] The Court, however, has recognized that crimes carrying a potential prison term of less than six months may yet be serious offenses, if other more serious penalties attach.[601] The burden,

593. 391 U.S. 145, 147–58 (1968).
594. *Id.* at 158.
595. *Id.* at 157–58.
596. *Id.* at 159–61.
597. *Id.* at 161.
598. 399 U.S. 66, 68 (1970) (plurality opinion).
599. Blanton v. City of N. Las Vegas, 489 U.S. 538, 543 (1989).
600. *Baldwin*, 399 U.S. at 69.
601. *Duncan*, 391 U.S. at 161.

however, is on the defendant because the Court "presume[s] for purposes of the Sixth Amendment that society views such an offense as 'petty.'"[602]

The right to a jury trial under the Kansas Constitution is significantly different than that under the U.S. Constitution. The Kansas Constitution grants the right to a jury trial under Sections 5 and 10 of the Kansas Constitution Bill of Rights.[603] Section 5 mandates that "[t]he right of trial by jury shall be inviolate."[604] Section 10 reads: "In all prosecutions, the accused shall be allowed . . . a speedy and public trial by an impartial jury . . . ."[605] The Kansas Supreme Court has expounded on what qualifies as a criminal prosecution, and although a jury trial has been denied for a bastardy proceeding—where the court indicated that "all prosecutions" referred only to those prosecutions for violations of Kansas laws[606]—the right to a jury trial was recognized in a nuisance proceeding.[607] The Court, in *In re Rolfs*, declared that "no party can be subjected to a prosecution for an act of a criminal nature, . . . without in some way and before some tribunal being secured an opportunity of having the truth of that charge inquired into by an impartial jury of the district."[608]

In subsequent years, the Kansas legislature decided when and how the right to a jury trial may be invoked. Because the right applies in any criminal prosecution, it attaches for both felonies and misdemeanors.[609] However, the right operates differently in each circumstance. When accused of a felony, a defendant is entitled to a jury of twelve, unless the parties agree to a waiver.[610] In contrast, misdemeanors are presumptively tried by the court unless the defendant requests a jury trial in writing, in which case the jury has six members.[611] Therefore, unlike under the U.S. Constitution, under Kansas law, defendants still enjoy the right to a jury trial for petty offenses.[612] There are a few exceptions, however, namely trials in municipal court and those for tobacco or traffic infractions.[613]

602. *Blanton*, 489 U.S. at 543.
603. KAN. CONST. Bill of Rights §§ 5, 10.
604. *Id.* § 5.
605. *Id.* § 10.
606. State *ex rel.* Mayer v. Pinkerton, 340 P.2d 393, 394 (Kan. 1959) (citing State *ex rel.* Williams v. Herbert, 152 P. 667 (Kan. 1915)).
607. *In re* Rolfs, 1 P. 523, 526–27 (Kan. 1883).
608. *Id.* at 526.
609. *See* KAN. STAT. ANN. §§ 22-3403 to -3404 (2007).
610. *Id.* § 22-3403(2).
611. *Id.* § 22-3404(1)–(2).
612. *Id.* § 22-3404.
613. *Id.* § 22-3404(5).

Although the right to a jury trial is generally regarded as essential to due process and a fair trial in adult proceedings, juveniles have historically been excluded from exercising the right.[614] In Kansas, juveniles have recently gained traction in the battle to safeguard their right, and the recent Kansas Supreme Court decision of *In re L.M.*[615] furthers their cause. A sixteen-year-old juvenile, known only as L.M., was arrested on one count of aggravated sexual battery and one count of minor in possession of alcohol.[616] In district court, L.M. requested a jury trial, but the trial court denied the request.[617] Under the Kansas Juvenile Justice Code, a judge's authority to grant a jury trial is discretionary.[618] After a bench trial, L.M. was convicted on both counts, as a Serious Offender I under the Juvenile Justice Code, and sentenced to eighteen months in a juvenile correctional facility; however, L.M.'s sentence was stayed in lieu of being placed on probation until the age of twenty.[619] The district court also ordered L.M. to register as a sex offender and to seek treatment.[620] L.M. appealed the denial of a jury trial to the Kansas Supreme Court,[621] which issued a landmark decision in June 2008. The Court held that juveniles have a constitutional right to a jury trial, both under the Kansas Constitution and the U.S. Constitution, via the Sixth and Fourteenth Amendments.[622] The Court's recognition of this right in juvenile trials may significantly alter the landscape of juvenile prosecutions in Kansas. Because the Court did not provide clear standards for the types of cases to which this jury trial right will apply, juvenile courts may be ill equipped to handle the potential influx of jury trials in the future.

614. Gerald P. Hill, *Revisiting Juvenile Justice: The Requirement for Jury Trials in Juvenile Proceedings Under the Sixth Amendment*, 9 FLA. COASTAL L. REV. 143, 143 (2008) (citing McKeiver v. Pennsylvania, 403 U.S. 528, 545 (1971)).

615. 186 P.3d 164 (Kan. 2008). For an in-depth treatment of this case see Andrew Treaster, *Juveniles in Kansas Have a Constitutional Right to a Jury Trial. Now What? Making Sense of* In re L.M., 57 U. KAN. L. REV. 1275 (2009).

616. *In re L.M.*, 186 P.3d at 165.

617. *Id.*

618. KAN. STAT. ANN. § 38-2357 (Supp. 2008) (providing that in felony trials for juveniles, the court "may upon motion, order that the juvenile be afforded a trial by jury").

619. *In re L.M.*, 186 P.3d at 165.

620. *Id.*

621. *Id.*

622. *Id.* at 170, 172.

1. Impartial Jury

The right to an impartial jury is guaranteed by the Sixth Amendment to the U.S. Constitution.[623] The United States Supreme Court interpreted this requirement in *Duren v. Missouri*.[624] In *Duren*, the Court established the following test to determine whether a jury consists of a fair cross-section of the community:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[625]

Kansas appellate courts did not hear any cases in which they applied the *Duren* test during the last year.

2. Peremptory Challenges

Both the State and the defendant have the right to exercise peremptory challenges for any reason, so long as that reason is related, in some manner, to the outcome of the case.[626] When a peremptory challenge is allegedly based on race, whether the challenge meets this threshold is governed by a three-part test developed by the United States Supreme Court in *Batson v. Kentucky*, and later adopted by Kansas appellate courts. That test is as follows: (1) the defendant must show a racial basis for peremptory challenges; (2) the prosecutor must then provide a race-neutral explanation; and (3) the court must decide whether the defendant proved "purposeful discrimination."[627] The Kansas Supreme Court has required that the proponent of the strike have only a "facially valid" reason for challenging a juror, while the opponent of the strike must persuade the Court that the reason advanced is inadequate.[628]

Recently, in *State v. Angelo*, the Kansas Supreme Court analyzed the

623. U.S. CONST. amend. VI.

624. 439 U.S. 357 (1979).

625. *Id.* at 364.

626. Batson v. Kentucky, 476 U.S. 79, 89 (1986).

627. State v. Washington, 68 P.3d 134, 144 (Kan. 2003) (citing State v. Vargas, 926 P.2d 223, 226 (Kan. 1996)).

628. *Id.* at 145.

third step in the *Batson* test.[629] Angelo was convicted on two counts of first-degree murder.[630] During jury selection, the prosecutor struck twelve jurors—six black, five white, and one Asian.[631] Angelo, who is black, challenged three of the strikes on black jurors—jurors 8, 31, and 38—as racially motivated.[632] After Angelo satisfied step one, the Court elicited reasons from the State explaining why the three jurors had been struck. The State explained that it struck juror 8 because of participation on a hung jury.[633] Juror 31 was struck because of a relative that was arrested.[634] Finally, juror 38 was struck because of unfavorable body language.[635] Although Angelo's counsel asserted that those reasons were insufficient, the court found that all three reasons offered by the State were race-neutral and enough to satisfy the *Batson* test.[636] However, the court failed to clearly articulate its analysis of the third step.[637] Angelo challenged that failure, but the Kansas Supreme Court held that it is acceptable for courts to conduct the third step in the *Batson* analysis implicitly, no exact language needs to be used and the court does not need to clearly delineate the third step.[638] According to the *Angelo* court, if there was a failure to conduct the third step of the *Batson* test, then the fault is Angelo's and not the court's because Angelo had the burden of proving the inadequacy of the prosecutor's race-neutral explanations.[639]

The *Angelo* decision is interesting for several reasons. First, it demonstrates the highly deferential nature of the *Batson* test. An attorney confronted with a *Batson* challenge has a low threshold to overcome because a race-neutral reason can be virtually anything. Second, *Angelo* illustrates that the burden of proof is, for all practical purposes, always on the party making the *Batson* challenge, which leads to two observations. The party challenging peremptory strikes must not rely on the court to recognize race-based discrimination. Also, if a party truly believes race-based discrimination is taking place, then that party must marshal overwhelming evidence to refute the inevitable race-neutral explanations. Third, an attorney should exercise *Batson*

629. 197 P.3d 337, 345 (Kan. 2008).
630. *Id.* at 343.
631. *Id.* at 345.
632. *Id.* at 346.
633. *Id.*
634. *Id.*
635. *Id.* at 347.
636. *Id.*
637. *Id.*
638. *Id.* at 348–50.
639. *Id.* at 349.

challenges only when the evidence of discrimination is overwhelming. For instance, if race-neutral explanations are highly superficial and there is a complete absence of the identified racial group on the jury, then perhaps a *Batson* challenge could be sustained.[640]

C. Other Sixth Amendment Trial Rights

The Sixth Amendment to the U.S. Constitution and section 10 of the Kansas Constitution's Bill of Rights guarantee criminal defendants the right to cross-examine the witnesses against them.[641] The United States Supreme Court in *Crawford v. Washington* established the test to determine whether a defendant's confrontation rights have been violated.[642] The test turns on whether the statement is testimonial; if it is, then: (1) the declarant must be unavailable; and (2) the defendant must have had a prior opportunity to cross-examine the declarant.[643] In determining whether a statement is testimonial, Kansas appellate courts use a totality of the circumstances test.[644] Factors considered include:

> (1) Would an objective witness reasonably believe such a statement would later be available for use in the prosecution of a crime?
> (2) Was the statement made to a law enforcement officer or to another government official?
> (3) Was proof of facts potentially relevant to a later prosecution of a crime the primary purpose of the interview when viewed from an objective totality of the circumstances, including circumstances of whether
> (a) the declarant was speaking about events as they were actually happening, instead of describing past events;
> (b) the statement was made while the declarant was in immediate danger, i.e., during an ongoing emergency;
> (c) the statement was made in order to resolve an emergency or simply to learn what had happened in the past; and
> (d) the interview was part of a governmental investigation; and
> (4)Was the level of formality of the statement sufficient to make it inherently testimonial; e.g., was the statement made in response to questions, was the statement recorded, was the declarant removed

640. *See id.* at 347 (discussing factors to consider when evaluating a race-neutral reason for dismissing a juror).

641. U.S. CONST. amend. VI; KAN. CONST. Bill of Rights § 10.

642. 541 U.S. 36, 53–54 (2004).

643. *Id.*

644. State v. Henderson, 160 P.3d 776, 785 (Kan. 2007).

> from third parties, or was the interview conducted in a formal setting such as in a governmental building?[645]

When *Crawford* was decided, the United States Supreme Court declined to establish any exceptions for testimonial statements of unavailable and unconfronted witnesses.[646] However, the Court hinted that historical justification existed for recognizing exceptions for forfeiture by wrongdoing and dying declarations.[647] Although the Court in *Giles v. California* recognized an exception for forfeiture by wrongdoing, it still has not spoken on a dying declaration exception.[648]

This lack of precedent is what makes *State v. Jones* so interesting and important. In *Jones*, the Kansas Supreme Court held that the Confrontation Clause incorporated a dying declaration exception.[649] Jones was convicted of first-degree murder after shooting Brannon Wright multiple times.[650] When the paramedics arrived, Wright was conscious but paralyzed.[651] On the way to the hospital, the paramedics asked questions that elicited the identity of the shooter.[652] The State successfully admitted Wright's statements at trial under the dying declaration exception to hearsay.[653] Jones appealed the admission of those statements. Jones's argument was convoluted, but the court rephrased it as whether Wright's statements were testimonial and, therefore, should have been excluded under the Confrontation Clause.[654] The Kansas Supreme Court accepted that the statements were dying declarations and, via the *Brown* factors, found that the statements were testimonial.[655] Relying on a footnote in *Crawford* and dicta in *Giles v. California*, the *Jones* court recognized the dying declaration exception, asserting that they "are confident . . . the Supreme Court would confirm that a dying declaration may be admitted into evidence, even when it is testimonial in nature and is unconfronted."[656]

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645. State v. Brown, 173 P.3d 612, 634 (Kan. 2007).
646. State v. Jones, 197 P.3d 815, 820–21 (Kan. 2008).
647. *Id.*
648. *Id.* at 822 (citing Giles v. California, 128 S. Ct. 2678 (2008)).
649. *Id.*
650. *Id.* at 817–18.
651. *Id.* at 818.
652. *Id.*
653. *Id.*
654. *Id.* at 818–19.
655. *Id.* at 820, 822.
656. *Id.* at 821–22 (citing Giles v. California, 128 S. Ct. 2678 (2008)).

That the Kansas Supreme Court recognized a dying declaration exception to the Confrontation Clause is important because the United States Supreme Court would be entirely justified in accepting the case to expand its Confrontation Clause jurisprudence. The United States Supreme Court, as illustrated above, has remade Confrontation Clause analysis in the last four years. A potential dying declaration exception to the Confrontation Clause would likely be the last big piece. However, the Confrontation Clause rule espoused in *Crawford* appeared to be categorical, in that if the statement is testimonial, then two criteria must be satisfied. However, as seen in *Giles* and now in *Jones*, that assumption may be flawed and the decision in *Jones* leaves the door open for the United States Supreme Court to poke more holes in the rule barring testimonial hearsay.

As for a practical effect on criminal procedure in Kansas, it is difficult to predict the impact *Jones* will have. After all, both the situation and the holding seem strikingly narrow because only a finite number of dying declarations will fall within the gambit of testimonial hearsay. On the other hand, now in Kansas, and potentially nationwide, well-informed police officers and paramedics—knowing the advantage in a later prosecution—may be more conscious of obtaining information from homicide victims. But that is speculative, particularly given the high priority such practice likely already receives. Therefore, although *Jones* may impact practical aspects of Kansas criminal procedure, the decision is particularly interesting because of the Kansas Supreme Court's willingness to lead on such a timely issue. Going forward, this case, and issue, will continue to be interesting. Perhaps the United States Supreme Court will weigh in and vindicate, or rebuff, the reasoning of the Kansas Supreme Court.

D. Right to Remain Silent: Self-Incrimination

In the seminal case of *Miranda v. Arizona*, the United States Supreme Court held the Fifth Amendment's right against self-incrimination attaches when a suspect is subject to custodial interrogation.[657] To protect against self-incrimination in such situations, the Court asserted that suspects should be warned of their rights, including the right to remain silent and the right to counsel.[658] The

657. 384 U.S. 436, 478–79 (1966).

658. *Id.* at 479.

Kansas Supreme Court has recognized that if such precautions are taken, then a waiver of those rights is deemed knowing and intelligent.[659]

The Kansas Supreme Court recently addressed *Miranda* requirements in *State v. Warledo*.[660] That case concerned the interrogation prong of *Miranda*.[661] Interrogation under *Miranda* refers to more than just express questioning; it also includes "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect."[662] In *Warledo*, the trial court admitted statements made by the defendant that were spontaneous and volunteered.[663] The defendant "blurt[ed] out the statements he [sought] to suppress as soon as the fire investigator and detectives entered the room."[664] The Court determined that was not interrogation,[665] which is the correct ruling. If a criminal defendant blurts out statements when there is no custodial interrogation, then the prosecution should not be precluded from utilizing those statements at trial.

E. Proof Beyond a Reasonable Doubt

The State must prove every element of the crime charged beyond a reasonable doubt in order to convict a defendant.[666] Identifying the elements of a crime is not always easy. For example, a Kansas statute defines the offense of criminal discharge of a firearm at an occupied vehicle as "the malicious, intentional and unauthorized discharge of a firearm at a dwelling, building, structure, motor vehicle, aircraft, watercraft, train, locomotive, railroad car, caboose, rail-mounted work equipment or rolling stock or other means of conveyance of persons or property in which there is a human being."[667] The Kansas Supreme Court has held that the elements of the crime are "[t]hat the defendant maliciously and intentionally, without authorization, discharged a firearm at an occupied vehicle" and "[t]hat the act resulted in great

659. State v. Henry, 44 P.3d 466, 471 (Kan. 2002) (quoting Davis v. United States, 512 U.S. 452, 458 (1994)).

660. 190 P.3d 937 (Kan. 2008).

661. *Id.* at 946.

662. Rhode Island v. Innis, 446 U.S. 291, 300–01 (1980).

663. *Warledo*, 190 P.3d at 946.

664. *Id.*

665. *Id.*

666. State v. Crum, 184 P.3d 222, 225 (Kan. 2008).

667. State v. Farmer, 175 P.3d 221, 226 (Kan. 2008) (quoting KAN. STAT. ANN. § 21-4219(b) (2006)).

bodily harm to a person."[668] Furthermore, in *City of South Park v. Weber*, the Kansas Court of Appeals did not agree with appellant that "practicability" was a distinct element of the violation of failure to maintain a single lane of traffic[669] where the city ordinance stated that "[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."[670]

A prevalent issue in drug prosecutions is whether circumstantial evidence is sufficient to establish a necessary element of an offense. *State v. Northrup*, decided in 1992, was the first Kansas case to establish that circumstantial evidence, by itself, was enough to prove the identity of an illegal drug beyond a reasonable doubt.[671] Normally, the actual drugs, expert testimony, or a laboratory analysis is required to establish the necessary element that the substances are in fact illegal drugs beyond a reasonable doubt.[672] If only circumstantial evidence is used, the evidence "must be sufficient to convince a rational factfinder that the defendant [is] guilty beyond a reasonable doubt."[673]

In *Northrup*, the defendant was convicted of selling marijuana.[674] Although no laboratory test had been done on the substance, the trial court had found that "the substance was a green vegetation," that "$120 was paid for one ounce of it," that "secrecy and deviousness was employed in the transaction," and that "everyone involved, including the defendant, referred to and identified the substance as marijuana."[675] The Kansas Court of Appeals upheld the conviction, stating that several other courts had found circumstantial evidence alone sufficient to find that a given substance was an illegal drug.[676] The court paid particular attention to *United States v. Dolan*, which offered a non-exclusive list of considerations in finding sufficient circumstantial evidence:

> [E]vidence of the physical appearance of the substance involved in the transaction, evidence that the substance produced the expected effects when sampled by someone familiar with the illicit drug, evidence that

668. *Id.* at 226–27 (citing PIK CRIM.3d § 64.02-A-1).

669. No. 96,974, 2008 WL 588143, at *3 (Kan. Ct. App. Feb. 29, 2008) ("The evidence was sufficient to support the trial court's verdict, assuming arguendo that practicability is a distinct element of the ordinance.").

670. *Id.* at *1.

671. 825 P.2d 174, 177 (Kan. Ct. App. 1992).

672. *Id.*

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

674. *Northrup*, 825 P.2d at 175.

675. *Id.* at 180.

676. *Id.* at 177–78.

> the substance was used in the same manner as the illicit drug, testimony that a high price was paid in cash for the substance, evidence that transactions involving the substance were carried on with secrecy or deviousness, and evidence that the substance was called by the name of the illegal narcotic by the defendant or others in his presence.[677]

1. *State v. Belt*

In October 2008, the Court of Appeals cited *Northrup* in upholding another drug conviction based on circumstantial evidence.[678] In *State v. Belt*, the defendant was convicted of possession of cocaine and marijuana.[679] A vehicle search conducted due to probable cause plus exigent circumstances revealed "a white powdery substance and a green leafy substance scattered in and around defendant's vehicle."[680] In addition, the officer conducting the search found a plastic bag with white powder on it.[681] The officer testified that the defendant said he had been "driving around all day getting high on weed and crack," and it was "understood" that the defendant had tried to disguise or dispose of the drugs by chewing them up and spitting them out.[682]

As the law now stands in Kansas, circumstantial evidence is enough to support a conviction for possession of illegal drugs. Indeed, "a conviction of even the gravest offense may be sustained by circumstantial evidence."[683] The question is whether the circumstantial evidence is sufficient to allow a rational factfinder to find that the defendant possessed the drug.[684]

The first question pertaining to sufficiency of the evidence is how many factors are necessary to find the defendant guilty beyond a reasonable doubt. In *Northrup*, the Kansas Court of Appeals cited four of the factors listed in *Dolan*: physical appearance, high price, secrecy and deviousness, and the defendant and others referring to the substance by the name of an illegal drug.[685] In *Belt*, perhaps only one of *Dolan*'s

677. *Id.* at 180 (citing United States v. Dolan, 544 F.2d 1219, 1221 (D. W. Va. 1976)).

678. *Belt*, 2008 WL 4471921, at *1.

679. *Id.*

680. *Id.* at *3.

681. *Id.*

682. *Id.*

683. *Id.* at *2 (citing State v. Garcia, 169 P.3d 1069 (Kan. 2007)).

684. *Id.* at *3 ("In the absence of the actual illegal substances or expert testimony authenticating their chemical nature, the available circumstantial evidence must be sufficient to convince a rational factfinder that the defendant was guilty beyond a reasonable doubt.").

685. State v. Northrup, 825 P.2d 174, 180 (Kan. Ct. App. 1992).

factors was definitively cited: physical appearance.[686] Arguably, the defendant's saying he had been "getting high on weed and crack" referred to the substances found in the car,[687] which would be referring to the substances as illegal drugs and, thus, would be another factor. Also, the fact that the defendant chewed up and spit out the substances pointed to "secrecy or deviousness" and could arguably be another factor. However, it is unclear whether the secrecy or deviousness must relate to a drug transaction or whether it can also relate to drug possession.

The question of how many factors must be present remains open. Would one officer's testimony that a substance appeared to be an illegal drug be sufficient? What if there also appeared to be some secrecy involved in the transaction or possession? What if no substance is ever found, but the circumstances pointed to secrecy and deviousness and the defendant referred to an illegal drug? If just these two factors are sufficient, it would be theoretically possible to convict someone of possession of cocaine, even if that person had unwittingly purchased rat poison or flour. It may also be possible to convict someone of possession of an illegal drug even if no substance is ever found, provided there are other factors, like secrecy and deviousness and the defendant's referring to the illegal drug. While some would not have a problem with this outcome, it would depart from current law.

The second question is what other factors might be considered in weighing the sufficiency of the evidence. Because the *Dolan* list is non-exclusive and because Kansas has had relatively little case law in the area, the question of what non-listed factors might prove possession or sale of illegal drugs beyond a reasonable doubt remains unsettled.

Holding that circumstantial evidence alone is sufficient to convict someone of a drug offense makes sense. In most cases, law enforcement personnel are familiar enough with illegal substances that the field tests are just a technicality. Also, the circumstances surrounding the drug sale or use, such as the circumstances in *Norton*, are sufficient to show that drugs were involved.

686. *Belt*, 2008 WL 4471921, at *3 ("[A] white powdery substance and a green leafy substance [were] scattered in and around the defendant's vehicle.").

687. *Id.* at *3.

F. Other Kansas Trial Issues

1. Motion for Acquittal

Kansas law provides that a court "shall order the entry of judgment of acquittal" if the evidence presented in a criminal case is not sufficient such that a reasonable factfinder could find the defendant guilty beyond a reasonable doubt at the close of evidence on either side.[688] If these terms are met, the motion to acquit must be granted; granting the motion is not discretionary.[689] The motion may be made either at the district court or at the appellate court; the sufficiency of evidence standard is the same in both instances.[690] Furthermore, the motion can be made either by the defendant or by the court.[691]

2. Submission of the Case to the Jury

a. Judgment as a Matter of Law

In certain circumstances, judgments as a matter of law are made in lieu of submitting the case to the jury.[692] Judgments as a matter of law were previously known as directed verdicts, and the standard of review remains the same as it was under the former title.[693] To make a judgment as a matter of law, the court must find that, after resolving all facts and inferences in favor of the nonmoving party, the evidence would not allow a jury to find in favor of the nonmoving party.[694] Thus, if the nonmoving party presents no evidence or if the evidence presented is such that reasonable minds could not differ in their conclusion in favor of the moving party, the court must grant the judgment as a matter of law without submitting the case to the jury.[695]

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688. State v. Murdock, 187 P.3d 1267, 1273 (Kan. 2008) (quoting KAN. STAT. ANN. § 22-3419(1) (2007)).

689. *Id.*

690. *Id.* at 1271.

691. § 22-3419(1).

692. White v. Tomasic, 69 P.3d 208, 210 (Kan. Ct. App. 2003) (citing KAN. STAT. ANN. § 60-250 (2006)).

693. Smith v. Kan. Gas Serv. Co., 169 P.3d 1052, 1057 (Kan. 2007).

694. *Id.*

695. Welch v. Centex Home Equity Co., Nos. 95,981, 96,585, 2008 WL 713690, at *9 (Kan. Ct. App. Mar. 14, 2008) (citing Brown v. United Methodist Homes for the Aged, 815 P.2d 72 (Kan. 1991)).

b. Judgment Notwithstanding the Verdict

Closely related to a motion for judgment as a matter of law is a motion for judgment notwithstanding the verdict. Such a motion is only appropriate when a motion for judgment as a matter of law was made at the close of evidence and was not granted.[696] Moving for a motion for judgment as a matter of law preserves the option to move for a judgment notwithstanding the verdict after the jury's decison.[697] "An appellate court's standard of review on a motion for judgment notwithstanding the verdict is the same as that for" a judgment as a matter of law.[698] Thus, if the evidence is undisputed and the minds of reasonable persons may not draw different inferences or arrive at opposing conclusions, judgment notwithstanding the verdict is appropriate.[699]

3. Mistrial

A mistrial may be ordered at the trial court level if "[i]t is physically impossible to proceed with the trial in conformity with the law;" if "[t]here is a legal defect in the proceedings which would make any judgment entered upon a verdict reversible as a matter of law and the defendant requests or consents to the declaration of a mistrial;" "[p]rejudicial conduct, in or outside the courtroom, makes it impossible to proceed with the trial without injustice either to the defendant or the prosecution;" "[t]he jury is unable to agree upon a verdict;" "[f]alse statements of a juror on voir dire prevent a fair trial;" or "[t]he trial has been interrupted pending a determination of the defendant's competency to stand trial."[700]

G. Double Jeopardy

1. Generally

The Fifth Amendment to the U.S. Constitution protects defendants from double jeopardy and is applicable to the states through the Fourteenth Amendment.[701] The Kansas Constitution Bill of Rights and

696. § 60-250(b).
697. *Id.*
698. *Welch*, 2008 WL 713690, at *9.
699. *Id.*
700. KAN. STAT. ANN. § 22-3423(1) (2007).
701. State v. Johnson, 932 P.2d 380, 382 (Kan. 1997).

K.S.A. 21-3108 also provide protection from double jeopardy.[702] "Double jeopardy protection shields an accused from: '(1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense.'"[703] However, both K.S.A. 21-3108 and K.S.A. 22-3423 list exceptions to double jeopardy protection.[704]

2. Multiplicity

The seminal Kansas case for multiplicity is *State v. Schoonover*, in which the Kansas Supreme Court thoroughly analyzed the complicated concept of multiplicity under the Fifth Amendment.[705] To decide whether charges are multiplicitous, the court must first determine they were for the "same offense."[706] Charges are for the "same offense" if they are for the "same act or transaction" or for a "single course of conduct."[707] There are two categories of charges under this umbrella.

The first category is when the defendant is charged with violations of multiple statutes. Such instances are referred to as "multiple description" charges.[708] In multiple description cases, the *Blockburger* test, also known as the "elements" test, has been applied since 1932.[709] This test states that "'where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact the other does not.'"[710] Case history clarifies "that the proper inquiry focuses upon the elements of the statutes in question."[711] If each offense contains an element not contained in the other, the two offenses are distinct and both can be charged without violating multiplicity prohibitions.[712] The evidence offered at trial is irrelevant.[713] The focus is on legislative intent. If the legislature "explicitly authorized" multiple punishments, then multiple charges are

702. *Id.*
703. State v. Mertz, 907 P.2d 847, 851 (Kan. 1995) (quoting State v. Cady, 867 P.2d 270, 273 (Kan. 1994)).
704. *Johnson*, 932 P.2d at 382.
705. 133 P.3d 48, 57 (Kan. 2006).
706. *Id.* at 60.
707. *Id.*
708. *Id.*
709. *Id.* at 62.
710. *Id.* (quoting Blockburger v. United States, 284 U.S. 299, 304 (1932)).
711. *Id.*
712. *Id.*
713. *Id.*

"authorized and proper."[714] There is no rule of lenity in multiple description cases, which would allow a single punishment, because Congress intended punishment for each separate offense.[715] Separate offenses can occur even if there is a single action or course of conduct.

The second category is when the defendant is charged with multiple violations of the same statute.[716] The sole issue in these instances is the "allowable unit of prosecution."[717] Under this concept, "the statutory definition of the crime determines the minimum scope of the conduct proscribed by the statute."[718] This is called the "unit of prosecution."[719] There can be only one conviction per unit of prosecution for the same conduct.[720] When examining the definition of the crime to determine the unit of prosecution, legislative intent is again the focus; whether there was a single action or multiple actions is irrelevant.[721] In unit of prosecution cases, the rule of lenity applies.[722]

Schoonover settled Kansas case law by striking the "single act of violence/merger analysis" that had been used in one line of cases.[723] In that line, it was permissible for courts to punish a defendant in multiple description cases for the same act under two different statutes without violating due process.[724] *Schoonover* instituted a new two-part test for determining if charges are multiplicitous.[725] The first question is whether "the convictions arise from the same conduct."[726] If the conduct is done separately and severally, there is no multiplicity. Factors for determining if actions constitute the same conduct are: (1) whether the actions occurred at or near the same time; (2) whether the actions occurred at or near the same location; (3) whether there is an intervening event; and (4) whether there was a fresh impulse.[727] If the charges arise from the same conduct, the court must ask: "By statutory definition are there two offenses or only one?"[728] If there are multiple violations of a single

714. *Id.* at 63.
715. *Id.* at 64.
716. *Id.* at 60.
717. *Id.* at 61 (quoting United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 221 (1952)).
718. *Id.* at 64.
719. *Id.*
720. *Id.* at 64–65.
721. *Id.* at 65.
722. *Id.*
723. *Id.* at 77.
724. *Id.*
725. *Id.* at 79.
726. *Id.*
727. *Id.*
728. *Id.*

statute, the unit of prosecution test is applied.[729] If, however, there are multiple violations of different statutes, the "same-elements" test is applied.[730]

a. *State v. Hawkins*

In *State v. Hawkins*, the defendant argued that his convictions for aggravated assault and aggravated assault on a law enforcement officer were multiplicitous.[731] Harold Hawkins, the defendant, shot at Officer Fongvilay Phommachanh, who was standing near the front door of a restaurant.[732] Phommachanh was in full uniform at the time of the shooting.[733] Phommachanh and his partner, Officer Carl Lemons, chased Hawkins.[734] While doing so, Phommachanh identified himself as a police officer.[735] Hawkins turned around during the chase and motioned as if he was going to shoot at Phommachanh again.[736] Lemons eventually shot Hawkins.[737]

The Kansas Court of Appeals held that the two convictions were not multiplicitous because they "did not proceed from the same conduct."[738] Rather, "Hawkins' actions clearly did not occur at the same time or location"—although they did occur within seconds of each other and probably within a few dozen yards.[739] Thus, Hawkins's shooting while Phommachanh was at the door of the restaurant was the basis for the aggravated assault conviction, and the shooting motions made while running away were the basis for the aggravated assault of an officer conviction. The court held that Phommachanh identifying himself as a police officer was an "intervening event" under the four-part analysis.[740]

Under the court's analysis, it is clear that actions that occur in close physical and temporal proximity to each other can still be found to be different enough to pass the first prong of the same offense test. The court also established that Phommachanh identifying himself as a police

729. *Id.*
730. *Id.* at 79–80.
731. 188 P.3d 965, 967 (Kan. Ct. App. 2008).
732. *Id.*
733. *Id.*
734. *Id.*
735. *Id.*
736. *Id.*
737. *Id.* at 967–68.
738. *Id.* at 971.
739. *Id.*
740. *Id.*

officer qualified as an "intervening event," in spite of the fact that he was in full uniform and, thus, presumably identifiable as a police officer at the time of the first shooting.

b. *State v. Allen*

When it comes to multiple conspiracy charges, however, the Kansas Court of Appeals recently stated that the two-prong *Schoonover* test merges into a single question: "[W]as there more than one agreement to engage in criminal activity?"[741]

In *State v. Allen*, the court found that Allen's three convictions of conspiracy to sell, deliver, or distribute cocaine were multiplicitous.[742] In *Allen*, a police informant came to a middleman's apartment on three separate occasions for the purpose of purchasing cocaine.[743] On each occasion, the middleman contacted Allen, who had cocaine to sell.[744] Allen then went to the middleman's apartment, sold cocaine to the informant, and gave the middleman some of the money for his services.[745]

In reversing two of the district court's conspiracy convictions, the Court of Appeals applied the rationale of *State v. Bobic*.[746] In *Bobic*, defendants were charged with three conspiracies and several crimes relating to an organized auto theft ring.[747] Although cars were stolen from numerous individuals on numerous occasions, the court found just a single conspiracy.[748] The relevant question was whether the alleged conspiracies consisted of "a single criminal enterprise."[749] Finding that they did in *Allen*, the court reversed two of the three conspiracy convictions.[750]

Although the facts in *Allen* involved a single drug purchaser, under the court's rationale, a single conspiracy would presumably be found even if there were numerous purchasers on numerous occasions. The focus is on the "one continuing agreement" between the middleman and

741. State v. Allen, No. 96,920, 2008 WL 2571792, at *1 (Kan. Ct. App. June 27, 2008).
742. *Id.* at *2.
743. *Id.*
744. *Id.*
745. *Id.*
746. *Id.* (citing State v. Bobic, 996 P.2d 610 (Wash. 2000)).
747. *Id.*
748. *Id.*
749. *Id.*
750. *Id.*

the drug dealer rather than the number of purchasers or transactions.[751] Thus, a defendant may be charged with multiple crimes, but, if there is just one ongoing business relationship between drug dealers, they may be charged just once for the crime of conspiracy.

H. Appeals

Defendants may appeal any decision made by the district court as a matter of right, except that appeals after a conviction resulting from a guilty plea or a plea of nolo contendere are limited to jurisdictional or other legal grounds.[752] The prosecution may only appeal:

> (1) From an order dismissing a complaint, information, or indictment; (2) from an order arresting judgment; (3) upon a question reserved by the prosecution; or (4) upon an order granting a new trial in any case involving a class A or B felony or for crimes committed on or after July 1, 1993, in any case involving an off-grid crime.[753]

I. Resentencing After Conviction

The appellate court may not review sentences either within the presumptive sentence for the crime or sentences resulting from an agreement between the State and the defendant that the sentencing court approves on the record.[754] The court may, however, review sentences that depart from the presumptive sentence to see if the findings of fact and reasons for departure are "supported by the evidence in the record" and if those findings and reasons "constitute substantial and compelling reasons for departure."[755] If the appellate court finds "that the trial court's factual findings are not supported by [the] evidence . . . or do not establish substantial and compelling reasons for a departure, it [must] remand the case . . . for resentencing."[756]

751. *Id.*
752. KAN. STAT. ANN. § 22-3602(a) (2007).
753. *Id.* § 22-3602(b).
754. KAN. STAT. ANN. § 21-4721(c) (2007).
755. *Id.* § 21-4721(d).
756. *Id.* § 21-4721(f).

J. Postconviction Remedies

Once convicted and sentenced, a prisoner may move the court to vacate, set aside, or correct the sentence.[757] Prisoners are guaranteed one such motion; further motions are only granted at the discretion of the court.[758] Except to prevent "manifest injustice," a time limit of one year applies for postconviction actions.[759] The clock starts upon the final order of the last appellate court in Kansas to exercise jurisdiction on direct appeal, the termination of the appellate jurisdiction, the denial of certiorari by the United States Supreme Court, or the final order of the United States Supreme Court.[760]

757. KAN. STAT. ANN. § 60-1507(a) (2005).
758. *Id.* § 60-1507(c).
759. *Id.* § 60-1507(f).
760. *Id.*