Kansas Law Review Criminal Procedure Survey*

I. INTRODUCTION

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

II. SEARCHES AND THE FOURTH AMENDMENT

A. Scope of the Fourth Amendment

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches . . . shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[1]

Likewise, the Kansas Constitution's Bill of Rights provides similar protection: "The right of the people to be secure in their persons and property against unreasonable searches and seizures, shall be inviolate . . . ."[2] Indeed, this provision in the Kansas Bill of Rights provides the same guarantee as does the Fourth Amendment to the United States Constitution.[3] Thus, with the application of the Fourth Amendment to the states through the Fourteenth Amendment, as well as similar

* This survey was compiled and edited by the staff memebers and the Executive Note and Comment Editor Whitney Novak. This Survey may be cited as: 62 U. KAN. L. REV. 1461 (2014).

1. U.S. CONST. amend. IV.
2. KAN. CONST. bill of rights § 15.
3. State v. Jefferson, 310 P.3d 331, 337 (Kan. 2013).

guarantees provided in the Kansas Bill of Rights, Kansas courts are bound by United States Supreme Court precedent regarding questions involving the Fourth Amendment.[4]

1. Government Action Requirement

The Fourth Amendment protections against unreasonable searches apply only when there is state action.[5] The Fourth Amendment does not apply to any search—no matter how unreasonable—that is conducted by a private citizen who is "not acting as an agent of the Government or with the participation or knowledge of any government official."[6] Here, it is important to reiterate the fact that a private citizen may be deemed a government actor—"[I]n some cases a search by a private citizen may be transformed into a governmental search implicating the Fourth Amendment if the government coerces, dominates or directs the actions of [the] private person conducting the search or seizure."[7] The Tenth Circuit uses a two-pronged test to determine when a search conducted by a private actor constitutes state action thus invoking the protections of the Fourth Amendment. First, it must be determined "whether the government knew of and acquiesced in the [individual's] intrusive conduct."[8] Second, it must be determined that the private actor conducting the search "intended to assist law enforcement efforts" and was not acting merely to further his or her own ends.[9] Both of these prongs, according to the Tenth Circuit, "must be satisfied considering the totality of the circumstances before [a] seemingly private search may be deemed a government search."[10]

Similarly, the Kansas Supreme Court has held that the Fourth Amendment applies to any private actor who is acting as an *agent* of the government, i.e. "under the authority or direction" of the government.[11]

4. State v. Henning, 209 P.3d 711, 718 (Kan. 2009).

5. United States v. Jacobsen, 466 U.S. 109, 113 (1984); United States v. Smith, 810 F.2d 996, 997 (10th Cir. 1987); United States v. Poe 556 F.3d 1113, 1123 (10th Cir. 2009); State v. Smith, 763 P.2d 632, 634 (Kan. 1988).

6. *Jacobsen*, 466 U.S. at 113 (quoting Walter v. United States, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)). *See also Poe*, 556 F.3d at 1123; State v. Brittingham, 294 P.3d 263, 267 (Kan. 2013) (citing *Smith*, 763 P.2d 634).

7. *Poe*, 556 F.3d at 1123 (quoting United States v. Smythe, 84 F.3d 1240, 1242 (10th Cir. 1996)).

8. *Id.* (quoting United States v. Souza, 223 F.3d 1197, 1201 (10th Cir. 2000)).

9. *Id.*

10. *Id.*

11. *Brittingham*, 294 P.3d at 267 (quoting *Smith*, 763 P.3d at 638 (Kan. 1988)).

Apart from private actors, the Kansas Supreme Court recently reiterated in *State v. Brittingham* that, at the time of the search, a government employee is not necessarily a "government actor" for purposes of the Fourth Amendment, "especially under circumstances where the government employee is not acting within the scope of his or her employment."[12] Moreover, the court noted in *Brittingham*:

> [There is no] bright-line rule that equates a government employee with a constitutionally constrained government actor any time the employee is performing any activity within the scope of his or her employment. In other words, the applicability of constitutional restraint is not driven solely by a government employee's job description. Rather, to be a constitutionally constrained government actor, the government employee must be performing an investigatory-type activity for the benefit of his or her employer. The restrained activity will normally be exploratory, rather than reactive, in nature.[13]

2. Reasonableness Requirement

Whether a search is "reasonable" is the principal question in a Fourth Amendment challenge—reasonableness being "the ultimate measure of the constitutionality of a governmental search . . . ."[14] The reasonableness test cannot be precisely defined and a court must examine reasonability on a case-by-case basis.[15] With that being said, determining whether a particular search is reasonable requires that a court "weigh 'the promotion of legitimate governmental interests' against 'the degree to which [the search] intrudes upon an individual's privacy.'"[16] In addition to this balancing of government and individual interests, a court should also view all the facts and circumstances surrounding the search—i.e. the totality of the circumstances—when determining whether the search was reasonable.[17] The Tenth Circuit recently provided that "[t]he Fourth Amendment requires us to evaluate the reasonableness of searches . . . based on the facts known to officers

12. *Id*. at 269.

13. *Id*.

14. Maryland v. King, 133 S.Ct. 1958, 1969 (2013) (quoting Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 652 (1995)). *See also* State v. Spagnola, 289 P.3d 68, 74 (Kan. 2012) (noting that "reasonableness is the touchstone of the Fourth Amendment).

15. Pool v. McKune, 987 P.2d 1073, 1078 (Kan. 1999) (citing Delaware v. Prouse, 440 U.S. 648, 654 (1979)).

16. *King*, 133 S.Ct. at 1970 (quoting Wyoming v. Houghton, 526 U.S. 295, 300 (1999)).

17. State v. Beltran, 300 P.3d 92, 102 (Kan. Ct. App. 2013) (citing Skinner v. Ry. Labor Execs' Assn., 489 U.S. 602, 619 (1989)).

when the event in question occurred, and to avoid as best we can the temptation of offering critiques with the '20/20 vision of hindsight.'"[18] When examining the totality of the circumstances surrounding the search, the subjective intent of the government actor conducting the search is irrelevant—what matters is the "objective effect" of the officer's actions.[19]

3. "Search" Defined

Today there are two standards used to determine when a search has occurred for Fourth Amendment purposes. Traditionally, a search occurs when there is a physical trespass.[20] That is, when the government obtains information regarding an individual's person, house, papers, or effects through any physical intrusion, a search has occurred for Fourth Amendment purposes.[21] A physical trespass, however, does not necessarily have to occur for there to be a search because "the Fourth Amendment protects people, not places."[22] With that being said, a search may also occur when the government intrudes on an individual's "actual (subjective) expectation of privacy," and the individual's expectation is one "society is prepared to recognize as 'reasonable.'"[23] In our technologically advanced society, this seminal test has come to dominate modern constitutional jurisprudence concerning when a search has occurred for Fourth Amendment purposes. Though there have been questions as to whether this "reasonable expectation of privacy" test should replace the older trespass test, today the "reasonable expectation of privacy" test continues to be *in addition to—not in substitution for—* the older trespass test.[24] As the Supreme Court recently held in *United States v. Jones*,

> [F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas ("persons, houses, papers, and effects") it enumerates. Katz did not repudiate that understanding . . . . [T]he Katz reasonable-expectation-

18. United States v. Harris, 735 F.3d 1187, 1191 (10th Cir. 2013) (quoting Graham v. Connor, 490 U.S. 386, 396 (1989)).

19. United States v. Madrid, 713 F.3d 1251 (10th Cir. 2013); State v. Beltran, 48 Kan. App. 2d 857, 879 (Kan. Ct. App. 2013) (quoting Bond v. United States, 529 U.S. 334, 338 (2000)).

20. United States v. Jones, 132 S.Ct. 945, 951–52 (2012).

21. *Id.* at 950–51.

22. Katz v. United States, 389 U.S. 347, 351 (1967).

23. *Id.* at 361 (Harlan, J., concurring).

24. *Jones*, 132 S. Ct. at 950–52.

> of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.[25]

B. Search Warrant Requirement

The Fourth Amendment requires that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched . . . ."[26] Again, Section 15 of the Kansas Bill of Rights provides a parallel guarantee.[27] As the Kansas Court of Appeals recently stated, this warrant requirement furthers the right of individuals to be free from unreasonable searches by "interpos[ing] an independent reviewing authority—a judge—to assess the sufficiency of the grounds government agents offer for interfering with citizens or their property."[28] A warrantless search conducted by a government actor is "per se unreasonable under the Fourth Amendment unless the State can fit the search within one of the recognized exceptions to the warrant requirement . . . ."[29] The recognized exceptions in Kansas to the warrant requirement are discussed below in section I.C.; however, even with an exception, "[t]he state bears the burden to prove a warrantless search was lawful."[30]

1. Probable Cause

As expressly required by the Fourth Amendment, a search warrant will be issued only when probable cause has been shown through a supporting oath or affirmation, and "particularly describing the place to be searched . . . ."[31] Likewise, Kansas requires that:

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

25. *Id.*
26. U.S. Const. amend. IV.
27. Kan. Const. bill of rights § 15; State v. Jefferson, 310 P.3d 331, 337 (Kan. 2013).
28. State v. Althaus, 305 P.3d 716, 722 (Kan. Ct. App. 2013).
29. State v. Brewer, 305 P.3d 676, 682 (Kan. Ct. App. 2013); Missouri v. McNeely, 133 S.Ct. 1552, 1558 (2013).
30. State v. Dennis, 300 P.3d 81, 85–86 (Kan. 2013).
31. U.S. Const. amend. IV.

> place or means of conveyance to be searched . . . .[32]

Importantly, any oral statement provided must be either, "taken down by a certified shorthand reported, sworn to under oath and made part of the application for [the] search warrant,"[33] or "recorded before the magistrate from whom the search warrant is requested and sworn to under oath."[34]

When reviewing whether probable cause exists to justify the issuance of a search warrant, a judge will consider the totality of the circumstances and make a "'practical, common-sense decision whether a crime has been committed or is being committed and whether there is a fair probability that contraband or evidence of a crime will be found in a particular place.'"[35] A government actor is said to have probable cause to conduct a search when "the facts available to [him] would 'warrant a [person] of reasonable caution in the belief' that contraband or evidence of a crime is present."[36] Furthermore, "[t]he test for probable cause is not reducible to 'precise definition or quantification,'"[37] and the Supreme Court has rejected "rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach."[38]

Simply put, probable cause is established when a government actor shows that there exists a fair probability that contraband or evidence of a crime will be found at the particular place to be searched.[39] Sufficient information must be provided to show a "nexus between [the] suspected criminal activity and the place to be searched . . . ."[40] Mere conclusive assertions, "unmoored from specific factual representations," are not enough to establish probable cause.[41] Finally, the information provided in the supporting oath or affirmation cannot be stale. The Kansas Supreme Court has noted that stale information, "is information that no longer informs whether there is a fair probability that evidence of a crime

32. KAN. STAT. ANN. § 22-2502(a) (2013).

33. *Id.*

34. *Id.*

35. State v. Hensley, 313 P.3d 814, 820 (Kan. 2013) (quoting State v. Hicks, 147 P.3d 1076, 1084 (Kan. 2006)); Florida v. Harris, 133 S.Ct. 1050, 1055 (2013).

36. *Harris*, 133 S.Ct. at 1055 (quoting Texas v. Brown, 460 U.S. 730, 742 (1983)); State v. Althaus, 305 P.3d 716, 725 (Kan. Ct. App. 2013).

37. *Harris*, 133 S.Ct. at 1055 (quoting Maryland v. Pringle, 540 U.S. 366, 371 (2003)).

38. *Id.*

39. United States v. Hendrix, 664 F.3d 1334, 1338 (10th Cir. 2011).

40. United States v. Barajas, 710 F.3d 1102, 1108 (10th Cir. 2013) (quoting United States v. Roach, 582 F.3d 1192, 1200 (10th Cir. 2010).

41. *Althaus*, 305 P.3d at 725.

will be found at a particular place because sufficient time has elapsed between when [the information was acquired or an event occured] and when officers act on the information."[42]

2. Anticipatory Warrants

An anticipatory warrant is a particular type of warrant that is "based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of a crime will be located at a specified place. Most anticipatory warrants subject their execution to some condition precedent other than the mere passage of time—a so called 'triggering condition.'"[43] For example, such a warrant may provide that its execution is dependent upon the suspect individual taking criminal evidence into his or her home. The Supreme Court has provided that in order to satisfy the probable cause requirement of the Fourth Amendment, anticipatory warrants must comply with two conditions: [1] "*if* the triggering condition occurs 'there is a fair probability that contraband or evidence of a crime will be found in a particular place,'" and [2] "there is probable cause to believe the triggering condition *will occur*."[44] Thus, so long as the above conditions are met, anticipatory warrants are constitutionally permissible even though there is yet probable cause to believe a crime has been committed.

3. Particularity Requirement

As explicitly noted in the text of the Fourth Amendment, the oath or affirmation must particularly describe the place to be searched. "The Fourth Amendment's particularity requirement ensures searches do not exceed the scope of the probable cause justifying them."[45] Furthermore, such a requirement "remains a vital guard against 'wide-ranging exploratory searches,' [and is] a promise that governmental searches will be 'carefully tailored to [their] justifications.'"[46] Regarding the location to be searched, the description of the particular location in the search warrant must be "sufficient to enable the executing officer to locate and

42. State v. Hensley 313 P.3d 814, 821 (Kan. 2013).

43. United States v. Grubbs, 547 U.S. 90, 94 (2006) (internal citations omitted).

44. *Id.* at 96–97 (internal citations omitted).

45. United States v. Garcia, 707 F.3d 1190, 1197 (10th Cir. 2013).

46. United States v. Christie, 717 F.3d 1156, 1164 (10th Cir. 2013) (quoting Maryland v. Garrison, 480 U.S. 79, 84 (1987)).

identify the premises with reasonable effort," and there cannot be a "reasonable probability that another premise might be mistakenly searched."[47]

4. Execution Requirements

A search warrant must be executed within ninety-six hours from the time it was issued.[48] The warrant may be executed at "any time of any day or night,"[49] within this time frame, though, the timing of the execution must still be reasonable.[50] Also, a search can only be executed within the judicial district in which the issuing judge resides (or has been assigned).[51] When executing a search warrant, while officers may use "all necessary and reasonable force" to effect entry into a premise to be searched,[52] as a general rule, officers must first "knock and announce" their identity and purpose before forcibly executing a search.[53] There are, however, circumstances in which officers can forego this requirement:

> In order to justify a 'no-knock' [forcible] entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.[54]

C. Exceptions to the Search Warrant Requirement

Though searches conducted without a search warrant are per se unreasonable, Kansas courts have provided specific and "well-delineated" exceptions.[55] Exceptions to the search warrant requirement

47. *Garcia*, 707 F.3d at 1197.

48. KAN. STAT. ANN. § 22-2506 (2013).

49. *Id.* § 22-2510.

50. *See* State v. Shively, 987 P.2d 1119, 1126 (Kan. Ct. App. 1999) (noting that K.S.A. § 22-2510 does not provide a "blanket exception" to the requirement of reasonableness in executing a search warrant; the execution of a search warrant must still be within the confines of the Constitution).

51. *Id.* § 22-2503.

52. *Id.* § 22-2508.

53. United States v. Esser, 451 F.3d 1109, 1112 (10th Cir. 2006).

54. *Id.* (quoting Richards v. Wisconsin, 520 U.S. 385, 394 (1997)). *See also* Hudson v. Michigan, 547 U.S. 586, 590 (2006) (ruling that the police are required to have a reasonable suspicion that one of the above grounds for failing to knock and announce exists, but that the showing of reasonable suspicion is not high).

55. State v. Ewertz, 305 P.3d 23, 26 (Kan. Ct. App. 2013).

include: consent, search incident to a lawful arrest, stop and frisk, probable cause to search with exigent circumstances, the emergency doctrine, inventory searches, plain view, and administrative searches of a closely regulated business.[56]

1. Consent

An exception to the search warrant requirement exists when an individual provides *voluntary*, *knowing*, and *intelligent* consent.[57] Consent to search may be obtained by either the owner of the property or a third party who "possesses common authority" over the property.[58] An individual has common authority if he or she has joint access or control of the property such that it is reasonable to recognize that he or she has the right to permit a search and any co-inhabitants have "assumed the risk that [he or she] might permit [a] common area to be searched."[59] Here, "[t]he State has the burden of establishing the scope and voluntariness of the [individual's provided] consent to search."[60]

In Kansas, a court will determine the voluntariness of an individual's consent—whether the consent was freely given—by looking at the totality of the circumstances.[61] Particularly, the Kansas Supreme Court has held that for consent to be valid "(1) [t]here must be clear and positive testimony that [the] consent was unequivocal, specific, and freely given; and (2) the consent must have been given without duress or coercion . . . ."[62] The Tenth Circuit has similarly held that "voluntary consent" consists of two parts: "(1) the law enforcement officers must receive either *express* or *implied* consent, and (2) that consent must be freely and voluntarily given."[63] Again, whether the above conditions are met must be determined by looking at the totality of the circumstances. The following considerations are relevant in determining whether purported consent was the product of coercion:

56. *Id.* (citing State v. Vandevelde, 138 P.3d 771, 776 (Kan. Ct. App. 2006)).

57. State v. Edgar, 294 P.3d 251, 260 (Kan. 2013).

58. State v. Kerestessy, 233 P.3d 305, 309 (Kan. Ct. App. 2010) (citing State v. Porting, 130 P.3d 1173, 1178 (2006)).

59. *Id.* at 325 (quoting United States v. Matlock, 415 U.S. 164, 171 (1974)).

60. *Id.* at 309 (quoting State v. Thompson, 166 P.3d 1015, 1026 (Kan. 2007)).

61. State v. Spagnola, 289 P.3d 68, 75 (Kan. 2012); State v. Parker, 147 P.3d 115, 123 (Kan. 2006) (citing State v. Jones, 106 P.3d 1, 6 (2005)).

62. *Spagnola*, 289 P.3d at 75.

63. United States v. Jones, 701 F.3d 1300, 1317 (10th Cir. 2012)(emphasis added).

> [any] physical mistreatment, use of violence, threats, promises, inducements, deception, trickery, or an aggressive tone, the physical and mental condition and capacity of the defendant, the number of officers on the scene, and the display of police weapons. Whether an officer reads a defendant his *Miranda* rights, obtains consent pursuant to a claim of lawful authority, or informs a defendant of his or her right to refuse consent also are factors to consider . . . ."[64]

The individual must also first be informed of his or her rights in order for consent to be considered valid, as simply submitting to lawful authority does not constitute consent.[65]

Implied consent, moreover, is "no less valid than explicit consent."[66] An individual may grant implied consent through "gestures or other indications of acquiescence, so long as they are sufficiently comprehensible to a reasonable officer."[67] Determining whether implied consent was given is focused on "not whether [the individual] subjectively consented, but rather, whether a reasonable officer would believe consent was given [as] inferred from [the individual's] words, gestures, or other conduct."[68] For example, in *United States v. Lopez-Carillo*, the Tenth Circuit held that implied consent was given by a woman who spoke little English but gestured to the officers to enter her home, conversed with an officer who spoke Spanish, did not object when the officers began conducting a search, and opened a door for the officers during the search.[69]

a. Scope of Consent

Once express or implied consent is given, the government official conducting the search cannot exceed the scope of consent. Here, too, the State "has the burden of establishing the scope . . . of the consent to search."[70] The scope of consent to search is determined by analyzing what a "typical reasonable person would have understood by the exchange between the officer and the [individual granting consent]," and

64. *Id.* at 1318 (quoting United States v. Harrison, 639 F.3d 1273, 1278 (10th Cir. 2011)).

65. *Parker*, 147 P.3d at 123 (citing *Jones*, 106 P.3d at 7).

66. United States v. Lopez-Carillo, 536 F. App'x 762, 768 (10th Cir. 2013) (citing *Jones*, 701 F.3d at 1320–21).

67. *Id.* (quoting United States v. Guerrero, 472 F.3d 784, 789–90 (10th Cir. 2007)).

68. *Id.* (quoting United States v. Pena-Ponce, 588 F.3d 579, 584 (8th Cir. 2009)).

69. *Id.* at 763–65.

70. State v. Kerestessy, 233 P.3d 305, 309 (Kan. Ct. App. 2010) (quoting State v. Thompson, 166 P.3d 1015 (Kan. 2007)).

is "generally defined by [the] expressed object" of the search.[71] Importantly, the scope of consent to search is under the control of the individual who provided the consent—"[a] suspect may . . . *delimit as he chooses the scope of the search to which he consents*."[72] This means that at any time prior to or during the search, the individual who initially gave consent may limit the scope of the search or withdraw his or her consent entirely. Thus, even though an officer may have fairly obtained an individual's consent, once that individual limits or removes his or her consent, the officer conducting the search must abide by that individual's demands.

2. Probable Cause Plus Exigent Circumstances

The "probable cause plus exigent circumstances" exception to the search warrant requirement "applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment."[73] The state bears the burden of proving that the search falls under this exception,[74] which requires that an officer have probable cause and that the situation present exigent circumstances.[75]

To have probable cause, an officer must "possess specific facts leading a reasonable person to conclude evidence of a crime may be found in a particular place."[76] However, "no amount of probable cause can justify a warrantless search or seizure absent 'exigent circumstances.'"[77]

Whether a law enforcement officer was justified in acting in the absence of a warrant depends on the "totality of circumstances."[78] The

71. United States v. Pikyavit, 527 F.3d 1126, 1131 (10th Cir. 2008) (quoting Florida v. Jimeno, 500 U.S. 248, 251 (1991)).

72. State v. Poulton, 152 P.3d 678, 685 (Kan. Ct. App. 2007) (quoting *Jimeno*, 500 U.S. at 252)(emphasis added) *rev'd in part on other grounds*, 179 P.3d 1145 (Kan. 2008).

73. Missouri v. McNeely, 133 S. Ct. 1552, 1558 (2013) (quoting Kentucky v. King, 131 S.Ct. 1849, 1856 (2011)). *See also* State v. Beltran, 300 P.3d 92, 100 (Kan. Ct. App. 2013) (citations omitted).

74. State v. Johnson, 301 P.3d 287, 297 (Kan. 2013) (citing State v. Sanchez-Loredo, 272 P.3d 34, 38 (Kan. 2012)).

75. *Sanchez-Loredo*, 272 P.3d at 38.

76. State v. Dugan, 276 P.3d 819, 827 (Kan. Ct. App. 2012) (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)).

77. State v. Schur, 538 P.2d 689, 693 (Kan. 1975) (citing Coolidge v. New Hampshire, 403 U.S. 443, 468 (1971)).

78. *McNeely*, 133 S. Ct at 1559 (citations omitted).

Supreme Court uses a "careful case-by-case" approach to determine whether circumstances rose to the required level of exigency.[79] Recognized exigent circumstances that justify warrantless entry may include, but are not limited to: the need to provide emergency aid to someone inside,[80] an immediate threat to officer safety,[81] "'hot pursuit' of a fleeing suspect,"[82] the need to "put out a fire and investigate its cause,"[83] and to prevent the imminent destruction of evidence of a serious crime.[84] While circumstances that present the requisite exigency to justify a warrantless search differ, "in each [situation] a warrantless search is potentially reasonable because 'there is a compelling need for official action and no time to secure a warrant.'"[85] Every "alleged exigency" is evaluated "based 'on its own facts and circumstances.'"[86]

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

> (1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) whether the suspect is reasonably believed to be armed; (3) a clear showing of probable cause; (4) strong reasons to believe that the suspect is in the premises; (5) a likelihood that the suspect will escape if not swiftly apprehended and (6) the peaceful circumstances of the entry.[87]

a. Emergency Aid

Under the "emergency aid" exigency exception, officers may enter a home without a warrant if "(1) the officers have an objectively reasonable basis to believe there is an immediate need to protect lives or safety of themselves or others, and (2) the manner and scope of the search is reasonable."[88] To meet the officer safety exigency exception,

79. *Id*. at 1561.

80. *Id*. at 1570.

81. United States v. Mongold, 528 F. App'x 944, 951 (10th Cir. 2013) (unpublished decision) (citing United States v. Smith, 797 F.2d 836, 840 (10th Cir. 1986)).

82. *McNeely*, 133 S. Ct at 1558 (citing United States v. Santana, 427 U.S. 38, 42–43 (1976)). *See also Mongold*, 528 F. App'x at 948 (citing Kentucky v. King, 131 S. Ct. 1849, 1856 (2011)).

83. *McNeely*, 133 S. Ct at 1559 (citing Michigan v. Tyler, 436 U.S. 499, 509–10 (1978)).

84. *Mongold*, 528 F. App'x at 949.

85. *McNeely*, 133 S. Ct. at 1559 (quoting *Tyler*, 436 U.S. at 509).

86. *Id*. at 1559 (quoting Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931)).

87. State v. Dugan, 276 P.3d 819, 832 (Kan. Ct. App. 2012) (quoting State v. Platten, 594 P.2d 201, 206 (Kan. 1979)).

88. United States v. Dupree, 540 F. App'x 884, 890–92 (10th Cir. 2014) (unpublished decision) (quoting United States v. Najar, 451 F.3d 710, 718 (10th Cir. 2006)(officers were justified

the State must establish that:

> (1) the law enforcement officers must have reasonable grounds to believe that there is immediate need to protect their lives or other or their property or that of others, (2) the search must not be motivated by an intent to arrest and seize evidence, and (3) there must be some reasonable basis, approaching probable cause, to associate an emergency with the area or place to be searched.[89]

b. Hot Pursuit

The hot pursuit exigent circumstance exception requires an officer to have "probable cause to arrest a person in a public place and then give chase to that person when the person attempts to evade the arrest by fleeing into a house or other place normally requiring a warrant."[90] The exception is triggered when a suspect moves "from a location unprotected by the Fourth Amendment to a protected location in a deliberate effort to evade arrest."[91] However, because "hot pursuit does not hand law enforcement officers an automatic or per se exemption from the constraints of the Fourth Amendment," a misdemeanor offense alone is ordinarily insufficient to support the exigency required for a warrantless search.[92]

c. Destruction of Evidence

The destruction of evidence exigency exception is triggered by an officer's reasonable belief that "there is a threat of imminent loss, destruction, removal, or concealment of evidence."[93] A four-part test is employed to determine whether the exception applies, requiring an officer's warrantless entry to be:

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in entering property without a warrant to check on safety of woman inside whose neighbor reported she had been severely beaten, and the scope of their search was "proportionate to the exigency at the time"). *See also* United States v. Stewart, 528 F. App'x 879, 880–82 (10th Cir. 2013), *cert. denied*, 134 S. Ct. 497 (2013) (woman yelling "it hurts" inside along with man answering door in "agitated" state "created an objectively reasonable basis" for officers to enter).

89. *Mongold*, 528 F. App'x at 951 (quoting United States v. Smith, 797 F.2d 836, 840 (10th Cir. 1986)).

90. State v. Shelinbarger, 308 P.3d 31, *3 (Kan. Ct. App. 2013) (unpublished table decision) (citing *Dugan*, 276 P.3d at 828–29).

91. *Dugan*, 276 P.3d at 830 (citations omitted).

92. *Id*. at 830.

93. State v. Parker, 282 P.3d 643, 656 (Kan. Ct. App. 2012) (quoting State v. Fewell, 184 P.3d 903, 913–14 (Kan. 2008)).

> (1) pursuant to clear evidence of probable cause, (2) available only for serious crimes and in circumstances where the destruction of the evidence is likely, (3) limited in scope to the minimum intrusion necessary to prevent the destruction of evidence, and (4) supported by clearly defined indicators of exigency that are not subject to police manipulation or abuse.[94]

The Tenth Circuit recently noted that while "'serious crime is not well-defined . . . the Supreme Court explained that penalties are the best indication of whether a crime is serious."[95] Despite the fact that the Supreme Court has yet to set a bar for what penalties constitute a serious crime, the Tenth Circuit held that "marijuana possession is not a serious crime."[96] Thus, the destruction of evidence exigency exception did not apply when an officer entered a home without a warrant after smelling marijuana during a "knock and talk" and becoming concerned "that the 'scurrying and shuffling' sounds he heard might indicate the destruction of evidence."[97]

d. Intoxication

While contemplating other situational contexts that might satisfy the exigency requirement, the Supreme Court recently held "that in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant."[98] The State argued for a categorical rule permitting an officer with probable cause to believe a driver is intoxicated to conduct a blood test, on the ground that blood alcohol concentration begins to dissipate upon absorption and continues to do so until elimination is complete.[99] In declining to adopt such a rule, the Court acknowledged that the exception will likely apply in many drunk-driving investigations, but refused to "depart from [its] careful case-by-case assessment of exigency."[100]

94. *Mongold*, 528 F. App'x at 949 (citing United States v. Aquino, 836 F.2d 1268, 1272 (10th Cir. 1988)).

95. *Id.* (citing Illinois v. McArthur, 531 U.S. 326, 336 (2001); Welsh v. Wisconsin, 466 U.S. 740, 753 (1984)).

96. *Id.* at 949–50 (citing OKLA. STAT. tit. 63, § 2-402 (2012)) (noting that "Oklahoma considers marijuana possession a misdemeanor that is not punishable by more than one year in prison").

97. *Id.* at 947, 952.

98. Missouri v. McNeely, 133 S. Ct. 1552, 1568 (2013).

99. *Id*. at 1560.

100. *Id.* at 1561.

The Kansas Court of Appeals recently held that a traffic violation coupled with an injury alone "does not constitute probable cause that drugs or alcohol were involved in the accident."[101] Thus, the court went on to hold section 8-1001(b)(2) "unconstitutional to the extent it requires a [blood test] absent probable cause" that the driver was "under the influence."[102]

e. Police-Created Exigency

Although the existence of probable cause along with exigent circumstances may generally justify a warrantless search, in Kansas, the police-created exigency doctrine precludes application of the exception when "police conduct 'created' or 'manufactured' that exigency."[103] In *State v. Campbell*, an officer's warrantless search could not be cured by the probable cause plus exigent circumstances exception because he "exceed[ed] the scope of a knock and talk" by "covering the peephole" to prevent the occupants from discovering that he was an officer.[104] The Kansas Supreme Court instructed that an officer "is not entitled to take advantage of his unreasonable behavior in creating the exigency by using that entry to gain evidence he otherwise would not have gathered."[105]

3. Automobiles and Vehicles

The vehicle exception to the search warrant requirement permits an officer with probable cause "to believe [a] vehicle contains contraband or evidence of a crime" to search the vehicle without a warrant.[106] Because a vehicle's mobility alone satisfies the exigency requirement, an officer needs only probable cause and not any additional exigent circumstances.[107] The vehicle exception may apply to vehicles that are parked,[108] or even temporarily immobile by reason of repair needs.[109]

101. State v. Declerck, 317 P.3d 794, 803 (Kan. Ct. App. 2014).

102. *Id*. at 802.

103. State v. Campbell, 300 P.3d 72, 77 (Kan. 2013) (citing Kentucky v. King, 131 S.Ct. 1849, 1857 (2011)).

104. *Id.* at 78–79.

105. *Id.* at 79.

106. State v. Jefferson, 310 P.3d 331, 338 (Kan. 2013) (quoting State v. Sanchez-Loredo, 272 P.3d 34, syl. ¶ 4 (2012)).

107. *Id*. at 338 (citing *Sanchez-Loredo*, 272 P.3d at syl. ¶ 4).

108. State v. Lundquist, 286 P.3d 232, 236 (Kan. Ct. App. 2012) (citing California v. Carney, 471 U.S. 386, 392–93 (1985)) ("For purposes of the motor vehicle exception, a car is considered 'readily mobile' if it is operable, even though it may be parked at the time of the search.").

A drug dog alert may supply the requisite probable cause to search a vehicle.[110] For a drug dog alert to provide probable cause to search, the State must lay a foundation of the dog's certification and training.[111] In *State v. Brewer*, the defendant challenged the sufficiency of a drug dog alert as probable cause on the ground that the dog had a false positive rate of approximately thirty-seven percent.[112] The Kansas Court of Appeals joined a majority of courts in finding "that it is immaterial to use a real world false positive rate to challenge a K-9's reliability because a K-9 can detect residual odor even after drugs have been removed from a vehicle."[113] Because the State established that the dog was trained and certified, the court found the alert sufficed as probable cause.[114]

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

a. Terry Stops

A *Terry*[115] stop permits an officer without probable cause to "detain a person to investigate suspected criminal behavior."[116] Based on the precedent set in *Terry*, the Kansas Supreme Court held that pursuant to a *Terry* stop, "police may stop and frisk a person if they have reasonable suspicion that the person is engaged in criminal activity and when officers have a reasonable belief the person poses a safety concern."[117] *Terry*'s holding is codified in section 22-2402.[118] Reasonable suspicion

109. United States v. Mercado, 307 F.3d 1226, 1229 (10th Cir. 2002)(citing Pennsylvania v. Labron, 518 U.S. 938, 940 (1996)) ("mere temporary immobility due to a readily repairable problem while at an open public repair shop does not remove the vehicle from the category of 'readily mobile'").

110. State v. Brewer, 305 P.3d 676, 682 (Kan. Ct. App. 2013) (citing State v. Barker, 850 P.2d 885, 893 (Kan. 1993)).

111. *Id.*at 682.

112. *Id.* at 681.

113. *Id.* at 683.

114. *Id.*

115. Terry v. Ohio, 392 U.S. 1 (1968).

116. United States v. Rodriguez, 739 F.3d 481, 485 (10th Cir. 2013) (citing *Terry*, 392 U.S. at 22).

117. State v. Martinez, 293 P.3d 718, 721 (Kan. 2013) (citing *Terry*, 392 U.S. at 19–20).

118. KAN. STAT. ANN. § 22-2402 (2009). Section 22-2402 provides:

(1) Without making an arrest, a law enforcement officer may stop any person in a public place whom such officer reasonably suspects is committing, has committed or is about to commit a crime and may demand of the name, address of such suspect and an explanation of such suspect's actions.

(2) When a law enforcement officer has stopped a person for questioning pursuant to this section and reasonably suspects that such officer's personal safety requires it, such officer may frisk such person

is easier to satisfy than the probable cause standard, and "may be established with less reliable information."[119] The totality of the circumstances analysis of whether reasonable suspicion is present considers both the amount and the reliability of the information police possess.[120] An anonymous tip can provide reasonable suspicion for a *Terry* stop,[121] as can a suspect's flight.[122] However, while reasonable suspicion is a less demanding standard, the Kansas Supreme Court recently reaffirmed that even an experienced officer's "hunch" that proves accurate cannot rise to the level of reasonable suspicion.[123]

For a *Terry* stop to be valid, it must be "(1) 'justified at its inception,' and (2) 'reasonably related in scope to the circumstances which justified the interference in the first place.'"[124] Because "[t]he stop and search are independent actions," each must be justified independently.[125] If the stop does not satisfy both elements, the seizure is an arrest and requires the support of probable cause.[126] Officers may handcuff a suspect during a *Terry* stop without effecting an arrest requiring probable cause so long as the use of handcuffs is reasonable under the circumstances.[127] To frisk the stopped person, an officer must "reasonably believe [that the person] might be armed and dangerous."[128]

A *Terry* stop "must be temporary and last no longer than is

for firearms or other dangerous weapons. If the law enforcement officer finds a firearm or weapon, or other thing, the possession of which may be a crime or evidence of crime, such officer may take and keep it until the completion of the questioning, at which time such officer shall either return it, if lawfully possessed, or arrest such person. *Id.*

119. *Martinez*, 293 P.3d at 722.

120. *Id.*

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

122. United States v. De La Cruz, 703 F.3d 1193, 1198 (10th Cir. 2013) (citing Illinois v. Wardlow, 528 U.S. 119, 121, 124–25 (2000); United States v. Cui Qin Zhang, 458 F.3d 1126, 1128 (10th Cir. 2006); United States v. Bonner, 363 F.3d 213, 218 (3d Cir. 2004)).

123. *Martinez*, 293 P.3d at 723 (citing Terry v. Ohio, 392 U.S. 1, 27 (1968)) (holding that the district court erred in finding that "experienced officers with a hunch rises to reasonable suspicion," even though the "hunch" turned out to be accurate).

124. United States v. Salas-Garcia, 698 F.3d 1242, 1248 (10th Cir. 2012) (quoting *Terry*, 392 U.S. at 20)).

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

126. *Salas-Garcia*, 698 F.3d at 1248 (citing Lundstrom v. Romero, 616 F.3d 1108, 1120 (10th Cir. 2010)).

127. *Id.* at 1252.

128. *Rodriguez*, 739 F.3d at 485 (citing United States v. Harris, 313 F.3d 1228, 1234 (10th Cir. 2002)).

necessary" for the officer to confirm or dispel reasonable suspicion.[129] If reasonable suspicion is not confirmed, "[e]ven a very brief extension of the detention without consent or reasonable suspicion violates the Fourth Amendment."[130] Thus, an officer violates the Fourth Amendment by continuing to detain a person after realizing that the person is not the correct suspect.[131] However, a *Terry* stop may continue "after the initial suspicion has dissipated if the additional detention is supported by [new] reasonable suspicion of criminal activity."[132] The reasonable suspicion required to detain a person does not have to be grounded in the same facts as the initial detention, but it nonetheless must exist via other facts.[133]

b. Plain View and Plain Feel

Kansas recognizes the plain view doctrine as an exception to the search warrant requirement.[134] An officer may seize evidence of a crime pursuant to the plain view exception if, "(1) the initial intrusion which afforded authorities the plain view is lawful; (2) the discovery of the evidence is inadvertent; and (3) the incriminating character of the article is immediately apparent to searching authorities."[135] The intrusion that initially places the officer in plain view of the evidence may be supported by a warrant or an exception to the search warrant requirement.[136] Thus, if an officer conducts a search of a vehicle incident to the driver's valid arrest and happens to see a glass pipe in an unzipped makeup bag, the plain view doctrine permits him to seize the pipe.[137]

The Kansas Supreme Court adopted the plain feel exception to the

129. United States v. De La Cruz, 703 F.3d 1193, 1197 (10th Cir. 2013) (citing United States v. White, 584 F.3d 935, 953 (10th Cir. 2009)).

130. *Id.* at 1197 (alteration in original) (quoting United States v. Burleson, 657 F.3d 1040, 1045 (10th Cir. 2011)).

131. *Id.* at 1198 (explaining that border agents violated the Fourth Amendment when they continued to detain De La Cruz after comparing his likeness to a photograph of the sought after suspect).

132. *Id.* (alteration in original) (citing United States v. Soto-Cervantes, 138 F.3d 1319, 1322 (10th Cir. 1998)).

133. *Id.* (citing *Soto-Cervantes*, 138 F.3d 1319, 1322 (10th Cir. 1998)).

134. State v. Ewertz, 305 P.3d 23, 28 (Kan. Ct. App. 2013) (citing State v. Vandevelde, 138 P.3d 771, 776 (Kan. Ct. App. 2006)).

135. *Id.* (citing State v. Canaan, 964 P.2d 681, 689 (Kan. 1998)).

136. *Id.* (citing Coolidge v. New Hampshire, 403 U.S. 443, 465–66 (1971)).

137. *Id.* at 28–29.

search warrant requirement in *State v. Wonders*.[138] The elements for the plain feel exception are identical to those of plain view, except officers must readily feel the incriminating nature of the object while conducting a lawful pat down search rather than view the object.[139]

c. Protective Sweeps of Premises

An officer without a warrant or probable cause may also conduct "a quick and limited search of [a] premises, incident to an arrest and to protect the safety of police officers or others."[140] However, the scope of the search is limited to "a cursory visual inspection of those places in which a person might be hiding."[141] The Supreme Court instructed that the sweeps cannot last longer than needed to dispel the "suspicion of danger," which will always be shorter than the time necessary to "complete the arrest" and leave.[142]

d. Search Incident to a Lawful Arrest

An officer may also act without a warrant pursuant to the search incident to a lawful arrest exception,[143] which stems from the officer safety and preservation of evidence concerns often accompanying arrests.[144] The scope of the search is confined to "the arrestee's person and the area 'within his immediate control,'" which is defined as the area he could obtain a weapon from.[145] If the arrestee could not reach the area the officer wants to search, then the exception cannot apply.[146]

When a vehicle occupant is arrested, an officer may only search the vehicle if "(1) the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or (2) it is 'reasonable to believe' evidence relevant to the crime of arrest might be found in the vehicle."[147] In *Arizona v. Gant*, the Supreme Court found

138. 952 P.2d 1351, 1359 (Kan. 1998).
139. *Wonders*, 952 P.2d at 1358 (citing Minnesota v. Dickerson, 508 U.S. 366, 375–76 (1993)).
140. State v. Johnson, 856 P.2d 134, 143 (Kan. 1993).
141. *Johnson*, 856 P.2d at 143 (citing Maryland v. Buie, 494 U.S. 325, 327 (1990)).
142. *Buie*, 494 U.S. at 335–36.
143. State v. Ewertz, 305 P.3d 23, 26 (Kan. Ct. App. 2013).
144. Arizona v. Gant, 556 U.S. 332, 338 (2009) (citing United States v. Robinson, 414 U.S. 218, 230–34 (1973)).
145. *Gant*, 556 U.S. at 339 (quoting Chimel v. California, 395 U.S. 752, 763 (1969)).
146. *Id.* (citing Preston v. United States, 376 U.S. 364, 367–68 (1964)).
147. *Ewertz*, 305 P.3d at 26 (quoting *Gant*, 556 U.S. at 343–44).

that the exception did not apply because (1) the arrestee was not near the vehicle and (2) the arrest was for driving with a suspended license, making it unreasonable to believe that evidence relating to the crime would be found in the vehicle[148]—unlike prior cases involving drug arrests.[149] In *State v. Ewertz*, the Kansas Court of Appeals considered the validity of a search incident to a lawful arrest for DUI, and asserted that "[w]hether it was 'reasonable to believe' evidence relevant to the crime of [DUI] might be found in Ewertz's vehicle" depends upon the interpretation of *Gant*'s "reasonable to believe" standard."[150] The court explained that while some courts have interpreted the standard to mean "certain offenses will never provide an officer with reasonable belief that a car contains evidence of the offense,[151] other offenses always will," other courts equate the standard with reasonable suspicion.[152] Noting that the Kansas Supreme Court has yet to interpret *Gant*'s "reasonable to believe" standard, the court found it unnecessary to choose between the two existing interpretations because the officer's search would survive either standard.[153] Thus, it remains unclear which reasonableness interpretation governs in Kansas.

e. Inventory Searches After Arrest

Another exception to the search warrant requirement is the inventory search after arrest,[154] the purpose of which is "to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger."[155] An inventory search must be "conducted according to standardized procedures," and cannot be used as a pretext to dig for incriminating evidence.[156] In *United States v. Sitlington*, the Tenth

148. *Gant*, 556 U.S. at 344.

149. *Ewertz*, 305 P.3d at 26 (citing *Gant*, 556 U.S. at 344).

150. *Id.*

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

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

153. *Id.* at 27–28.

154. Illinois v. Lafayette, 462 U.S. 640, 643 (1983) (citing South Dakota v. Opperman, 428 U.S. 364, 376 (1976)).

155. Colorado v. Bertine, 479 U.S. 367, 372 (1987).

156. United States v. Haro-Salcedo, 107 F.3d 769, 772 (10th Cir. 1997) (citing *Bertine*, 479 U.S. at 377 (Marshall, J., concurring)); Florida v. Wells, 495 U.S. 1, 4 (1990)).

Circuit noted that while it had yet to determine whether an inventory search log "that lacks sufficient detail" violates the Fourth Amendment, other circuits are split on the issue.[157] The court found it unnecessary to answer the question because it found that the defendant's "rifle would have been inevitably discovered in a properly conducted inventory search."[158]

f. Administrative Searches of Closely Regulated Industries

Warrantless administrative searches of pervasively regulated businesses constitute another exception to the search warrant requirement.[159] The rationale behind the exception is that "[c]ertain industries hav[ing] such a history of government oversight" have a reduced expectation of privacy, and thus the government's heightened interest in regulating the industry may make a warrantless search reasonable.[160] Searches pursuant to the exception are permissible only when (1) "there is a 'substantial' government interests that informs the regulatory scheme pursuant to which the inspection is made," (2) the search is "necessary to further [the] regulatory scheme," and (3) "the statute's inspection program, in terms of the certainty and regularity of its application, [provides] a constitutionally adequate substitute for a warrant."[161] A search pursuant to this exception "must be 'carefully limited in time, place, and scope.'"[162]

D. The Exclusionary Rule

1. General Exclusion of Evidence from Illegal Searches

The exclusionary rule was judicially created to redress

157. United States v. Sitlington, 527 F. App'x 788, 792 (10th Cir. 2013) (unpublished decision) (citing United States v. Kindle, 293 F. App'x 497, 500 (9th Cir. 2008) ("[U]nder the totality of the circumstances . . . an incomplete inventory list does not establish that the inventory was subterfuge for an unconstitutional investigatory search."); United States v. Lopez, 547 F.3d 364, 371 (2d Cir. 2008) ("The concept of an inventory does not demand the separate itemization of every single object."); United States v. Rowland, 341 F.3d 774, 780–82 (8th Cir. 2003) (holding that an inventory search was invalid when law enforcement failed to follow standardized procedures and searched the vehicle for only incriminating evidence)).

158. *Id.*

159. State v. Marsh, 823 P.2d 823, 826 (Kan. Ct. App. 1991).

160. New York v. Burger, 482 U.S. 691, 699, 702 (1987) (citing Katz v. United States, 389 U.S. 347, 351–52 (1967)).

161. *Marsh*, 823 P.2d at 827 (citing *Burger*, 482 U.S. at 702–03).

162. *Id.* at 828.

unconstitutional searches.[163] The rule serves to deter government officials from engaging in unlawful searches by excluding evidence from criminal prosecutions that was obtained in an unconstitutional search.[164] While Kansas does recognize the exclusionary rule, neither the Fourth Amendment nor the Kansas Constitution prohibit the introduction of evidence obtained in unlawful searches.[165] Thus, "[e]xclusion is not a personal constitutional right; rather, its purpose is to deter future violations by the State."[166]

Because the application of the exclusionary rule could preclude the conviction of a guilty person, the Supreme Court employs a "cost-benefit analysis" to determine when "the cost in retarding a given criminal prosecution by excluding evidence justif[ies] the resulting benefit in deterring Fourth Amendment violations."[167] Because of the rule's end of deterrence, there are exceptions to the exclusionary rule.[168]

2. Good Faith Exception

Kansas recognizes the good faith exception to the exclusionary rule, which permits the introduction of evidence obtained in violation of the Fourth Amendment if "officers relied in good faith on a signed warrant in conducting a search."[169] The exception encourages officers to attain warrants "by affording them greater protection for doing so," thereby discouraging warrantless searches.[170] Additionally, excluding evidence obtained pursuant to a warrant would not further the exclusionary rule's purpose because judges do not purposely offend the Fourth Amendment.[171]

The good faith exception cannot apply where:

> (1) the judicial officer issuing the warrant has been misled by information the author of the affidavit knew or should have known to be false; (2) the judicial officer has 'wholly abandoned' the role of a

163. State v. Dennis, 300 P.3d 81, 86 (Kan. 2013) (citing State v. Daniel, 242 P.3d 1186 (Kan. 2010), *cert. denied*, 131 S. Ct. 2114 (2011)).

164. *Id.* (citing Davis v. United States, 131 S. Ct. 2419, 2426–27 (2011)).

165. *Id.* (citing *Daniel*, 242 P.3d at 1190).

166. *Id.* (citing *Daniel*, 242 P.3d at 1190).

167. State v. Althaus, 305 P.3d 716, 723 (Kan. Ct. App. 2013) (citing Herring v. United States, 555 U.S. 135, 141 (2009)).

168. *Dennis*, 300 P.3d at 86 (citing *Daniel*, 242 P.3d at 1186).

169. *Althaus*, 305 P.3d at 724 (citing United States v. Leon, 468 U.S. 897, 913 (1984)).

170. *Id.* (citing *Leon*, 468 U.S. at 913–14, 920–21).

171. *Id.* (citing *Leon*, 468 U.S. at 916–17).

> detached and neutral official and has merely rubberstamped the request for a warrant; (3) the affidavit is 'so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable'; or (4) the warrant itself is patently deficient, for example, in describing with particularity the place to be searched or the items to be seized.[172]

The exception "presumes a 'well trained'" officer who has knowledge of the Fourth Amendment's general prohibitions and is able to "recognize an obviously deficient warrant."[173] Because "good faith is measured [from] a 'reasonable' officer's perspective," an officer ignorant of basic Fourth Amendment requirements cannot utilize the exception simply "because he subjectively believes" the obviously deficient warrant is valid.[174]

3. Inevitable Discovery

The inevitable discovery exception allows unconstitutionally obtained evidence to be admitted "if law enforcement officers eventually would have found that evidence without violating the Fourth Amendment."[175] The State has the burden of proving by a preponderance of the evidence that the unconstitutionally seized evidence would have been discovered during the officer's investigation even in the absence of the Fourth Amendment violation.[176] Discovery of the unlawfully seized evidence must occur by means "independent of the police conduct tainting the evidence in the first instance."[177]

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

Kansas recognizes the general rule that before entering dwelling, officers "must knock on the door and announce their identity and purpose."[178] To execute a no-knock warrant, officers "must have a

172. *Id.* (quoting *Leon*, 468 U.S. at 923).

173. *Id.* (citing *Leon*, 468 U.S. at 919 n. 20, 923; United States v. Gonzales, 399 F.3d 1225, 1230 (10th Cir. 2005); United States v. Roach, 582 F.3d 1192, 1204 (10th Cir. 2009)).

174. *Althaus*, 305 P.3d at 724 (citing *Leon*, 468 U.S. at 919–20, 919 n. 20).

175. State v. Beltran, 300 P.3d 92, 104 (Kan. Ct. App. 2013) (citing Nix v. Williams, 467 U.S. 431, 444–47 (1984); State v. Ingram, 113 P.3d 228, 232 (Kan. 2005); State v. Johnson, 264 P.3d 1018, 1025 (Kan. Ct. App. 2011); United States v. Crespo-Rios, 645 F.3d 37, 42 (1st Cir. 2011)).

176. *Id.* (citing *Nix*, 467 U.S. at 444; *Ingram*, 113 P.3d at 232).

177. *Id.* (citing Murray v. United States, 487 U.S. 533, 539 (1988); *Murray*, 487 U.S. at 544–45 (Marshall, J., dissenting); *Crespos-Rios*, 645 F.3d at 42; United States v. Jackson, 596 F.3d 236, 241 (5th Cir. 2010)).

178. State v. Shively, 999 P.2d 259, 262 (Kan. 2000) (citing Wilson v. Arkansas, 514 U.S. 927,

reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence."[179] The Supreme Court held that violations of the "knock and announce" rule do not warrant application of the exclusionary rule.[180] The rationale for not applying the exclusionary rule to "knock and announce" violations is that the rule "has never protected an individual's interest in preventing the government from seeing or taking evidence described in a warrant," and thus the rule is unrelated to the seizure of evidence.[181]

E. Search of Open Fields, Trash and Curtilage

Generally, police officers and government agents need a warrant to search a person's home.[182] The Fourth Amendment's protections do not extend outside the home in the "open fields," and police do not need a warrant to perform a search.[183] However, the same protections that apply to a house also apply to a home's "curtilage"—the area outside the home that is "so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection."[184] The Supreme Court identified four factors to help lower courts differentiate between curtilage and open fields: (1) the proximity of the area to the home; (2) whether the area is within an enclosure surrounding the home; (3) the nature and uses to which the area is put; and (4) the steps taken by the resident to protect the area from observation by passerby.[185]

In *Florida v. Jardines*, the Supreme Court clarified its definition of curtilage when police used a drug-sniffing dog to investigate a suspect's porch.[186] The Court reiterated its general definition of curtilage as the area immediately surrounding and associated with the home.[187] The Court held that the use of the dog was a search under the Fourth

934 (1995)).

179. *Id.* at 263 (citing Richards v. Wisconsin, 520 U.S. 385, 386 (1997)).
180. Hudson v. Michigan, 547 U.S. 586, 599 (2006).
181. State v. Staton, 154 P.3d 46, 2 (Kan. Ct. App. 2007) (unpublished decision).
182. Payton v. New York, 445 U.S. 573, 576 (1980).
183. United States v. Dunn, 480 U.S. 294, 303–04 (1987).
184. *Id.* at 301.
185. *Id.*
186. Florida v. Jardines, 133 S. Ct. 1409, 1412 (2013).
187. *Id.* at 1414.

Amendment because the porch was part of the home's curtilage.[188] Therefore, the porch was given the same Fourth Amendment protections as the inside of the home.[189]

In contrast to curtilage, searches in open fields are not subject to Fourth Amendment scrutiny.[190] Observations made from public roads are equivalent to searches of open fields, and therefore do not need to meet Fourth Amendment scrutiny.[191] In *State v. Ibrahim*, the Kansas Court of Appeals held that officers did not violate the Fourth Amendment by taking photographs of endangered horses from a public road.[192] The court of appeals also held that the officers' inspections of the horses on defendant's property did not violate the Fourth Amendment because the inspections took place in an open field.[193] Even assuming the inspections took place within the home's curtilage, the court held that the officers' conduct was harmless error because of the evidence obtained through the photographs on the public road.[194]

In *State v. Talkington*, the Kansas Court of Appeals held that police did not violate the Fourth Amendment by conducting a warrantless search in the defendant's backyard.[195] The police in *Talkington* entered the backyard, searched a bag that was about three to four feet from the house, and arrested the defendant after finding a substance that appeared to be methamphetamine in the bag.[196] The district court in *Talkington* held that the backyard was curtilage and granted the defendant's motion to suppress, noting its concern with "the proximity of the contraband to the house itself."[197] The Kansas Court of Appeals reversed and held that based on the *Dunn* factors the backyard was not curtilage.[198] The court found that the proximity factor weighed in favor of the defendant because of the short distance between the bag and the house.[199] However, because the backyard was surrounded only by "remnants of a chain-link fence" and a few rocks, the court found that the area was not

188. *Id.* at 1415.
189. *Id.*
190. *Dunn*, 480 U.S. at 303–04 (quoting Oliver v. United States, 466 U.S. 170, 177 (1984)).
191. State v. Ibrahim, No. 106,953 2013 WL 195516, at *6 (Kan. Ct. App. Jan. 11, 2013).
192. *Id.*
193. *Id.*
194. *Id.*
195. State v. Talkington, No. 107,596 2013 WL 1859215, at *6 (Kan. Ct. App. Apr. 26, 2013).
196. *Id.* at *1
197. *Id.*
198. *Id.* at *6.
199. *Id.* at *4.

within an enclosure surrounding the home.[200] The court found that the "nature and uses to which the area is put" factor did not favor either party.[201] However, the court found that the defendant had taken very few steps to protect the area from observation, and therefore the factors weighed in favor of the State.[202]

Police officers may conduct some investigatory activities within a home's curtilage without reasonable suspicion.[203] When officers have a "knock and talk" purpose, they can enter that part of the curtilage that is within the "normal route of access" to the home.[204] For example, as long as officers use a route that normal visitors would use, the officers can walk to the front door of the house and knock even if that area is part of the curtilage.[205] If police use a normal route of access, they can also use what they smell to form the basis for probable cause.[206]

F. Standing to Object to Search

1. Generally

To object to a search on Fourth Amendment grounds, a defendant must establish standing as a threshold matter.[207] In *Rakas v. Illinois*, the Supreme Court held that a defendant must have a reasonable expectation of privacy—either a proprietary or lawful possessory interest in the area searched—to satisfy the standing requirement.[208] The Supreme Court of Kansas has applied the same analysis and held that defendants who do not assert a possessory or proprietary interest in the area searched lack standing.[209]

A defendant's possessory interest must be lawful to satisfy the standing requirement.[210] The Tenth Circuit held in *United States v. Wilfong* that the defendant had no standing to challenge the search of a

200. *Id.*
201. *Id.* at *5.
202. *Id.*
203. United States v. Shuck, 713 F.3d 563, 567 (10th Cir. 2013).
204. *Id.* at 568.
205. *Id.*
206. *Id.* at 567; United States v. McDowell, 713 F.3d 571, 573–74 (10th Cir. 2013).
207. *See* Rakas v. Illinois, 439 U.S. 128, 139 (1978) (stating that the standing requirement is subsumed under the substantive Fourth Amendment doctrine).
208. *Id.* at 148.
209. State v. Gilbert, 254 P.3d 1271, 1275 (Kan. 2011).
210. United States v. Worthon, 520 F.3d 1173, 1183 (10th Cir. 2008).

car he stole because the defendant did not have lawful possession of the car.[211] Although the defendant had possession of the car, his possession was not lawful and therefore he had no "legitimate expectation of privacy."[212]

Although a defendant may lack standing to challenge the search of a general area—such as a car or house—a defendant may have standing to challenge the search of personal belongings in that area.[213] A defendant who does not establish a connection between herself and the owner of a car that the defendant is driving does not have standing to object to a search of the car.[214] However, the defendant may have standing to object to the search of a bag in the car if she can demonstrate a legitimate possessory or proprietary interest in that bag.[215]

A defendant may also establish standing to challenge the search of a letter or package by demonstrating a possessory interest in the package.[216] Although the defendant's name may not be on the package, the defendant has standing to challenge the search of the package if the defendant has a possessory interest in it.[217] By placing the package in his car or another area where he has a reasonable expectation of privacy, the defendant demonstrates a possessory interest in the package regardless of whom the package is addressed to.[218]

2. Search of 3rd Parties

a. Passengers in Vehicles

As stated above, to establish standing to challenge the search of a vehicle, a passenger must demonstrate a legitimate possessory or proprietary interest.[219] If the passenger does not have standing to challenge the search of the vehicle, the passenger can still challenge the basis for the stop of the vehicle.[220] In *United States v. Osorieo-Torres*,

211. United States v. Wilfong, 528 F. App'x 814, 817 (10th Cir. 2013).
212. *Id.*
213. *Worthon*, 520 F.3d at 1182.
214. United States v. Aispuro, No. 13-10036-01, 2013 WL 3820017, at *8 (D. Kan. July 24, 2013) (quoting United States v. Eckhart, 569 F.3d 1263, 1275 (10th Cir. 2009)).
215. *Id.* at *11.
216. State v. Bierer, 308 P.3d 10, 14 (Kan. Ct. App. 2013), *rev. denied* (Dec. 27, 2013).
217. *Id.* at 13.
218. *Id.* at 14.
219. Rakas v. Illinois, 439 U.S. 128, 148 (1978).
220. Brendlin v. California, 551 U.S. 249, 259 (2007).

the United States District Court for the District of Kansas held that although the defendant did not have standing to challenge the car's search, he could challenge the initial seizure of the car.[221] The court found that the defendant failed to demonstrate a legitimate possessory or property interest, as required by *Rakas* to establish standing to challenge the search.[222] However, the court found that the defendant could challenge the car's initial seizure because as a passenger the defendant had be seized.

To establish standing to challenge the search of a car, a defendant must assert a legitimate possessory or proprietary interest.[223] In *State v. Martynowicz*, the defendant passenger told police officers twice that she did not own the vehicle.[224] The Kansas Court of Appeals held that because the defendant told police she did not own the vehicle, she failed to assert a legitimate possessory or proprietary interest, and therefore lacked standing to challenge the search.[225] Although the defendant lacked standing to challenge the vehicle's search, the court held that she could challenge the initial seizure.[226]

G. Technology & Searches

1. Wiretapping

The use of wiretapping in criminal investigations is regulated by the Omnibus Crime Control and Safe Streets Act of 1968.[227] The Act requires investigators to apply for a judicial order to use wiretaps. Among other elements, the application must contain a "full and complete statement" whether "other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous."[228] Additionally, the court issuing the wiretap order must find that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too

221. United States v. Osorieo-Torres, No. 12-40043-02-RDR, 2012 WL 5831186, at *3 (D. Kan. Nov. 13, 2012).

222. *Id.*

223. State v. Martynowicz, No. 109,056, 2013 WL 5303557, at *6 (Kan. Ct. App. Sept. 20, 2013).

224. *Id.* at *7.

225. *Id.*

226. *Id.*

227. 18 U.S.C. § 2510–2520.

228. 18 U.S.C. § 2518(1)(c).

dangerous."[229] These elements form the basis of the necessity requirement of 18 U.S.C. § 2518.[230]

To meet the necessity requirement, applicants must provide information that is sufficiently detailed to establish that normal investigative procedures will not suffice.[231] However, courts will tolerate some boilerplate language in the application, and the government is not required to exhaust all conceivable investigative procedures.[232] Courts will also extend a wiretap order upon a showing of necessity even if the first order successfully reveals information.[233] Once a judge authorizes a wiretap, a presumption arises that the order is proper and the defendant has the burden to prove otherwise.[234]

A court may find that the necessity requirement is still met although the government includes some generalized or conclusory language in its wiretap application.[235] In *United States v. McDowell*, the Tenth Circuit held that the government met the necessity requirement even though some statements in the wiretap application were generalized.[236] The court held that the statements, which expressed that a law enforcement officer knew certain facts based on "training and experience," could be given weight by the district court in determining whether the necessity requirement was met.[237]

In addition to the showing of necessity, the federal wiretap statute also limits the submission of wiretap applications to "the principal prosecuting attorney" of a state or a political subdivision of the state.[238] The Kansas wiretap statute does not place a similar restriction on wiretap applicants.[239] However, the Kansas Supreme Court has held that the federal wiretap statute preempts the Kansas wiretap statute on the

229. 18 U.S.C. § 2518(3)(c).

230. United States v. Tatum, No. 12-20066-29-KHV, 2013 WL 3854483, at *1 (D. Kan. July 25, 2013).

231. *Id.* at *2.

232. *Id.*

233. *See* United States v. Aldava, No. 13-40076-JAR-01, 2013 WL 6729814, at *4 (D. Kan. Dec. 19, 2013) (denying motion to suppress information gathered through wiretap because initial wiretap order was properly extended by 30 days based on showing of necessity).

234. *Id.* at *1.

235. United States v. McDowell, 520 F. App'x 755, 760 (10th Cir. 2013) *cert. denied*, 134 S. Ct. 463 (U.S. 2013).

236. *Id.*

237. *Id.*

238. 18 U.S.C. § 2516(2).

239. State v. Bruce, 287 P.3d 919, 924 (Kan. 2012).

submission issue.[240] In *State v. Bruce*, the Kansas Attorney General delegated the submission of a wiretap application to an assistant attorney general.[241] The Kansas Supreme Court held that the delegation violated the federal statute's submission limitation, and that because the limitation was a "central provision" of the statute, the evidence gained from the wiretap must be suppressed.[242]

2. Electronic Surveillance

In *United States v. Jones* the Supreme Court reconsidered the definition of "search" in the context of electronic surveillance.[243] In *Jones*, the government placed a GPS tracking device on the defendant's vehicle to monitor the vehicle's movements.[244] The government argued that because the defendant did not have a "reasonable expectation of privacy" in the vehicle—a test announced in *United States v. Katz*[245]—the placement of the tracking device was not a search.[246] However, the Court held that the placement of the GPS tracker could also constitute a search if it violated the "trespassory test," which analyzes whether the government physically intrudes into a constitutionally protected area.[247] The Court held that it would use both the *Katz* test and the trespassory test to evaluate the existence of searches within the electronic surveillance context.[248] Because the placement of the GPS tracker was an invasion of a constitutionally protected area, the Court held that the placement constituted a search, which was unreasonable because of the government's noncompliance with a search warrant.[249]

The Tenth Circuit recently considered the applicability of the trespassory rule from *Jones* in *United States v. Wilfong*.[250] In *Wilfong*, the government placed a GPS tracking device on the defendant's car after learning that the defendant had an outstanding arrest warrant and

240. *Id.*
241. *Id.* at 920.
242. *Id.* at 924–27.
243. *See* United States v. Jones, 932 S. Ct. 945 (2012).
244. *Id.* at 948.
245. Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).
246. *Jones*, 132 S. Ct. at 950.
247. *Id.* at 951.
248. *Id.* at 952 ("the Katz reasonable-expectation-of-privacy test has been added to, not substituted for, the common-law trespassory test.").
249. *Id.* at 952–54.
250. United States v. Wilfong, 528 F. App'x 814, 819 (10th Cir. 2013).

that the defendant had recently stolen a car.[251] The defendant argued that the *Jones* trespassory test applied and made the use of the tracker a search.[252] The court disagreed, holding that the *Jones* test did not apply to the facts of the case.[253] Whereas the government in *Jones* used the tracker to investigate criminal activity, the government in *Wilfong* used the tracker to find and arrest the defendant.[254] This distinction made the situation in *Wilfong* look much more like exigent circumstances, and therefore the *Jones* test did not apply to the government's conduct.[255]

In *United States v. Wells*, the Tenth Circuit interpreted the reasonable expectation of privacy test.[256] The government in *Wells* recorded conversations in a motel room involving a defendant suspected of conspiring to steal public funds.[257] The court held that because the defendant was onlye in the room for approximately fifteen minutes, he had no socially meaningful connection to the room, and therefore lacked any reasonable expectation of privacy.[258] Without a reasonable expectation of privacy, the use of electronic surveillance alone did not make the government's conduct unreasonable.[259] The court found that ruling for the defendant on this basis would require a rule of exclusion for electronic surveillance without limitation.[260]

The Tenth Circuit considered the good-faith exception in the context of electronic surveillance in *United States v. Barajas*.[261] In *Barajas*, the government applied for a wiretap order for the defendant's phone to investigate suspected drug activity.[262] The government did not request to obtain GPS data in its affidavit, however the judge's order granting the wiretap included an authorization for GPS data.[263] The Tenth Circuit affirmed the defendant's conviction, holding that the good-faith exception permitted the government to obtain the GPS information even

251. *Id.* at 815.
252. *Id.* at 816.
253. *Id.* at 819.
254. *Id.* ("the placement of the GPS was not to obtain information connecting him to a crime but to find and arrest him.").
255. *Id.*
256. United States v. Wells, 739 F.3d 511, 518, 524–25 (10th Cir. 2014).
257. *Id.* at 514–15.
258. *Id.* at 524–25.
259. *Id.*
260. *Id.*
261. 710 F.3d 1102 (10th Cir. 2013).
262. *Id.* at 1105.
263. *Id.*

if the affidavit was defective.[264] The court held that because the law was "very much unsettled" on whether a wiretap order could authorize the collection of GPS data, the government agents were not required to know whether the affidavit was proper.[265]

3. Chemical Drug Tests

The Kansas statute regulating the administration of drug and alcohol tests and refusal to submit to such tests was recently revisited by both the legislature and the courts. The amended section 8-1001 provides that once a driver enters a vehicle, the driver impliedly consents to drug and alcohol testing, including tests of "blood, breath, urine or other bodily substance."[266] This is known as the implied consent provision.[267] The statute also provides for criminal penalties for refusal to submit to testing.[268]

Although drivers consent to testing, officers must request testing only under certain circumstances.[269] To request testing, an officer must have "reasonable grounds to believe the [driver] was operating or attempting to operate a vehicle while under the influence of drugs or alcohol."[270] Additionally, the driver must be arrested (for any violation of any state statute, county resolution, or city ordinance), or be involved in an automobile accident causing property damage or non-serious personal injury, or be involved in an accident causing serious physical injury or death and be subject to a traffic citation.[271] The statute states that in accidents causing serious injury or death, a traffic citation provides probable cause for testing.[272]

The Kansas Court of Appeals has held that the "reasonable grounds

264. *Id.* at 1111.

265. *Id.*

266. KAN. STAT. ANN. § 8-1001(a).

267. State v. Jones, 106 P.3d 1, 7 (Kan. 2005).

268. KAN. STAT. ANN. § 8-1025.

269. KAN. STAT. ANN. § 8-1001(b).

270. *Id.* (requiring that "the officer has reasonable grounds to believe the person was operating or attempting to operate a vehicle while under the influence of alcohol or drugs, or both, or to believe that the person was driving a commercial motor vehicle, as defined in K.S.A. 8-2,128, and amendments thereto, while having alcohol or other drugs in such person's system, or was under the age of 21 years and was operating or attempting to operate a vehicle while having alcohol or other drugs in such person's system").

271. *Id.* An officer is not required to test if the "officer has reasonable grounds to believe" the vehicle operator's actions did not contribute to the accident or collision. *Id*.

272. *Id.*

to believe" requirement equates to probable cause.[273] In *Bixenman v. Kansas Department of Revenue*, the court held that an officer had reasonable grounds to believe that the driver was operating under the influence of alcohol while under the age of twenty-one, where the driver had bloodshot eyes, alcohol on his breath, and had admitted to drinking alcohol.[274] The Kansas Supreme Court has also interpreted section 8-1001(a) as requiring a *lawful* arrest if the officer relies on an arrest, rather than a collision, to establish "reasonable grounds to believe" the driver is intoxicated for testing purposes.[275] In *Sloop v. Kansas Department of Revenue*, the Kansas Supreme Court held that because the officer lacked probable cause to arrest the defendant, the arrest was unlawful and therefore the officer could not lawfully request testing.[276]

In *State v. Declerck*, the Kansas Court of Appeals considered the constitutionality of two provisions of section 8-1001.[277] First, the court considered section 8-1001(b)(2), which provides that officers have probable cause when a driver is involved in an automobile accident resulting in serious injury or death and the driver is given a traffic citation.[278] The court held that "[the statute] is unconstitutional to the extent it requires a search and seizure absent probable cause the person was operating or attempting to operate a vehicle under the influence of drugs or alcohol."[279] Second, the court held that the implied consent provision was unconstitutional as applied to the case.[280] The court held that the implied consent provision, standing alone, could not provide the basis for an exception to the warrant requirement.[281]

The statute regulating preliminary breath tests (PBTs) contains an implied consent provision similar to that in section 8-1001.[282] Before administering a PBT, an officer must give the driver notice that: (1) there is no right to consult with an attorney regarding whether to submit to testing; (2) refusal to submit to testing is a traffic infraction; and (3)

273. Bixenman v. Kan. Dep't of Revenue, 307 P.3d 217, 221 (Kan. Ct. App. 2013).
274. *Id.*
275. Sloop v. Kan. Dept. of Revenue, 290 P.3d 555, 559 (Kan. 2012).
276. *Id.* at 561.
277. State v. Declerck, 317 P.3d 794 (Kan. Ct. App. 2014).
278. *Id.* at 801.
279. *Id.* at 802.
280. *Id.* at 804.
281. *Id.*
282. KAN. STAT. ANN § 8-1012(a) ("[a]ny person who operates or attempts to operate a vehicle within this state is deemed to have given consent to submit to a preliminary screening test.").

further testing may be required after the PBT.[283] However, the defendant cannot use as a defense any failure by the officer to provide such notice.[284] Because PBTs are searches, the search warrant requirement applies to PBTs absent some exception to the warrant requirement.[285] One exception to the warrant requirement is the defendant's voluntary consent.[286] In *State v. Edgar*, the Kansas Supreme Court held that because the officer stated that the defendant had no right to refuse the PBT, the implied consent provision could not serve as an exception to the warrant requirement.[287] Although an officer's complete failure to give notice cannot serve as a defense, the court held that an officer cannot give incorrect notice.[288] The court held that the officer's statement deprived the defendant of his right to refuse his statutorily implied consent, "an opportunity expressly contemplated by K.S.A. 2010 Supp. 8–1012(c)(2), (d)."[289] Therefore, the consent was invalid and the PBT results must be suppressed.[290]

4. DNA Testing

In *Maryland v. King*, the Supreme Court considered the constitutionality of the warrantless collection of DNA through a buccal swab of a defendant's cheek.[291] The police in *King* made a valid arrest of the defendant based on probable cause and then performed a cheek swab on him at the police station.[292] The officers performed the DNA swab pursuant to a Maryland statute that authorized DNA swabs after lawful arrests for crimes of violence and only for identification purposes.[293]

Emphasizing the State's interest in identifying suspects involved in violent crimes, the Court held that the swab was reasonable as a search incident to a lawful arrest.[294] The Court analogized DNA swabs for

283. *Id.* § 8-1012(c).
284. *Id.*
285. State v. Edgar, 294 P.3d 251, 2610 (Kan. 2013).
286. *Id.*
287. *Id.* at 262.
288. *Id.* ("[A]s the district court noted, the statute concerns the failure to give notice—not failing to provide the *correct* notice.").
289. *Id.*
290. *Id.* at 626–63.
291. Maryland v. King, 133 S. Ct. 1958 (2013).
292. *Id.* at 1965–66, 1980 (noting police had probable cause to arrest defendant).
293. *Id.* at 1967.
294. *Id.* at 1970–80.

identification purposes to the collection of fingerprints or identification by face recognition.[295] Because of the State's interest in identification, the Court stated it must "give great weight both to the significant government interest at stake in the identification of arrestees and to the unmatched potential of DNA identification to serve that interest."[296] The Court also noted that by comparison, the intrusion on the defendant's privacy through a stationhouse cheek swab was minimal.[297] Therefore, the Court held that DNA cheek swabs incident to lawful arrests are reasonable, at least where the collection of DNA is limited to the identification of arrestees.[298]

III. SEIZURES

A. Fourth Amendment, Generally

The United States Constitution states that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable . . . seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the . . . persons or things to be seized."[299] The State of Kansas adopted nearly identical language when it created Section 15 of its Bill of Rights.[300] The Kansas Supreme Court has recognized that the "wording and scope" of both provisions is "identical for all practical purposes."[301]

B. Warrant Requirement, Generally

While the Supreme Court has held that searches and seizures within a home are presumptively unreasonable, it has provided that the warrant requirement is ultimately subject to a test of reasonableness.[302] Kansas has identified a handful of exceptions that permit law enforcement to forego obtaining a warrant including consent, searches incident to lawful arrests, a stop and frisk, probable cause combined with an exigent

295. *Id.* at 1971–72.
296. *Id.* at 1977.
297. *Id.*
298. *Id.* at 1980.
299. U.S. CONST. amend. IV.
300. KAN. CONST. BILL OF RIGHTS § 15.
301. State v. Johnson, 856 P.2d 134, 138 (Kan. 1993).
302. Kentucky v. King, 131 S. Ct. 1849, 1856 (2011).

circumstance, situations covered by the emergency doctrine, inventory searches, when an officer has a plain view or feel, and administrative searches of regulated businesses.[303]

A number of exigent circumstances have been identified and include: (1) preventing harm to officers by capturing a dangerous individual; (2) gathering necessary evidence before its imminent loss; (3) hot pursuit of a fleeing individual; and (4) stopping the escape of a criminal suspect.[304] Moreover, this list is not exclusive and other courts have also considered assisting a seriously injured person as an acceptable, reasonable warrantless exigent circumstance.[305]

C. Types of Seizures

1. Seizure of Items

Generally, meaningful interference with a person's possessory interest in her property implicates the Fourth Amendment's protections against seizures.[306] The Supreme Court has repeatedly stated that a seizure can occur even though law enforcement does not invade the privacy of the individual while seizing their property.[307] A seizure of tangible property occurs when law enforcement takes control of property by removing it from another's possession, or when the officer merely states his intent to take the property.[308] There has been no seizure when law enforcement picks up an object to look at it.[309]

a. Seizure of Mail

The Fourth Amendment, subject to certain limitations, encompasses protections to limit interference with a person's mail.[310] The temporary detention of mail pursuant to an investigation by law enforcement is not

303. State v. Sanchez-Loredo, 272 P.3d 34, 38 (Kan. 2012) (citing State v. Fitzgerald, 192 P.3d 171, 173 (Kan. 2008)).

304. State v. Dugan, 276 P.3d 819, 828 (Kan. Ct. App. 2012).

305. *Id.* (citing Brigham City, Utah v. Stuart, 547 U.S. 398, 403 (2006)).

306. State v. Daly, 789 P.2d 1203, 1209 (Kan. Ct. App. 1990) (citing United States v. Jacobsen, 466 U.S. 109, 113 (1984)).

307. United States v. Jones, 132 S. Ct. 945, 951 (2012).

308. United States v. Wood, 6 F. Supp. 2d 1213, 1224 (D. Kan. 1998) (citing United States v. Place, 462 U.S. 696, 707–08 (1983)).

309. *Id.*

310. State v. Duhon, 109 P.3d 1282, 1287 (Kan. Ct. App. 2005).

a seizure under the Fourth Amendment if officers have a reasonable suspicion of criminal activity.[311] The U.S. Postal Service uses certain identifiers to discern packages likely to contain narcotics, called the narcotics package profile.[312] The existence of more than one identifier found within the narcotics package profile provides justification for the detention or interruption of mail delivery.[313]

In *State v. Bierer*, the Kansas Court of Appeals clarified that due to its mandate to follow Supreme Court precedent, it would apply the holding in *California v. Acevedo*,[314] that "officers can conduct a warrantless search of a package located within an automobile if they have probable cause to believe contraband or evidence is contained therein."[315]

2. Seizure of Persons, Generally

For purposes of the Fourth Amendment, a person is seized in violation of his rights "when an officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen."[316] Courts determine that a person has been seized by a show of authority when the person reasonably believed, based on all of the circumstances, that she was not free to leave and so submits to the authority.[317]

a. Detentions of Third Parties During Search

In *Michigan v. Summers*, the Supreme Court affirmed the right of law enforcement executing a search warrant to detain individuals located on the premises where the search was taking place.[318] The Court found that detention of persons occupying the area of the search was reasonable because it promoted officer safety and efficiency, and prevented flight by persons who might face criminal charges.[319]

In 2013, the Court placed a limitation on the reach of this detention

311. U.S. v. Scarborough, 128 F.3d 1373, 1378 (10th Cir. 1997).
312. *Duhon*, 109 P.3d at 1287.
313. *Id.*
314. 500 U.S. 565 (1991).
315. 308 P.3d 10, 16 (Kan. Ct. App. 2013).
316. State v. Moralez, 300 P.3d 1090, 1096 (Kan. 2013) (citing State v. Morris, 72 P.3d 570 (Kan. 2003)).
317. *Id.* at 1096 –97 (citing *Morris*, 72 P.3d at 18–19).
318. 452 U.S. 692, 705 (1981).
319. 133 S. Ct. 1031, 1038–40 (2013).

exception by holding that only those within the "immediate vicinity of the premises" that were being searched could be detained.[320] In *Bailey v. United States*, police had detained an individual connected to the premises after he was one mile away.[321] The Court reasoned that the "search-related law enforcement interests are diminished and the intrusiveness of the detainment is more severe" when an occupant is beyond the immediate vicinity of the search.[322]

b. Detentions During Traffic Stops

The Tenth Circuit has identified that a traffic stop is valid if it is the result of an observed traffic violation or if law enforcement has a "reasonable articulable suspicion that a . . . violation has occurred or is occurring."[323] Generally, a lawful traffic stop must be "reasonably related in scope" to the initial justification for the stop,[324] and may not last longer than needed to "effectuate the purpose of the stop."[325] Once the reason for the traffic stop has concluded, the officer must permit the individual to leave unless the officer has an "objectively reasonable and articulable suspicion that the individual is engaged in illegal activity."[326]

If a reasonable and articulable suspicion exists and law enforcement begins an investigatory detention, the officer is permitted to "conduct a pat-down search for weapons that might pose a danger to the officer."[327] Law enforcement may not conduct a full search of the individual or his automobile "or other effects" when the individual is only suspected of criminal activity.[328] The touchstone of any search is reasonableness, and officers must always employ the "least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time."[329]

If officers do not have a reasonably articulable suspicion of criminal

320. *Id.* at 1041.

321. *Id.* at 1033–34.

322. *Id.* at 1042.

323. Swanson v. Town of Mountain View, 577 F.3d 1196, 1201 (10th Cir. 2009).

324. Courtney v. Oklahoma, 722 F.3d 1216, 1223 (10th Cir. 2013) (citing United States v. Lyons, 510 F.3d 1225, 1236 (10th Cir. 2007)).

325. United States v. Cash, 733 F.3d 1264, 1273 (10th Cir. 2013) (citing United States v. Pena-Montes, 589 F.3d 1048, 1052 (10th Cir. 2009)).

326. *Courtney*, 722 F.3d at 1223–24 (citing *Lyons*, 510 F.3d at 1237).

327. State v. Spagnola, 289 P.3d 68, 74 (Kan. 2012).

328. *Id.* (citing Florida v. Foyer, 460 U.S. 491, 499 (1983)).

329. *Id.*

activity, they may detain persons after the conclusion of a traffic stop only when the continuance is consensual.[330] Courts determine if the "continued encounter" with law enforcement is consensual by considering whether a reasonable person in the situation would have believed she could refuse law enforcement's requests or end the encounter altogether.[331]

c. Community Caretaking

Courts have recognized that law enforcement act as "community caretakers" wholly apart from detecting and investigating crimes.[332] A few identified examples of officers acting as community caretakers include taking individuals to safety, impounding vehicles on the side of the road, and restraining intoxicated persons.[333] Any detentions that occur while an officer is acting as a community caretaker are required to be based on "specific and articulable facts which reasonably warrant an intrusion into the individual's liberty."[334]

d. Police Interrogations

Law enforcement officers can approach individuals in public spaces and ask if they would mind answering some questions, and if the individuals agree, officers can then engage in conversations that may later be used as evidence in court.[335] However, individuals may decline to answer the officer's questions without facing repercussions.[336] In fact, no individual may be detained for questioning "without reasonable, objective grounds for doing so."[337] Law enforcement maintains reasonable, objective grounds for detaining someone when they have a "reasonable and articulable suspicion that [the person has] committed, is about to commit, or is [currently] committing a crime."[338]

330. State v. Murphy, 293 P.3d 703, 705 (Kan. 2013) (citing State v. Thompson, 166 P.3d 1015, 1037 (Kan. 2007)).

331. *Id.*

332. Storey v. Taylor, 696 F.3d 987, 993 (10th Cir. 2012) (citing Lundstrom v. Romero, 616 F.3d 1108, 1120 (10th Cir. 2010)).

333. *Id.*

334. *Id.* (citing United States v. Garner, 416 F.3d 1208, 1213 (10th Cir. 2005)).

335. Florida v. Royer, 460 U.S. 491, 497 (1983).

336. *Id.* (citing Terry v. Ohio, 392 U.S. 1, 31, 32–33 (1968)).

337. *Id.* (quoting United States v. Mendenhall, 446 U.S. 544, 555 (1980)).

338. State v. Johnson, 259 P.3d 719, 722 (Kan. 2011).

Regarding the amount of reasonable suspicion required for officers to detain an individual briefly, it has to be more than an "unparticularized suspicion or hunch."[339] On the other hand, reasonable suspicion requires much less than does a preponderance of the evidence or for probable cause.[340] An officer must only articulate a "minimal level of objective justification" for detaining an individual.[341]

When courts analyze whether an investigatory detention is valid under the Constitution, they consider if the detention was "justified at its inception" and "reasonably related in scope to the circumstances which justified the interference in the first place."[342] If the investigatory detention cannot pass this two-prong test, it must then be considered an arrest and justified on different grounds.[343]

i. United States v. Salas-Garcia

The Tenth Circuit considered whether an investigatory detention was constitutional in a 2012 case. In *United States v. Salas-Garcia*, narcotics task force officers had set up a drug bust using an informant.[344] When cued by the directing agent, the defendant was stopped by an officer in a parking lot and "immediately placed in handcuffs."[345] Officers then told the defendant that he was not under arrest and that they were only conducting an investigation.[346] The defendant was patted down and consented to stay and cooperate with officers, and his handcuffs were removed after approximately four to ten minutes.[347] The defendant answered some "investigatory questions" and confirmed he had drugs in his vehicle, prompting officers to search the car using a search warrant and arrest him after finding cocaine.[348]

The defendant argued that officers were outside the scope of their detention when they handcuffed him without any justification or

339. United States v. Briggs, 720 F.3d 1281, 1285 (10th Cir. 2013) (quoting United States v. Sokolow, 490 U.S. 1 (1989)).

340. *Id.*

341. *Id.*

342. U.S. v. Salas-Garcia, 698 F.3d 1242, 1248 (10th Cir. 2012).

343. *Id.*

344. *Id.* at 1246.

345. *Id.*

346. *Id.* at 1246–47.

347. *Id.* at 1247.

348. *Id.*

probable cause.[349] However, the Tenth Circuit reiterated that an otherwise lawful, investigatory detention does not necessarily become unreasonable or an arrest under the Fourth Amendment simply because handcuffs were utilized by law enforcement.[350] However, the court admitted that because the use of handcuffs, or alternatively, firearms by officers, represented a greater intrusion, officers must be able to demonstrate that the circumstances warranted the action they took.[351]

Ultimately, the court found that because the officers did not have initial information on the defendant, and because drug transactions typically involve weapons, officers had a reasonable fear of their safety that permitted the use of handcuffs.[352] The court was influenced, in part, on the relatively short length of time that the defendant was handcuffed, when in another case it found that twenty minutes was reasonable under the facts presented.[353]

ii. State v. Edgar

The Kansas Supreme Court recently decided whether a PBT is admissible when an officer misstates an individual's choice to submit to the test. According to Kansas law, before an officer can administer a PBT test, he must first inform the individual that (1) the person cannot consult with a lawyer before taking the test; (2) a refusal will result in a traffic infraction; and (3) more testing may be necessary depending on the PBT results.[354]

In *State v. Edgar*, the defendant was given a series of sobriety tests following an encounter during a driver's license checkpoint.[355] After the other tests, the officer told the defendant he was going to conduct a PBT, which requires the individual to blow a deep breath into a device for about three to five seconds.[356] The officer correctly instructed the defendant that he was not permitted to consult with a lawyer about the test, and that he might be subject to further testing depending on the PBT results, but he incorrectly informed him that he could not refuse the PBT

349. *Id.* at 1249.
350. *Id.*
351. *Id.*
352. *Id.* at 1250–51.
353. *Id.* at 1252 (citing United States v. Sharpe, 470 U.S. 675, 687–88 (1985); United States v. Albert, 579 F.3d 1188, 1191 (10th Cir. 2009)).
354. *Id.* at 261; KAN. STAT. ANN. § 8-1012.
355. State v. Edgar, 294 P.3d 251, 254 (Kan. 2013).
356. *Id.* at 254–55.

test.[357] The defendant consented to the PBT test, which indicated a blood alcohol level in excess of permitted levels.[358] He was subsequently arrested for drunk driving.[359]

The issue presented to the Kansas Supreme Court was whether the statute required the officer's misstatement of the law to result in a suppression of the defendant's PBT test results.[360] The court reasoned that informing the defendant he has no choice of refusal was a misstatement that overrode his consent due to the fact that individuals may refuse and choose a traffic infraction instead.[361] The court considered if the officer's notice substantially complied with the statutory text, making his mistake otherwise harmless, but held instead that misstatements are not the same as deviations.[362] As a result, the court ruled the PBT test was involuntary and so should have been suppressed.[363]

e. Arrest

Kansas law permits law enforcement officers to arrest individuals under four circumstances. An arrest by a law enforcement officer must be lawful, and the officer must have probable cause if no arrest warrant has been issued.[364] The officer may have an arrest warrant or may have probable cause to believe that the person has a warrant out for their arrest.[365] Alternatively, the officer may arrest an individual when he has probable cause that the person has committed or is committing a crime, or when the person commits a crime in view of the officer, excluding traffic, cigarette, and tobacco infractions.[366]

Courts have identified probable cause as "the reasonable belief that a specific crime has been or is being committed and that the defendant committed the crime."[367] Moreover, courts have admitted that the existence of probable cause requires the consideration of the totality of

357. *Id.* at 255.
358. *Id.*
359. *Id.*
360. *Id.* at 256.
361. *Id.* at 261.
362. *Id.* at 262.
363. *Id.* at 263.
364. Sloop v. Kansas Dep't. of Revenue, 290 P.3d 555, 559 (Kan. 2012).
365. KAN. STAT. ANN. § 22-2401.
366. *Id.*
367. *Sloop*, 290 P.3d at 559 (citing State v. Abbott, 83 P.3d 794 (Kan. 2004)).

the circumstances, meaning that there is no rigid formula courts can use to make such a determination.[368] Kansas case law previously held that an officer could successfully show he had probable cause if he demonstrated that "*guilt [wa]s more than a possibility*."[369] However, in 2012, the Kansas Supreme Court clarified that this emphasized language had crept inexplicably into the case law and that the proper determination was whether probable cause can support an arrest considering "the information and fair inferences therefrom known to the officer at the time of the arrest."[370]

f. Confessions Following Illegal Arrests

While an unlawful arrest is not a bar on prosecution, certain evidence obtained at the time of the unlawful arrest must be suppressed.[371] The status of information or evidence obtained during an interrogation following an unlawful arrest requires a separate analysis.[372] Courts have produced four factors to be considered when determining whether information gathered subsequent to an unlawful arrest is admissible.[373] Courts consider "(1) whether *Miranda* warnings were given [to the defendant], (2) the proximity of the illegal arrest and the statement or confession, (3) the purpose and flagrancy of the officer's misconduct, and (4) other intervening circumstances."[374]

D. Standing to Object to a Seizure

In order for a defendant to object to the seizure of his property, he must first have standing to challenge the search.[375] A defendant has standing if he can demonstrate a "legitimate expectation of privacy in the . . . property seized" and establish that "the expectation [of privacy] is one that society recognizes as reasonable."[376] Fourth Amendment

368. *Id.* at 559–60 (citing State v. McGinnis, 290 Kan. 547, 552–53 (2010)).

369. *Id.* at 560 (citing Bruch v. Kansas Dep't. of Revenue., 282 Kan. 764, 775–76 (2006)).

370. *Id.*

371. State v. Hill, 130 P.3d 1, 12 (Kan. 2006) (citing State v. Weis, 792 P.2d 989 (Kan. 1990)).

372. *Id.* at 13.

373. *Id.*

374. *Id.*

375. State v. Ralston, 257 P.3d 814, 817 (Kan. Ct. App. 2011) (citing State v. Gonzalez, 85 P.3d 711, 713 (Kan. Ct. App. 2004).

376. State v. Bierer, 308 P.3d 10, 13 (Kan. Ct. App. 2013) (citing State v. Rupnick, 125 P.3d 541, 548 (Kan. 2005)).

guarantees against unreasonable searches and seizures are personal, thus a defendant generally does not have standing to object to the illegal seizure of a third person's property.[377] Under some circumstances, however, social guests may have standing to object to unreasonable searches and seizures of their host's property.[378] Even if a defendant does not have standing to challenge a search, he may still be able to object to the admissibility of evidence if its discovery was the fruit of the unlawful seizure of his person.[379]

E. Fifth & Sixth Amendment Issues

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

Under the Fifth Amendment of the United States Constitution, "[n]o person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."[380] The protection against compelled statements applies only to testimonial evidence.[381] Courts should construe the provision liberally, covering not just confessions but any statement that may incriminate the defendant.[382]

2. Applicable Language of the Sixth Amendment

The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defense."[383] The Sixth Amendment right to counsel attaches once adversarial judicial proceedings have begun

377. United States v. Cooper, 283 F.Supp.2d 1215, 1244 (D. Kan. 2003).

378. *See* United States v. Poe, 556 F.3d 1113 (10th Cir. 2009) (finding social guests who have "acceptance" into host's home have a reasonable expectation of privacy); State v. Huff, 92 P.3d 604 (Kan. 2004) (finding guest had standing to challenge warrantless entry and search of host's home).

379. *See* State v. Smith, 184 P.3d 890 (Kan. 2008) (finding passenger was seized within the meaning of the Fourth Amendment during traffic stop and search of her purse left in the automobile exceeded the scope of the stop); United States v. DeLuca, 269 F.3d 1128 (10th Cir. 2001) (finding passenger who did not have standing to challenge search of automobile did have standing to challenge lawfulness of his detention and thus seek suppression of contraband found in automobile as a result).

380. U.S. CONST. amend. V.

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

382. Hoffman v. United States, 341 U.S. 479, 486 (1951).

383. U.S. CONST. amend. VI.

against the defendant and applies to all critical stages of those proceedings.[384] A defendant may waive this right as along as he does so voluntarily, knowingly and intelligently.[385]

Kansas law also guarantees a defendant's right to counsel. The Kansas Bill of Rights provides, "[i]n all prosecutions, the accused shall be allowed to appear and defend in person, or by counsel."[386] In addition to this constitutional provision, the right to counsel in Kansas is guaranteed by statute—section 22-4503 provides that any defendant charged with a felony has a right to counsel at every stage of the proceedings against him.[387]

In *State v. Lawson*, the Kansas Supreme Court looked at whether a signed *Miranda* waiver form was a valid waiver of a defendant's right to counsel after the initiation of adversarial judicial proceeding.[388] The defendant, Lester Lawson, was charged with aggravated criminal sodomy of a child under fourteen.[389] According to the judge's notes, Lawson was represented by counsel at his first court appearance, and his application for appointment of counsel was filed later that same day.[390] The next day, a law enforcement officer transported Lawson from his jail cell to the Leavenworth Police Department where he waived his *Miranda* rights and the officer conducted a polygraph examination and interview of him.[391] During the interrogation, Lawson admitted to multiple instances of sexual contact with a minor.[392] Lawson's attorney challenged the admissibility of these statements at trial.[393] The trial court, however, ruled them admissible after the State provided the officer's testimony and the signed *Miranda* waiver form.[394]

To determine if Lawson's right to counsel under constitutional and statutory law had been violated, the Kansas Supreme Court first had to analyze whether a polygraph examination was a stage of the judicial

384. Brewer v. Williams, 430 U.S. 387, 398 (1977); Kirby v. Illinois, 406 U.S. 682, 690 (1972).

385. Montejo v. Louisiana, 556 U.S. 778, 786 (2009).

386. KAN. CONST. BILL OF RIGHTS. § 10.

387. KAN. STAT. ANN. § 22-4503(a) ("A defendant charged by the state of Kansas in a complaint, information or indictment with any felony is entitled to have the assistance of counsel at every stage of the proceedings against such defendant . . . .").

388. 297 P.3d 1164, 1172 (Kan. 2013).

389. *Id.* at 1166.

390. *Id.*

391. *Id.* at 1167.

392. *Id.*

393. *Id.*

394. *Id.*

proceedings. The court found that including trial-related activities outside of the courtroom, e.g., a polygraph examination, as a stage of the proceedings was consistent with the history of the right to counsel in Kansas.[395] In addition, the court noted the Supreme Court had found interrogation was a critical stage of criminal proceedings.[396] Since states cannot narrow the protections provided by the federal constitution, interrogations must also be considered a stage of judicial proceedings under state law.[397] Thus, Lawson's polygraph examination was a stage of the judicial proceedings against him, and he was guaranteed a right to counsel during the examination.[398]

Next, the court turned to the issue of whether Lawson had validly waived his right to counsel by signing the *Miranda* waiver form. The State argued the Supreme Court decision *Montejo v. Louisiana* was the controlling case on the issue of waiver of the right to counsel.[399] In *Montejo*, the Court held that a defendant's waiver of his *Miranda* rights was sufficient to waive his right to counsel after the initiation of judicial proceedings.[400] The Kansas Supreme Court acknowledged that it has historically interpreted the Kansas Constitution in line with federal constitutional jurisprudence, but it was not precluded from interpreting the state's constitution independently.[401] In addition, the right to counsel in Kansas is protected not only by state and federal constitutions—it is also guaranteed by statute.[402] Section 22-4503 guarantees a defendant charged with a felony the right to counsel at every stage of the proceedings.[403]

An earlier version of Kansas's right to counsel statute had specifically required a written waiver in addition to a court record of the waiver proceedings.[404] While this language was not included in section 22-4503, an additional statute on records in criminal proceedings requires a written statement if the defendant chooses to forgo appointment of counsel.[405] The Kansas Supreme Court had also

395. *Id.* at 1171–72.
396. *Id.* at 1172 (quoting Montejo v. Louisiana, 556 U.S. 778, 786 (2009)).
397. *Lawson*, 297 P.3d at 1172.
398. *Id.*
399. *Id.* at 1169 (citing *Montejo*, 556 U.S. 778 (2009)).
400. *Montejo*, 556 U.S. at 786.
401. *Lawson*, 297 P.3d at 1169.
402. *Id.* at 1170–71.
403. KAN. STAT. ANN. § 22-4503.
404. *Lawson*, 297 P.3d at 1172.
405. *Id.* at 1173.

indicated that a trial judge must make "more than a routine inquiry" into whether a defendant's waiver of the right to counsel was voluntary, knowing and intelligent.[406] Following this reasoning, the court held that "after the statutory right to counsel has attached, the defendant's uncounseled waiver of that right will not be valid unless it is made in writing and on the record in open court."[407] The court further held that a *Miranda* waiver form, which primarily serves to protect the defendant's Fifth Amendment rights, is not a sufficient substitute for the required waiver procedure.[408]

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

a. Generally

Prior to a custodial police interrogation, officers must inform the suspect of: (1) his right to remain silent; (2) the consequences of a failure to remain silent (e.g., "anything said can and will be used against the individual in court"); (3) his right to an attorney; and (4) his right to have the court appoint an attorney if he is unable to afford one.[409] If a defendant makes any incriminating statements in a custodial police interrogation prior to receiving these warnings, the statements are subject to a presumption of police coercion and generally are not admissible in the prosecution's case-in-chief.[410]

b. Custodial Police Interrogation

A person is in custody if the police have restrained his freedom of movement in a significant way.[411] The test to determine if someone is in custody is whether a reasonable person in the situation would not feel free to leave.[412] Interrogation is defined as "any words or actions on the part of the police (other than those normally attendant to arrest and

406. *Id.* (citing State v. Martin, 740 P.2d 577, 589 (Kan. 1987)).
407. *Id.*
408. *Id.* at 1174.
409. Miranda v. Arizona, 384 U.S. 436, 467–474 (1966).
410. State v. Schultz, 212 P.3d 150, 156 (Kan. 2009) (citations omitted).
411. Orozco v. Texas, 394 U.S. 324, 327 (1969); State v. Brunner, 507 P.2d 233, 237 (Kan. 1973).
412. Berkemer v. McCarty, 468 U.S. 420, 442 (1984); State v. Fritschen, 802 P.2d 558, 562–66 (Kan. 1990).

custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."[413]

c. Police Officers' Duties During Interrogations

In situations that pose an imminent threat to police or public safety, police officers may forgo the usual procedural safeguards and question a suspect without first administering *Miranda* warnings.[414] The public safety exception is a narrow one, and is justified by the objective reasonableness of questioning the suspect, not the officer's subjective intent.[415]

The Kansas Court of Appeals recently addressed the limits of the public safety exception in an unpublished decision, *State v. Riggans*.[416] Two officers went to the home of Alonzo Riggans based on a tip that two people wanted on arrest warrants (including Riggans) were in the apartment.[417] Riggans, a man in his sixties who used an oxygen tank, answered the door and let the officers into the apartment.[418] Inside, the officers found five other people as well as evidence of drug use and paraphernalia.[419] As the officers checked the other inhabitants for outstanding warrants, two more officers arrived.[420] The officers asked Riggans if there were any weapons in the apartment, and Riggans replied there was a rifle in one of the closets.[421] The officers did not know Riggans was a convicted felon, making his possession of a firearm a felony.[422] The officers later testified they asked about the weapon because of officer safety concerns due to the large number of people in such a confined space.[423] The court, citing the Fourth Circuit, found that without more specific information, a general suspicion of the presence of weapons was not sufficient to qualify as an objectively reasonable

413. Rhode Island v. Innis, 446 U.S. 291, 301 (1980); State v. Newfield, 623 P.2d 1349, 1356 (Kan. 1981).

414. State v. Johnson, 264 P.3d 1018, 1024 (Kan. Ct. App. 2011) (citing New York v. Quarles, 467 U.S. 649, 657–59) (1984).

415. *Johnson*, 264 P.3d at 1024 (citations omitted); State v. Riggans, No. 107,322, 2012 WL 3823486, at *3 (Kan. Ct. App. Aug. 31, 2012).

416. *Riggans*, 2012 WL 3823486, at *3–4.

417. *Id.* at *2.

418. *Id.*

419. *Id.* at *2–3.

420. *Id.* at *3.

421. *Id.* at *4.

422. *Id.*

423. *Id.*

concern for an imminent threat to officer or public safety.[424] The court noted that to apply the public safety exception in such circumstances would virtually eliminate the *Miranda* protections and allow the State to interview suspects any time weapons might "hypothetically" be present.[425]

i. Interpreters

Under section 75-4501, anyone whose primary language is not English or who is hearing or speech impaired must be appointed an interpreter prior to interrogation or making a statement.[426] A violation of this statute does not necessarily require the suppression of any statements obtained or invalidate a *Miranda* waiver.[427] The relevant inquiry is whether the defendant understood the *Miranda* warnings sufficiently in order to be able to voluntarily waive them.[428]

ii. Failure to Record Interrogation

Kansas follows the majority rule that an interrogation does not need to be recorded in order to be admissible at trial.[429]

d. Invocation of the Right to Remain Silent

A suspect wishing to invoke the right to remain silent in a custodial interrogation must do so unambiguously.[430] If the suspect makes an ambiguous statement as to whether he is invoking the right to remain silent, the interrogating officer is allowed, but not required, to ask for clarification and may continue the interrogation.[431]

Once a suspect has properly invoked the right to remain silent, the interrogating officers must scrupulously honor it and cease all

424. *Id.* at *5 (citing United States v. Mobley, 40 F.3d 688, 693 n.2 (4th Cir. 1994)).

425. *Id.* at *5–6.

426. KAN. STAT. ANN. § 75-4351.

427. State v. Rosas, 17 P.3d 379, 386 (Kan. Ct. App. 2000).

428. *Id.*

429. State v. Speed, 961 P.2d 13, 24 (Kan. 1998) (citations omitted).

430. State v. Cline, 283 P.3d 194, 201 (Kan. 2012).

431. State v. Scott, 183 P.3d 801, 816–17 (2008) (citing State v. Gonzalez, 145 P.3d 18, 41 (Kan. 2006)). "If the officer does continue questioning without seeking clarification, however, he runs the risk that a court may find the statement unambiguous and any subsequent statements thus inadmissible." *Id.*

questioning or its functional equivalent.[432] A suspect in custody may also invoke the right at any point during an interrogation or may invoke it selectively regarding certain questions or subject matter.[433] After invoking the right, a suspect may initiate a conversation with law enforcement officers or validly waive the right, after which questioning may recommence.[434]

e. Invocation of the Right to Counsel

Like the right to remain silent, the right to counsel must also be invoked unambiguously, i.e., in a manner that a reasonable offer would understand to be a request for counsel.[435] The statement must communicate both the desire to have an attorney present and that the suspect is seeking assistance with the interrogation and not later proceedings.[436] If the statement is ambiguous, officers may seek clarification or continue questioning.[437] Once a suspect has invoked the right to counsel, questioning of the suspect must stop.[438] Officers can only resume interrogation once an attorney is present or the "suspect reinitiates conversation."[439]

f. Statements Made During Police Interrogation

In order for a statement made during a police interrogation to be admissible at trial, the statement must be "voluntarily made."[440] If the defendant made the statement as a result of coercion, "it will be excluded as [evidence]."[441]

432. *Id.* (citing State v. Carty, 644 P.2d 407 (Kan. 1982)).

433. State v. Waugh, 712 P.2d 1243, 1250 (Kan. 1986) (citing United States v. Thierman, 678 F.2d 1331, 1335 (9th Cir. 1982)).

434. *Id.* at 1250–51.

435. State v. Cline, 283 P.3d 194, 201 (Kan. 2012).

436. State v. Walker, 80 P.3d 1132, 1136-37 (Kan. 2003) (citing Davis v. United States, 512 U.S. 452, 459 (1994).

437. *Id.*

438. *Id.* at 1137 (citing Fare v. Michael C., 442 U.S. 707, 718 (1979)).

439. *Id.* (citations omitted).

440. State v. Harris, 162 P.3d 28, 41 (Kan. 2007) (quoting State v. Wakefield, 977 P.2d 941, 951 (Kan. 1999)).

441. *Id.*

i. Voluntariness Requirement

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

> (1) the accused's mental condition; (2) the manner and duration of the interrogation; (3) the ability of the accused to communicate on request with the outside world; (4) the accused's age, intellect, and background; (5) the fairness of the officers in conducting the interrogation; and (6) the accused's fluency with the English language.[442]

In *State v. Garcia*, the Kansas Supreme Court analyzed the voluntariness of a confession after police officers denied the defendant medical treatment for a gunshot wound and used the defendant's girlfriend to deliver a promise of leniency.[443] The defendant, Miguel Garcia, was shot in the foot during a robbery.[444] Garcia returned home for the night without receiving any professional medical attention for his wound.[445] The next morning, police officers took Garcia and his girlfriend, Eman Malkawi, to the station to be questioned separately.[446] During his interrogation, Garcia claimed he had not participated in the robbery and had been shot while attempting to help the victim.[447] The interrogating officers did not accept this version of events and encouraged Garcia to confess to his role in the robbery.[448] Throughout the interview, Garcia repeatedly requested medical attention, but the officers denied his requests, saying he would not receive any treatment until the interrogation was over and he "had done 'what [he knew was] the right thing to do.'"[449] Garcia also requested to see his girlfriend, Malkawi, but the officers informed him he would not be able to see her until he told the truth about the robbery.[450] Eventually, the interrogating officer brought Malkawi into the room to tell Garcia he would not be

442. State v. Stone, 237 P.3d 1229, 1235–36 (Kan. 2010) (quoting State v. Johnson, 190 P.3d 207, 216–17 (Kan. 2008)).

443. 301 P.3d 658 (Kan. 2013).

444. *Id.* at 661.

445. *Id.*

446. *Id.*

447. *Id.*

448. *Id.*

449. *Id.*

450. *Id.* at 661–62.

charged with murder if he confessed to robbery, upon which Garcia immediately admitted to participating in the robbery.[451] Shortly thereafter, Garcia was charged with both felony murder and robbery.[452]

Before trial, Garcia moved to suppress his confession.[453] After reviewing a video recording of the interrogation, the trial court found that under a totality of the circumstances, Garcia's confession was voluntary; he had been given *Miranda* warnings and even though he was in pain during the interrogation, the pain was not acute enough to affect his ability to communicate, and he did not appear to believe any of the promises of leniency that may have been made by the interrogating officer.[454] On appeal, Garcia challenged the trial court's finding that his confession was voluntary by emphasizing two circumstances: (1) the interrogating officer's withholding of medical treatment until the interrogation was completed; and (2) the State's use of promises of leniency.[455]

As to the first issue, the withholding of medical treatment, the Kansas Supreme Court found that the trial court had used the wrong standard in analyzing the effects of Garcia's gunshot wound and resulting pain—while the pain may not have been acute enough to affect Garcia's ability to know what he was saying, this merely indicates the confession was knowing but not necessarily voluntary.[456] In determining voluntariness,

> [t]he inquiry . . . is whether the officers' withholding of medical treatment influenced Garcia's decision to confess to robbery. If law enforcement officers make an accused endure pain, even less than debilitating pain, until the accused gives a statement that the officers will accept, the voluntariness of that confession is, at best, suspect.[457]

The court noted the record indicated such were the circumstances in this case.[458] Garcia had requested medical attention within the first half hour of the several-hours-long interrogation, but the interrogating officer asked for "a couple minutes" while they continued to question him.[459]

451. *Id.* at 662.
452. *Id.*
453. *Id.*
454. *Id.*
455. *Id.*
456. *Id.* at 665.
457. *Id.*
458. *Id.*
459. *Id.* at 665, 667.

When Garcia cursed his pain, the officer asked him to hang on for a few seconds and proceeded to ask him eighteen more questions.[460] The officer then asked if Garcia would like someone to tend to the wound.[461] When Garcia answered in the affirmative, the officer left the interrogation room and returned without summoning any medical treatment.[462] The court concluded that the withholding of medical treatment for Garcia's gunshot wound was "inherently coercive" and weighed heavily in favor of a finding of involuntariness.[463]

The court then turned to the State's uses of promises of leniency. In order for a confession to be involuntary due to promises of a benefit (including leniency) the promise must relate to the actions of a public official; it must be likely to cause someone to make a false statement to acquire the promised benefit; and it must be made by someone who could reasonably be believed to have the authority to fulfill the promise.[464] Here, the court was somewhat constrained by the trial court's factual finding that the officers had not actually promised any benefit to Garcia.[465] As the Kansas Supreme Court noted, however, the trial court had not analyzed the portion of the interrogation involving Garcia's girlfriend, Malkawi.[466] Malkawi had entered the interrogation room at the invitation of the interrogating officer and communicated to Garcia that he would not be booked for murder if he confessed to the robbery.[467] The court found that this incident met all the requirements of a promise of benefit: Garcia related to the actions of a public official, the promise to drop a murder charge would likely cause someone to make a false statement, and even though a third party relayed the promise, Malkawi was clearly referring to the interrogating officer who had the authority to fulfill the promise.[468] Thus, the promise of leniency in this case met the requirements of a promise that may have rendered a confession involuntary despite the use of a third party.[469] Looking at the totality of the circumstances, the court found Garcia's confession was involuntary due to the coercive effects of the withholding of medical

460. *Id.* at 665.
461. *Id.*
462. *Id.*
463. *Id.* at 667.
464. *Id.* at 667–68 (citing State v. Harris, 162 P.3d 28, 579–80 (2007)).
465. *Id.* at 667.
466. *Id.*
467. *Id.* 667–68.
468. *Id.* at 668.
469. *Id.*

treatment and the officer's promises of leniency.[470]

ii. Tainted Statements

A statement obtained as the result of an illegal search, illegal detention, or prior coerced statement may be tainted and thus inadmissible as evidence.[471] In determining whether a subsequent statement is tainted, courts consider "(1) whether *Miranda* warnings were given, (2) the proximity of the illegal [act] and the statement or confession, (3) the purpose and flagrancy of the officer's misconduct, and (4) other intervening circumstances."[472]

IV. PRE-TRIAL ISSUES

A. Formal Charges

The Due Process Clause of the Fifth Amendment, which applies to the States through the Fourteenth Amendment, provides in part that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . ; nor be deprived of life, liberty, or property, without due process of law . . . ."[473] An accused is entitled to know the "nature and cause" of the allegations he faces.[474] The requirements of section 22-3201 of the Kansas statutes regarding the charging document protects this constitutional guarantee.[475] A charge is a "written statement presented to a court accusing a person of the commission of a crime."[476] In Kansas, charging documents include the complaint and the information or indictment.[477]

470. *Id.*

471. *See* State v. Swanigan, 106 P.3d 39, 55–57 (Kan. 2005) (finding that "the State has failed to meet its burden of showing the second statement was untainted by the first . . . . Accordingly, the [second] statement also should have been excluded); State v. Knapp, 671 P.2d 520, 526 (Kan. 1983) (considering whether illegal arrest tainted statement).

472. State v. Weis, 792 P.2d 989, 992 (Kan. 1990) (citing Dunaway v. New York, 442 U.S. 200, 218 (1979)). *See also Swanigan*, 106 P.3d at 41–43.

473. U.S. CONST. amend. V.

474. KAN. CONST. BILL OF RIGHTS § 10.

475. State v. Tapia, 287 P.3d 879, 884 (Kan. 2012).

476. KAN. STAT. ANN. § 22-2202(7).

477. *Id.*

1. Charging Instruments: Complaint, Information and Indictment

A complaint is a written statement of the facts alleged to constitute a criminal offense, given under oath,[478] and signed by "a person with knowledge" of those facts.[479] An indictment is a written statement prepared by a grand jury to be presented to a court, charging the accused of committing a crime.[480] The presiding juror of the grand jury must sign the indictment.[481] The information is a written statement verified by an authorized agent of the state, charging the accused of committing a crime.[482] The county attorney, attorney general or "any legally appointed assistant or deputy of either" must sign the information.[483]

The charging document must establish the "essential facts constituting the crime charged" in order to initiate criminal prosecution.[484] To be sufficient, the document must be "drawn in the language of the statute," making it clear to the accused the specific provision of law he has allegedly violated.[485] A non-prejudicial mistake or omission in the citation is not fatal to the validity of the charging document, nor is it grounds for reversal of the conviction.[486]

The statute also allows the state to file a motion to request joining multiple charges in separate counts in a single charging document.[487] The State must show that the crimes and/or misdemeanors charged (1) are of similar nature; (2) arise from the same act or transaction; or (3) result from different acts or transactions that are "connected together" as parts of the same scheme.[488]

In *State v. Hurd*, the Kansas Supreme Court found that the lower court erred in granting the prosecution's motion to consolidate two cases against the defendant based on "court calendar" considerations.[489] In *Hurd*, the defendant—a registered sex offender—got into an altercation with his father during which the defendant shoved his father against the

478. *Id.* § 22-2202(8).
479. *Id.* § 22-3201(b).
480. *Id.* § 22-2202.
481. *Id.* § 22-3201(b).
482. *Id.* § 22-2202(12).
483. *Id.* § 22-3201(b).
484. *Id.*
485. *Id.*
486. *Id.*
487. *Id.* § 22-3202(1).
488. *Id.*
489. 316 P.3d 696, 702 (Kan. 2013).

wall and threatened him with a mechanical pencil.[490] The State charged the defendant with aggravated assault with a deadly weapon and with making a criminal threat.[491]

Days later, after learning of defendant's arrest, the officer in charge of sex offenders in Seward County filed a separate complaint to charge the defendant with failure to register in Seward County upon his return from a stay in Oklahoma.[492] The district court granted the State's motion to consolidate the charges of assault, criminal threat, and failure to register against the defendant, on the grounds that the charges were close in time, were closely related, would rely on testimonies of some of the same witness, and "based upon the court calendar."[493]

Even though temporal proximity, use of the same witnesses and calendar considerations were found not to be statutory grounds to grant a motion to join the charges against the defendant, the Kansas Supreme Court nonetheless reviewed the record to ascertain whether the other grounds claimed by the district court would justify the joinder.[494] The court reiterated that the phrase "connected together" applies, for the purposes of the statute, "(1) when the defendant provides evidence of one crime while committing another; (2) when some of the charges are precipitated by other charges; and (3) when all of the charges stem from a common event or goal."[495] The State failed to show that the charges were connected together under this prevailing interpretation; therefore the joinder of the charges was invalid.[496] The court, further concluding that the improper consolidation was probably prejudicial to the defendant, reversed the convictions and remanded the case to the district court to be tried in two separate trials.[497]

2. Bill of Particulars

If the charging document is defective or incomplete, both the State and the defendant can avail themselves of curative procedural measures: the State can request leave to amend the charges; while the defendant can

490. *Id.* at 700.
491. *Id.* at 701.
492. *Id.* at 700.
493. *Id.* at 702.
494. *Id.*
495. *Id.* (citing State v. Donaldson, 112 P.3d 99 (Kan. 2005)).
496. *Id.* at 703.
497. *Id.* at 704.

request a bill of particulars or move to arrest the judgment.[498] The defendant can file a motion requesting a bill of particulars if the charging document is not sufficiently precise as to allow the defendant to prepare a defense.[499] The court may grant the motion and require the prosecution to then produce a bill of particulars, to which the State's evidence must be confined at trial.[500]

Three main aspects are considered in reviewing a defendant's motion for a bill of particulars: "(1) meaningful opportunity to prepare [defendant's] defense; (2) assurances against unfair surprises at trial; and (3) protection from double jeopardy."[501] Furthermore, the court will consider whether the government has already supplied all the relevant information to the defendant through "other disclosures."[502]

In *United States v Neighbors*, the District of Kansas denied the defendant's request for a bill of particulars on charges of money laundering and forfeiture, finding that the indictment sufficiently "track[ed] the relevant statutes and express[ed] the elements of each offense."[503] Moreover, the defendant had received sufficient discovery directly from the State and from the records of his co-defendant's trial made available to him, rendering the bill of particulars unnecessary.[504]

In contrast, in *United States v. Najera*, the District of Kansas granted the defendant's request for a bill of particulars that disclosed the identity of defendant's unindicted known co-conspirators.[505] In considering the request for a bill of particulars, the court inquired whether the defendant showed that the information "if not disclosed, may subject defendants to prejudicial surprise or double jeopardy problems."[506]

The defendant in *Najera* was allegedly the leader of a criminal organization operating in Dodge City, Kansas, and as such was charged under conspiracy theory with violent crimes including murder and robbery.[507] The court agreed with the defendant's contention that the

498. State v. Tapia, 287 P.3d 879, 884 (Kan. 2012).

499. KAN. STAT ANN. § 22-3201(f).

500. *Id.*

501. United States v. Neighbors, No. 07–201204–02–CM, 2012 WL 5199695, at *1 (D. Kan. Oct. 22, 2012) (citing United States v. Dunn, 841 F.2d 1026, 1029 (10th Cir. 1988)).

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

503. *Id.*

504. *Id.*

505. No. 12-10089-01, 2013 WL 139766, at *1 (D. Kan. Jan. 10, 2013).

506. *Id.* at *2 (citing United States v. Anderson, 31 F. Supp.2d 933, 938 (D. Kan. 1998)).

507. *Id.* at *1.

nondisclosure of the identities of the defendant's alleged co-conspirators could impair the defendant's preparation of his defense against the conspiracy charges; therefore, the motion for a bill of particulars on the identity information was granted.[508]

Alternatively, however, the *Najera* Court did not grant the defendant's request for more information on location, dates, times, means and people present during the formation of the alleged conspiracy.[509] The bill of particulars, the court reasoned, "is not a discovery device" and the defendant should seek to ascertain the information requested from the large volume of discovery made available by the State.[510] In sum, the defendant was not entitled to be handed the "entirety of the government's case, which is essentially what they [were] requesting."[511]

3. Changes to Charging instruments

a. Amendments and Variances

The court, at its discretion, may allow for the amendment of the charging document at any time before the jury delivers a verdict.[512] In making its determination, the court will engage in a two-step inquiry to establish (1) whether the amendment charges "an additional or different crime," and (2) whether the amendment is prejudicial to the "substantial rights" of the defendant.[513] The ruling on the amendment of the charging document may be reviewed for abuse of discretion.[514]

b. Challenges

A defendant can challenge the validity of the charging document by making a showing that a defect or insufficiency in the document, "(1) prejudiced the defendant's preparation of a defense; (2) impaired the defendant's ability to plead the conviction in any subsequent

508. *Id.* at *2.
509. *Id.* at *1.
510. *Id.* at *2.
511. *Id.*
512. KAN. STAT. ANN. § 22-3201(e) (West).
513. *See, e.g.,* State v. Calderon-Aparicio, 242 P.3d 1197, 1209 (Kan. Ct. App. 2010) (citing State v.
Matson, 921 P.2d 790, 793 (Kan. 1996)).
514. *See id.* at 1211.

prosecution; or (3) limited the defendant's substantial rights to a fair trial."[515]

In 2014, the Kansas Supreme Court upheld the validity of a complaint that presented alternative means by which the defendant might have committed the alleged crime.[516] The charging document did not fail to meet the statutory requirement when it charged "the commission of the same offense in different ways."[517] Kansas law traditionally established that the State can validly present the charges in alternative means and that it need not "elect one means or another" to present the case to the jury or to request jury instructions.[518]

Moreover, after trial and conviction, a motion to correct an illegal sentence is not the appropriate channel to challenge the validity of the charging document.[519] In *State v. Trotter*, the defendant filed a motion to correct an illegal sentence claiming the district court lacked subject matter jurisdiction over his case because the charging document was defective.[520] The Kansas Supreme Court then reiterated the settled law that defendant's motion was not the appropriate vehicle.[521]

After trial and conviction, a motion for arrest of judgment is the appropriate instrument to challenge the validity of the charging document and the court's subject jurisdiction over the crime charged.[522] The motion should be filed "within [fourteen] days after the verdict or finding of guilty or nolo contendere, or within such further time as the court may fix during the fourteen-day period."[523]

The charging document will be considered sufficient in a practical sense if the accused is "fully informed" and the court is able to ascertain the statutory provision upon which the charge is based.[524] If the time of the commission is not an element of the offense, the charge must only state the time of the commission with enough precision to determine that

515. State v. Littlejohn, 316 P.3d 136, 152 (Kan. 2014) (citing State v. Gracey, 200 P.3d 1275 (Kan. 2009)).

516. *Id.*

517. *Id.*

518. *Id.* (citing State v. Stevens, 172 P.3d 570 (Kan. 2007), *overruled on other grounds by* State v. Ahrens, 290 P.3d 629 (Kan. 2012)).

519. State v. Trotter, 295 P.3d 1039, 1043 (Kan. 2013).

520. *Id.*

521. *Id.* at 1044.

522. KAN. STAT. ANN. § 22-3502.

523. *Id.*

524. State v. Hurd, 316 P.3d 696, 704 (Kan. 2013).

the statute of limitations has not expired.[525] The court can strike any unnecessary information from the charging document.[526]

B. Initial Appearances

The right to a speedy trial and effective assistance of counsel are guaranteed by the United States Constitution, which provides in its Sixth Amendment that the person accused of committing a crime, "shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defense."[527] The Kansas Constitution mirrors these protections in its Bill of Rights.[528]

1. Speedy Public Trial

In Kansas, the State must bring the defendant to trial no later than ninety days after his arraignment, unless the defendant is being held in custody for other charges unrelated to the trial.[529] However, the statute also prescribes grounds on which the time for trial may be extended, including: (1) when the defendant is found to be incompetent to stand trial; (2) when the determination of whether the defendant is incompetent is pending; (3) when "there is material evidence which is unavailable; that reasonable efforts have been made to procure such evidence . . ."; and (4) when the court calendar does not permit the court to begin trial within the specified time.[530]

In *State v. Dobbs*, the defendant claimed that the district court violated his right to a speedy trial when it granted the State's motion for a continuance under section § 3402(e)(3), while the prosecution waited on crime scene DNA evidence to be processed by the Kansas Bureau of Investigation.[531] The Kansas Supreme Court reviewed the trial court's decision to grant the continuance.[532]

The court held that material evidence for the purposes of continuance under the statute is defined as "evidence that *may have* a legitimate and effective bearing on the decision of the case, i.e., when the evidence has

525. KAN. STAT. ANN. § 22-3201(b).
526. *Id.* § 22-3201(d).
527. U.S. CONST. amend. VI.
528. KAN. CONST. BILL OF RIGHTS § 10.
529. KAN. ANN. STAT. § 22-3402.
530. *Id.* § 3402(e).
531. State v. Dobbs, 308 P.3d 1258, 1264 (Kan. 2013).
532. *Id.* at 1264.

the potential to inculpate or exculpate the defendant."[533] The court found that the crime scene DNA evidence was "material", and that the KBI delay in processing the evidence would not be counted against the State.[534] The granting of the continuance did not violate the defendant's right to a speedy trial.[535]

2. Right to Counsel

The Kansas Constitution's Bill of Rights also affords the criminal defendant with the right to assistance of counsel.[536] The Supreme Court established that the criminal defendant's right to counsel arises when formal charges are filed.[537] In 2012, the Kansas Supreme Court resolved, as an issue of first impression, whether the right to effective assistance of counsel attached to the defendant during a probation revocation proceeding.[538]

In *State v. Galaviz*, the Kansas Supreme Court held that a defendant has a right to be represented by an attorney in probation revocation proceedings—which are not technically part of the criminal prosecution—but that the right arose from a state statute, and not directly from the protections of the Sixth Amendment.[539] The Kansas Legislature provided unequivocally that a defendant who is charged with a probation violation is entitled to assistance of counsel, and to court-appointed counsel if the defendant is indigent.[540] Because the statute is analogous to the constitutional protection, the representation enjoyed by the defendant must be "free from conflicts of interest."[541] The Kansas Supreme Court found that there could be a conflict of interest in the relationship between the defendant and his counsel in this case; therefore it remanded the case to the district court with directions to either afford the defendant new counsel and conduct a conflict-free probation revocation hearing, or ascertain the nature of the conflict and whether a

533. *Id.* at 1266 (citing State v. Brown, 973 P.2d 773 (Kan. 1999); and Smith v. Deppish, 807 P.2d 144 (Kan. 1991)).

534. *Id.*

535. *Id.*

536. KAN. CONST. BILL OF RIGHTS § 10.

537. Texas v. Cobb, 532 U.S. 162, 172 (2001).

538. State v. Galaviz, 291 P.3d 62, 64 (Kan. 2012).

539. *Id.* at 68.

540. *Id.*

541. *Id.* at 67.

reversal of the probation revocation was warranted.[542]

C. Pretrial Release and Bail

The Eighth Amendment to the United States Constitution protects the criminal defendant from the imposition of excessive bail and fines.[543] The Kansas Bill of Rights mirrors this protection by prohibiting the requirement of excessive bail and imposition of excessive fines.[544] The person accused of having committed a capital offense, however, shall not be entitled to bail "where proof is evident or the presumption is great."[545]

In Kansas, "Bail is 'the security given for the purpose of insuring compliance with the terms of an appearance bond.'"[546] In 2013, the Kansas Court of Appeals resolved whether signing a traffic citation and a notice to appear was equivalent to executing a bond or instrument of bail for the purposes of convicting the defendant for aggravated false impersonation.[547] In *State v. Diaz*, officers with the Hutchinson Police Department responded to a traffic accident in which the defendant was involved.[548] The defendant was not carrying a driver's license at the time of the accident so he identified himself under a false name, and the police officer issued a citation for driving without a license and inattentive driving, as well as a notice to appear before the Hutchinson Municipal Court.[549]

On the day of his court appearance, defendant again identified himself under the false name and executed a "Waiver of Right to Counsel and Trial" and a "Promise to Appear and Pay fines" with the false name.[550] Later, the defendant appeared at the police station for fingerprinting and presented a false identification card, bearing the false name.[551] Before the fingerprinting process was completed, however, the defendant confessed that the name on the citation and on the card was not his real name.[552]

542. *Id.* at 78.
543. U.S. CONST. amend. VIII.
544. KAN. CONST. BILL OF RIGHTS § 9.
545. *Id.*
546. KAN. STAT. ANN. § 12-4113(e).
547. State v. Diaz, 308 P.3d 17, 18 (Kan. Ct. App. 2013).
548. *Id.*
549. *Id.*
550. *Id.*
551. *Id.*
552. State v. Diaz, 308 P.3d 17, 18 (Kan. Ct. App. 2013).

The defendant was arrested, charged, and subsequently convicted with "falsely representing or impersonating another . . . and in such falsely assumed character executing a bond or other instrument as bail for any party in any proceeding. . . ." under section 21-3825(a)(1).[553] The Kansas Court of Appeals clarified that bail can only exist in conjunction with an "appearance bond"[554] and an "appearance bond" can only be undertaken by a person "in custody."[555] Because the defendant was not in custody when he signed the traffic citation, the waiver of counsel, and the notice to appear, these instruments were not equivalent to "bail" for the purposes of the aggravated false impersonation charges.[556] Therefore, the Kansas Court of Appeals reversed defendant's conviction on that charge.[557]

The authority to define bail rests with the magistrate, and should be "sufficient to assure the appearance of [the defendant] before the magistrate when ordered and to assure the public safety."[558] Excessive bail and denial of petition to refuse the bail amount are not grounds for reversal of convictions and release from sentences.[559] If the defendant faces a felony charge, the bond must require the defendant to appear before the district court or via teleconference.[560] If the charges are of a person felony or person misdemeanor, the bond must also require that the defendant cease all contact with the alleged victim for at least seventy-two hours.[561]

At the magistrate's discretion, additional conditions of release can be imposed to "reasonably assure" the appearance of the defendant, including: placing the defendant under specified supervision; restricting travel and association; imposing a curfew; placing the defendant under house arrest; and imposing monitoring by a court services officer.[562] The magistrate may also order drug and alcohol testing; dispense with the

553. *Id.* at 19.

554. *Id.* at 22. *See also* KAN. STAT. ANN. § 12-4113(e).

555. *Id.* at 22. *See* KAN. STAT. ANN. § 12-4113(a) (""Appearance bond" means an undertaking, with or without security, entered into by a person in custody by which the person is bound to comply with the conditions of the undertaking."); *and* KAN. STAT. ANN. § 12-4113(h) (""Custody" means the restraint of a person pursuant to an arrest").

556. *Diaz*, 308 P.3d at 22.

557. *Id.*

558. KAN. STAT. ANN. § 22-2802(1).

559. Guerra v. Mott, No. 13-3211-SAC, 2014 WL 201012, at *2 (D. Kan. Jan. 17, 2014).

560. KAN. STAT. ANN. § 22-2802.

561. *Id.*

562. *Id.* § 22-2802 (1)(a)–(e).

requirement of sureties; and accept a cash deposit in lieu of the execution of the bond, generally on the same amount.[563] Finally, the court cannot impose administrative fees.[564]

The court also enjoys discretion over whether to allow a defendant to be released upon his own recognizance, without requiring a cash deposit from the defendant, but requiring him to guarantee the payment of the amount of the bond if he fails to appear in court.[565] The magistrate may impose conditions of release, which shall be enumerated in the appearance bond.[566] Conditions of release can be amended any time by the magistrate, who can impose additional or different terms.[567] If the defendant in custody is persistently unable to meet the imposed conditions to be released, he may petition the magistrate who imposed them (or any other magistrate available in the court) to review the conditions without undue delay.[568] Section 22-2802 (12)–(15) also includes detailed rules to govern the processing of the defendant's bond and release.

Under the Federal Bail Reform Act of 1984, the accused will generally be released unless the court finds that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community."[569] Factors to considered include (1) the "nature and circumstances" of the charge; (2) the "weight of the evidence" against the accused; (3) the "history and characteristics" of the accused, including physical, psychological, familial and financial elements, as well as the existence of a criminal record; and (4) the "nature and seriousness of the danger" the released of the accused would pose to the community . . .[570] Any conflicts should be resolved in favor of releasing the accused.[571]

In *United States v. Wang*, for example, the defendant was a citizen of China living in Kansas without authorization, and was charged with "willfully failing to depart the United States within a period of ninety

563. *Id.* § 22-2802 (2)–(5).
564. *Id.* § 22-2802 (7).
565. *Id.* § 22-2802(6).
566. *Id.* § 22-2802 (8)–(9).
567. *Id.* § 22-2802 (11).
568. *Id.* § 22-2802 (10).
569. 18 U.S.C. § 3142(e).
570. No. 13-cr-2013-JAR-JPO, 2013 WL 6843003, at *1–2 (D. Kan. Dec. 27, 2013).
571. *Id.* at *2.

days from the date a final order of removal was entered against him."[572]

In making its release determination, the district court considered (1) that the charge "did not involve violence, a minor, controlled substances, or weapons"; (2) that the weight of the evidence against the defendant did not tend to favor one side or the other; (3) that the defendant was a middle-aged married man with health issues that required eight different types of medication, he lived with family at a fixed address, and he lacked a prior criminal record—and as such he tended to pose a low risk of flight; and (4) that government had not shown that the defendant could be dangerous to the community.[573] Therefore, the court denied the government's motion for pretrial detention and ordered a hearing to determine the conditions of release.[574]

D. Preliminary Hearing

1. The Right to a Preliminary Hearing

All persons charged with a felony in Kansas have a statutory right to a preliminary hearing before a magistrate, pursuant to section 22-2902.[575] The statutory right does not exist when a person is charged as a result of a grand jury indictment.[576] The preliminary hearing must take place in the county of venue and must occur within fourteen days of the personal appearance of the defendant or the defendant's arrest.[577] The defendant and the State may both waive the right to a preliminary hearing, and if the statutory right is waived the defendant will be bound over to the judge with proper jurisdiction by the magistrate.[578]

While the preliminary hearing must take place within a prescribed amount of time after the arrest, the statute does not require a certain amount of time between the preliminary hearing and the trial.[579] In *State v. Rivera*, the Kansas Court of Appeals held there was no error in holding the trial on August 2, when the last preliminary hearing was held on July 30.[580] The court did not state what amount of time is required between

572. *Id.* at *1.
573. *Id.* at *2–3.
574. *Id.* at *3.
575. KAN STAT. ANN. § 22-2902(1).
576. *Id.*
577. *Id.* § 22-2902 (2).
578. *Id.* § 22-2902 (4).
579. *Id.* § 22-2902 (2).
580. 291 P.3d 512, 536 (Kan. Ct. App. 2012).

the preliminary hearing and the trial.[581] In examining the adequacy of the period between the preliminary hearing and the trial, the court considered both the defendant's attorney's statements about preparedness and the amount of time the case had been pending.[582] The court found that since the case had been pending for more than a year, the defendant's lawyer had an adequate amount of time to prepare for the trial.[583]

Requiring a defendant to attend multiple preliminary hearings is not alone prejudicial.[584] A defendant would need to show some unique factor to raise the multiple preliminary hearings to a prejudicial level.[585] In *State v. Sprague*, the defendant was charged with his third DUI and at the initial preliminary hearing, the State could not produce the defendant's records and dismissed the case.[586] The State re-filed the charges and required the defendant to attend multiple preliminary hearings.[587] The court found that requiring a defendant to attend multiple preliminary hearings over the course of a fifteen-month period was not prejudicial to the defendant.[588]

Preliminary hearing continuances are excluded from the calculation of time for speedy trial purposes.[589] Such requests are counter to the purpose behind the right to a speedy trial and should not be counted.[590] In addition to being excluded from the speedy trial calculation, preliminary hearings are excluded from the speedy trial guarantee.[591]

In *Moral v. Babcock*, the defendant was charged with twenty-nine counts of financial crimes.[592] The defendant petitioned the court for a writ of habeas corpus, which the district court issued and later dissolved.[593] After the district court dissolved the writ, the defendant appealed.[594] The defendant argued that the district court violated his

581. *Id.*
582. *Id.*
583. *Id.*
584. State v. Sprague, No. 105,827, 2012 WL 3822625, at *1 (Kan. Ct. App. Aug. 31, 2012).
585. *Id.* at *6.
586. *Id.* at 1.
587. *Id.* at 2.
588. *Id.*
589. State v. Salcido-Quintana, No. 105,007, 2012 WL 3289942, at *3 (Kan. Ct. App. Aug. 10, 2012).
590. *Id.*
591. State v. Macomber, No. 107,205, 2013 WL 3455776, at *5 (Kan. Ct. App. July 5, 2013).
592. Moral v. Babcock, No. 107,124, 2013 WL 2321044, *1 (Kan. Ct. App. May 17, 2013).
593. *Id.* at *1.
594. *Id.*

constitutional rights with an unfair and unreliable preliminary hearing process that denied him access to evidence that could have proved his innocence.[595] Under Kansas law, the right to a preliminary trial is statutory, not constitutional.[596] The court found that because the right to a preliminary trial is statutory, the defendant was not entitled to the same right to put on a defense as he would have had with a constitutional right.[597] While not defining what exactly would satisfy the defendant's statutory right to put on a defense at a preliminary trial, the court found that since the defendant had an opportunity to cross-examine witnesses and present his own witnesses at the preliminary trial, his rights were satisfied.[598]

In *State v. Allen*, the defendant filed a motion to dismiss a charge of vehicular manslaughter, which the district court granted.[599] The Kansas Court of Appeals reversed the district court's dismissal.[600] On appeal the State alleged that the district court improperly held a de facto preliminary hearing concerning the misdemeanor vehicular manslaughter charge.[601] The Kansas Court of Appeals found that the evidentiary hearing did not constitute a de facto preliminary hearing.[602] The court found that if the evidentiary hearing constituted a de facto preliminary hearing the district court would have been obligated to conform with the requirements of a preliminary hearing.[603] The court reasoned that if the hearing was a de facto preliminary hearing then the district court would not have been able to arraign the defendant until after the hearing, rather than before the hearing as was the case.[604] The district court also would have been prevented from accepting any pleas from defendant until after the de facto hearing, however the district court accepted a plea from the defendant before the hearing.[605] The evidentiary hearing was held four months after the defendant's first appearance, well outside the statutorily required ten-day period.[606] Lastly, the court reasoned that preliminary

595. *Id.*
596. *Id*. at *2.
597. *Id.*
598. *Id.*
599. State v. Allen, 305 P.3d 702, 705 (Kan. Ct. App. 2013).
600. *Id.*
601. *Id*. at 710.
602. *Id.* at 711.
603. *Id.*
604. *Id.*
605. *Id.*
606. *Id.*

hearings are a requirement and do not need to be moved for—the defendant in *Allen* only got the hearing after he filed a motion for the hearing.[607] In order to be a preliminary examination, the examination must comply with the requirements of a preliminary examination, "[s]imply because two different kind of hearings . . . may end in the same result . . . does not make them the same type of hearing."[608]

2. Self-Representation at Preliminary Hearing

The Sixth Amendment guarantees a defendant the right to self-representation at a preliminary hearing.[609] In *State v. Jacobs*, the defendant was convicted of failing to register as an offender and appealed his conviction.[610] The defendant alleged the district court violated his right to self-representation at the preliminary hearing.[611] The Kansas Court of Appeals found that the defendant did not clearly and unequivocally assert his self-representation right.[612] The defendant in this case asserted his right in two separate unclear motions.[613] The court found that the defendant's motions only asserted the right to fire his attorney, not to clearly proceed pro se.[614] The court found the defendant's motion was unclear because he mislabeled the motions, made the motions in the middle of the preliminary hearing, and split the request between two separate motions.[615] Because the defendant's motions were unclear about his desire to proceed pro se, the court found that the defendant's right to pro se representation was not violated.[616] The defendant's motion did not meet the standard of clarity necessary to entitle the defendant to pro se representation.[617]

607. *Id.*
608. *Id.*
609. State v. Jacobs, No. 108,135, 2013 WL 5303523, at *3 (Kan. Ct. App. Sept. 20, 2013).
610. *Id.* at *1.
611. *Id.*
612. *Id.*
613. *Id.* at *3.
614. *Id.*
615. *Id.*
616. *Id.*
617. *Id.*

3. Juvenile's Right To Preliminary Hearing

Juveniles have no constitutional right to a preliminary hearing.[618] Additionally, if the juvenile is charged under the Juvenile Code, there is no statutory right to a preliminary hearing.[619] The Kansas Supreme Court has found that no statutory right exists because the defendant is not being charged with a felony, a "juvenile is charged with having committed an offense 'which if committed by an adult would constitute the commission of a felony.'"[620]

4. Effect of Guilty Plea on Preliminary Hearing Rights

In *State v. Chavarin*, the seventeen-year-old defendant was charged with aggravated robbery after carjacking a pickup truck while armed.[621] The State moved to waive the defendant into adult court.[622] After the State's motion was granted, the defendant entered into a plea agreement with the State, agreeing to plead guilty to the count of aggravated robbery in exchange for the State joining the defendant's motion for probation.[623] After violating the terms of his probation, the defendant was ordered to serve 120 months in prison.[624] After serving a portion of this sentence, the defendant moved to withdraw his plea, citing a violation of his due process rights during the preliminary hearing.[625] The defendant alleged that his rights were violated when the court considered inconsistent and unreliable witness testimony in its decision during the preliminary hearing.[626] The court decided that the defendant's argument was immaterial, finding that "[Defendant] waived his due process claim and any other irregularities on the day he entered his plea of guilty."[627]

618. *See* Moral v. Babcock, No. 107,124, 2013 WL 2321044, at *2 (Kan. Ct. App. May 17, 2013) (citing *In re* D.E.R., 225 P.3d 1187 (Kan. 2010) ("the right to a preliminary hearing is a statutory right rather than a constitutional right.").

619. *In re* D.E.R., 225 P.3d 1187, 1191 (Kan. 2010).

620. *Id.* (citing KAN STAT. ANN. § 38-2302(n)).

621. State v. Chavarin, No. 107,088, 2013 WL 781106, at *1 (Kan. Ct. App. Mar. 1, 2013).

622. *Id.*

623. *Id.*

624. *Id.* at *2.

625. *Id.*

626. *Id.* at *7.

627. *Id.*

5. Sufficiency of Evidence

In *State v. Kendall*, the defendant was imprisoned for stalking his ex-wife, and while in prison, the defendant continued to attempt to contact her.[628] These attempts resulted in the defendant being charged with additional counts of stalking, attempting to stalk, and violation of a restraining order.[629] On appeal, the defendant argued that the State failed to establish the crime of stalking at his preliminary hearing.[630] The court stated that in Kansas, any issues at the preliminary hearing do not warrant reversal of a verdict after a trial has been held.[631] The court acknowledged an exception to this rule in the case where a defendant can prove that the insufficient evidence at the preliminary hearing was prejudicial at trial.[632]

The only way to challenge the sufficiency of evidence at a preliminary hearing is to file a motion to dismiss at the district court level.[633] This type of challenge is reviewed de novo on appeal.[634]

6. Preliminary Hearing Procedure

As discussed above, unless the defendant is indicted by a grand jury, a preliminary hearing for a person charged with a felony must be held within fourteen days of either the personal appearance of the defendant or the defendant's arrest.[635] Good cause must be shown before any continuances will be granted.[636] A magistrate conducts the hearing with the purpose of (1) determining whether a felony has been committed and (2) determining if the defendant committed the felony.[637] The State must present evidence to satisfy both criteria.[638] In reviewing the evidence, "[t]he court must determine whether there is sufficient evidence to cause a person of ordinary prudence and caution to entertain a reasonable belief

628. State v. Kendall, No. 106,960, 2013 WL 4404174, at *1 (Kan. Ct. App. Aug. 16, 2013).
629. *Id.*
630. *Id.* at *5.
631. *Id.*
632. *Id.*
633. State v. Washington, 268 P.3d 475, 477 (Kan. 2012).
634. *Id.*
635. KAN. STAT. ANN. § 22-2902(1)–(2).
636. *Id.* § 22-2902(2).
637. *Id.* § 22-2902(3).
638. State v. Toole, No. 103,573, 2011 WL 767984, at *2 (Kan. App. Ct. Feb. 25, 2011).

of the defendant's guilt."[639] As part of this determination the court makes inferences that are beneficial to the prosecution.[640] This standard favors the prosecution by only requiring the prosecution establish probable cause.[641] In making these determinations, the court is not supposed to consider the reasonableness of the charges or how likely a conviction is.[642] If the magistrate determines that both elements are satisfied, "the magistrate shall order the defendant bound over to the district judge having jurisdiction to try the case."[643] If, however, the judge determines that both elements are not met, the judge must discharge the defendant.[644] The rules controlling who can preside over a preliminary hearing are very lenient.[645] Any district judge may conduct the preliminary hearing and the statute expressly allows a district judge who presided over the preliminary hearing to preside over the subsequent trial.[646]

At a preliminary hearing, the defendant may either proceed pro se or be represented by counsel.[647] A defendant wanting to self-represent must do so clearly and unequivocally.[648] There are important distinctions between a trial and a preliminary hearing. Like a trial, the defendant is entitled to be present at the preliminary hearing with the witness examined in the defendant's presence.[649] If, however, the defendant chooses to not be present at the preliminary hearing, the hearing will still continue.[650] The right to be present during examination of witnesses does not extend to witnesses who are under the age of thirteen.[651] The defendant may, with the exception of witnesses under the age of thirteen, cross-examine witnesses and is entitled to put on evidence beneficial to himself.[652] If the victim is under the age of thirteen, the probable cause finding may be based on hearsay evidence on videotape or some other

639. *Id.*
640. *Id.*
641. *Id.*
642. *Id.*
643. KAN. STAT. ANN. § 22-2902(3).
644. *Id.*
645. *Id.* § 22-2902(5).
646. *Id.*
647. *See* State v. Jacobs, No. 108,135, 2013 WL 5303523, at *2 (Kan. Ct. App. Sept. 20, 2013).
648. *Id.*
649. KAN. STAT. ANN. § 22-2902(3).
650. *Id.* § 22-2902(3).
651. *Id.*
652. *Id.*

means.[653] The State may admit controlled substances into evidence at the preliminary hearing if (1) the substance was subject to an approved field test; (2) the field test was done by a certified officer; and (3) the field test was positive.[654] If the field test was positive, probable cause is established that the substance is the alleged controlled substance.[655] The evidence of the controlled substance satisfies the chain of custody if it is accompanied by a receipt certifying its continuous possession by law enforcement.[656]

E. Competency to Stand Trial

1. Determination of Competency

A defendant is assumed to be competent.[657] The burden of proving incompetency is placed on the party raising the issue, and the party must prove competency or incompetency by a preponderance of the evidence.[658] A defendant is "'incompetent to stand trial' when he is charged with a crime and, because of mental illness or defect is unable: (a) To understand the nature and purpose of the proceedings against him; or (b) to make or assist in making his defense."[659] Conversely, a defendant is considered "legally competent if 'he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [and] a rational as well as factual understanding of the proceedings against him.'"[660] A defendant may request a competency determination at any time after the defendant has been charged with a crime but before pronouncement of the sentence.[661] After a competency hearing, the court must rule that the defendant cannot assist in his own defense or understand the charges against him if the "defendant proved, by a preponderance of the evidence, that he presently suffers from a mental disease or defect that renders him incompetent to such an

653. *Id.*
654. *Id.* § 22-2902c(a).
655. *Id.* § 22-2902c(a)(2).
656. *Id.* § 22-2902c(b).
657. State v. Richards, No. 108,240, 2013 WL 4404182, at *4 (Kan. Ct. App. Aug. 16, 2013).
658. State v. Edwards, No. 106,278, 2012 WL 6061554, at *4 (Kan. Ct. App. Nov. 30, 2012).
659. KAN. STAT. ANN. § 22-3301(1).
660. United States v. Dennis, No. 11-10250-EFM, 2012 WL 4794593, at *3 (D. Kan. Oct. 9, 2012).
661. KAN. STAT. ANN. § 22-3302(1).

extent."[662] This guarantee, however, does not extend to those involved in civil proceedings.[663]

Competency involves due process issues that are reviewable for the first time on appeal.[664] Failure to hold a competency hearing, if the evidence raises a legitimate question about the competency of the defendant, constitutes a denial of due process rights.[665] Appellate courts review decisions regarding defendants' competency to stand trial under an abuse of discretion standard.[666] Discretion is abused if it "(1) is arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on error of fact."[667]

If a defendant is found to be competent after an initial competency examination, it is not ineffective representation for later appointed counsel to not investigate the competency of defendant.[668] To prove that counsel was ineffective in his decision, defendant is required to show that failure to investigate was objectively unreasonable from counsel's perspective at the time of the decision.[669]

2. Effects of Involuntary Commitment

Commitment to a mental health facility may be counted against the defendant's sentence. In *State v. Sult*, the defendant pled guilty to manufacturing methamphetamine and was given a 148-month prison sentence but was given a downward dispositional departure sentence of probation for thirty-six months.[670] After serving part of this probation, the defendant was deemed to have violated probation and was arrested, after which the defendant posted bond.[671] After the defendant had been re-apprehended, the court held a competency hearing and found the defendant not competent to stand trial.[672] The court ordered the defendant committed to a state mental health facility for not longer than

662. *Dennis*, 2012 WL 4794593, at *3.
663. *In re* Sykes, 316 P.3d 811, 816 (Kan. Ct. App. 2014).
664. *Richards*, 2013 WL 4404182, at *4.
665. *Id.* at *4
666. State v. Edwards, No. 106,278, 2012 WL 6061554, at *4 (Kan. Ct. App. Nov. 30, 2012).
667. *Id.*
668. Shopteese v. Waddington, No. 12-3084-SAC, 2013 WL 328982, at *12 (D. Kan. Jan. 29, 2013).
669. *Id.*
670. State v. Sult, No. 108,532, 2013 WL 3455806, at *1 (Kan. Ct. App. July 5, 2013).
671. *Id.*
672. *Id.* at *2.

ninety days.[673] The defendant was involuntarily held at the mental health facility until he was deemed to be competent.[674] The court held that because defendant's freedom was restricted and he was involuntarily held at the hospital, the defendant was entitled to count the days spent in the hospital against his sentence.[675]

F. Jurisdiction and Venue

1. Jurisdiction

The Kansas Constitution establishes that "[t]he district courts shall have such jurisdiction in their respective districts as may be provided by law."[676] In Kansas, the state legislature has given "the district court[s] . . . exclusive jurisdiction to try all cases of felony and other criminal cases arising under the statutes of the state of Kansas."[677] On appeal, the issue of jurisdiction is question of law and the appeals court has unlimited scope of review.[678] Jurisdiction and venue cannot be used to pass the same elements test of the "identical charges" portion of aggregation for a right to a speedy trial challenge.[679]

2. Venue

The issue of venue is "a necessary jurisdictional fact that must be proven along with the elements of the actual crime."[680] Venue as a component of jurisdiction is subject to the same standard of review as jurisdiction, the appeals court reviews venue issues de novo. [681] The court in *State v. Castleberry*, was faced with the issue of proper venue when the crime potentially involved the unlawful use of a communication facility in two separate venues.[682] The court held that a violation occurs simultaneously in both locations when there are two

673. *Id.* at *9.
674. *Id.*
675. *Id.* at *2, *9.
676. KAN. CONST. art. III, § 6(b).
677. KAN. STAT. ANN. § 22-2601.
678. State v. Currie, 308 P.3d 1289, 1291 (Kan. Ct. App. 2013).
679. State v. Quakenbush, No. 107,189, 2012 WL 5974018, at *7 (Kan. Ct. App. Nov. 12, 2012).
680. State v. Castleberry, 293 P.3d 757, 763 (Kan. Ct. App. 2013).
681. *Id.*
682. *Id.* at 763–65.

venues, and therefore venue was proper here.[683] However, this rule is not absolute. The court in *State v. Coty*, held that while new technological crimes raise important policy concerns, the legislature, rather than the courts should decide how to treat the venue issues that new caused by new technology.[684] Circumstantial evidence may be used to establish whether venue is proper.[685]

G. Statute of Limitations

Section 21-5107 outlines the criminal statute of limitations in Kansas. The default statute of limitations for offenses not specifically mentioned in other sections of 21-5107 is five years.[686] Crimes committed against KPERS have an increased statute of limitations of ten years.[687] Section 21-5107 also provides for the tolling of the statute of limitations period given specific circumstances.[688]

1. Recent Statutory Changes

During the 2013 Kansas Legislative Session, the Kansas Legislature amended section (a) of section 21-5107 to repeal the statute of limitations for the offenses of rape and aggravated criminal sodomy.[689] Therefore, charges against defendants suspected of either crime may now be brought at any time. Additionally, the Legislature amended subsection (c)(1) and added subsection (c)(2) to allow for different treatment of other "sexually violent" crimes based on the age of the victim.[690] In cases where the victim is over the age of eighteen, a ten-year statute of limitations is imposed unless the identity of the suspect is established by DNA testing.[691] If DNA testing establishes the identity of the suspect, a one-year statute of limitations is applied from the date of identification, or the ten-year statute of limitations applies, whichever is later.[692]

683. *Id.*
684. State v. Coty, 297 P.3d 305, 309 (Kan. Ct. App. 2013).
685. State v. Bennett, No. 108,616, 2013 WL 3970199, at *4 (Kan. Ct. App. Aug. 2, 2013).
686. KAN. STAT. ANN. § 21-5107(d).
687. *Id.* § 21-5107(b).
688. *Id.* § 21-5107(e)(1)-(6).
689. *Id.* § 21-5107(a); H.B. 2252, 85th Leg., Reg. Sess. (Kan. 2013).
690. *Id.* § 21-5107(c)(1)-(2), H.B. 2252, 85th Leg. Reg. Sess. (Kan. 2013).
691. *Id.* § 21-5107(c)(1).
692. *Id.*

Subsection (c)(2) of 21-5107 provides that the relevant statute of limitations period for crimes against victims under the age of eighteen is ten years after the victim's eighteenth birthday.[693] Subsection (c)(2) also includes a DNA testing clause that mirrors the rule from (c)(1).[694] Thus, unless a prosecutor has DNA evidence that establishes the identity of the suspect, charges may be brought against suspects of violent sexual offenses against minors up until the victim's twenty-eighth birthday.[695] The prior statute of limitations for sexually violent crimes against minors was five years after the victim's eighteenth birthday, or before the victim turned twenty-three years old.[696]

The Legislature also made a few cosmetic changes to section 21-5107. The latter portion of section (f) was removed in order to avoid contradiction with the amendments made in (c)(1) and (c)(2).[697] Also, the word "offense" was replaced with "crime" in the prefatory portion of section (c); presumably to add further clarity, but also, perhaps, to stop a savvy defense attorney from successfully parsing the words.

The effect of this change in the law is obvious for the practitioner. In order to avoid potential ineffective assistance of counsel challenges, defense attorneys will need to keep in mind while counseling clients that rape and aggravated criminal sodomy are no longer protected by any statute of limitations. For the same reasons, the ten-year statute of limitations for sexually violent crimes against adults and the additional five years that prosecutors now have to bring charges for sexually violent crimes against minors are equally important. On the economic side, the Kansas Division of the Budget predicted that amendments to section 21-5107 will result in increased prosecutions in both Kansas' district and appellate courts.[698] The Division also asserted that the exact fiscal effect cannot be determined because of the unpredictability of the complexity of the new cases filed.[699] However, even assuming an adverse effect on both judicial economy and the state budget, the amendments to section 21-5107 are arguably justified by the state's interest in prosecuting violent sexual crime.

693. *Id.* § 21-5107(c)(2).

694. *Id.*

695. *Id.*

696. SUMMARY OF H.B. 2252, 85th Leg., Reg. Sess. (Kan. 2013).

697. H.B. 2252, 85th Leg., Reg. Sess. (Kan. 2013).

698. Corrected Fiscal Note for H.B. 2252 from Steven J. Anderson, Kansas Director of the Budget, to John Rubin, Chairperson, House Committee on Corrections and Juvenile Justice (March 4, 2013) (on file with author).

699. *Id.*

H. Joinder of Charges

In Kansas, section 22-3202 covers joinder of charges and defendants.[700] The joinder of separate charges for an individual defendant is governed by section 22-3202(1). In order to join two or more crimes into a single charging document, the crimes charged—whether felonies or misdemeanors—must be: (1) of the "same or similar character"; or (2) "based on the same act or transaction"; (3) based "on two or more acts or transactions connected together . . . ."[701] Additionally, if the prosecutor elects not to consolidate charges into a single charging document, section 22-3203 allows for the court to consolidate a defendant's separate charging documents into one trial if the separate crimes could have been consolidated into a single charging document under section 22-3202.[702]

In 2013, the Kansas Supreme Court decided *State v. Hurd*, which delved into the third "connected together" prong of section 22-3202.[703] The issue in *Hurd* was whether the defendant's separate charges were properly joined by the district court.[704] The outcome depended on whether his charges for failure to register as a sex offender were "connected together" with his charges for battery, assault, and making a criminal threat.[705] In *Hurd*, the court noted that, for joinder purposes, acts or transactions are "connected together" in any three of the following scenarios: "(1) when the defendant provides evidence of one crime while committing another; (2) when some of the charges are precipitated by other charges; and (3) when all of the charges stem from a common event or goal."[706]

The district court's stated justifications for the joinder were that the cases would involve similar witnesses, the crimes were temporally related, and the court's calendar considerations.[707] The Kansas Supreme Court quickly dispatched with the last stated justification, holding that the court's calendar considerations are never a valid basis for joinder.[708]

700. KAN. STAT. ANN. § 22-3202.
701. *Id.* § 22-3202(1).
702. *Id.* § 22-3203.
703. 316 P.3d 696, 698 (Kan. 2013).
704. *Id*. at 699–700.
705. *Id*. at 702.
706. *Id*. (citing State v. Donaldson, 112 P.3d 99 (Kan. 2005)).
707. *Id*.
708. *Id*.

Prior to supreme court review, the Kansas Court of Appeals interpreted the two remaining justifications as the district court's way of saying that the two crimes were "connected together."[709] The Kansas Court of Appeals then found that since one of Hurd's victims in the assault and battery reported the failure to register, the crimes were "connected together" by virtue of the first prong of the "connected together" analysis, the defendant providing evidence of one crime while committing another.[710]

In reaching this conclusion, the Kansas Court of Appeals looked to *State v. Anthony*,[711] a 1995 Kansas Supreme Court case which held that Anthony, who confessed to a murder and a robbery to police during a drug sting operation, provided evidence of one crime while committing another, and thus made the crimes "connected together."[712] Here, the Supreme Court distinguished the two cases by pointing out that a victim, not the defendant, was providing the evidence.[713] The court reversed and held the joinder improper.[714] The wary practitioner should look to this case and take away two main points: (1) the defendant, not a third party, must be the one providing the evidence to support the finding that two distinct crimes are "connected together" and (2) the court's calendar needs are not an extra-statutory justification for joinder.

Another recent development in the Kansas criminal joinder realm comes in an unpublished Kansas Court of Appeals case, *State v. Fogle*.[715] Although not binding precedent, *Fogle* appears to be a case of first impression in Kansas on how to treat joined crimes for sex offender registry purposes.[716] In *Fogle*, as a result of a plea agreement between the State and the defendant, separate charges of sexual misconduct were joined into a single charging document.[717] After joinder, Fogle pleaded guilty on both counts.[718] For purposes of registry, the district court treated both counts as separate convictions and required Fogle to become a lifetime registrant, rather than for just ten years as required by one

709. *Id.*
710. *Id.*
711. 898, P.2d 1109 (Kan. 1995).
712. *Hurd*, 316 P.3d at 702.
713. *Id.* at 703.
714. *Id.*
715. No. 106,800, 2012 WL 3290012 (Kan. Ct. App. Aug. 10, 2012).
716. *Id.* at *3 (ruling on the basis of the statute's plain language and rejecting arguments based on analogous case law).
717. *Id.* at *1.
718. *Id.*

conviction.[719] Fogle appealed, citing Kansas sentencing guidelines which treated multiple counts in joined claims as a single conviction.[720] However, the court did not agree, finding that because each count was distinct and featured separate victims on separate occasions, each count would be treated as a separate conviction for registry purposes.[721]

I. Joinder and Severance of Co-Defendant

In addition to the joinder of charges, section 22-3202 also allows for the joinder of two or more defendants in the same charging document.[722] To qualify, defendants must have: (1) participated in the same act or transaction or (2) in the same series of acts or transactions constituting the crime or crimes.[723] Additionally, while no statutory authority exists for consolidating defendants charged in separate charging documents into a single trial, Kansas case law has established that the rule for consolidation is the same as the rule for joinder in section 22-3202.[724] Two or more defendants will satisfy the common law rule allowing consolidation or, in other words, will be deemed to have met the parallel section 22-3202 requirement, when: (1) each defendant is charged for each offense; (2) each defendant is charged with conspiracy and some of the defendants are charged with an offense in furtherance of the conspiracy; or (3) in the absence of conspiracy, the several offenses charged were part of a common scheme or so closely related that proof of one charge would require proof of the others.[725]

Inherently connected to joinder of defendants is severance of defendants. Section 22-3204 governs severance of criminal defendants. Under section 22-3204, a judge may order severance into separate trials upon request of either the prosecutor or a defendant.[726] While the permissive "may" language of the statute certainly allows for substantial discretion on the part of the trial judge, that discretion is limited.[727] A trial judge should grant a defendant's motion to sever if the defendant

719. *Id*.
720. *Id*. at *2.
721. *Id*. at *3.
722. KAN. STAT. ANN. § 22-3202(3).
723. *Id*.
724. State v. Boyd, 127 P.3d 998, 1007 (Kan. 2006).
725. *Id*.
726. KAN. STAT. ANN. § 22-3204.
727. State v. Stafford, 290 P.3d 562, 575 (Kan. 2012).

can show that she would suffer actual prejudice if the cases were tried jointly.[728] Failure to grant a defendant's motion to sever when prejudice exists is an abuse of discretion and will result in reversal on appeal.[729]

Factors to consider in determining whether prejudice exists include: (1) the existence of antagonistic defenses; (2) important evidence favorable to one defendant is inadmissible in a joint trial; (3) evidence that is inadmissible against one defendant, but admissible as to the other would be prejudicial to the former; (4) a confession by one defendant would be calculated to prejudice the jury against the other defendants; and (5) one of the defendants who could give evidence for the other defendants could become competent and compellable in separate trials.[730]

A 2012 Kansas Supreme Court case, *State v. Stafford*, dealt with the first factor listed above.[731] In *Stafford*, Wells, a mother, and her boyfriend, Stafford, were convicted of rape and aggravated criminal sodomy of Wells's seven-year old daughter.[732] On appeal, Stafford argued that he suffered prejudice because he was tried jointly with Wells.[733] Stafford's argument was based on his assertion that the parties had antagonistic defenses.[734] However, each defendant presented the united defense of denying any wrongdoing.[735] Therefore, Stafford was really asking the court to assume that he might have brought up a different defense had his trial been severed from Wells's trial. The court was not persuaded, and held that mere speculation that a different defense would have been provided was insufficient to show prejudice.[736] The court also held that defenses would not be deemed antagonistic unless the defendants blame the other party for the crime; here, neither Wells nor Stafford implicated the other party in their respective defenses.[737]

J. Plea Agreements

In Kansas, a plea agreement is a contract between the accused and

728. *Id.*
729. *Id.*
730. *Id.*
731. *Id.*
732. *Id.* at 571–75.
733. *Id.* at 575.
734. *Id.*
735. *Id.* at 575–76.
736. *Id.*
737. *Id.*

the State and is governed by general contract principles.[738] Because a defendant has given up many rights in conjunction with his plea agreement, if the State breaches the agreement it is considered a due process violation.[739] Therefore, prosecutors must be careful to ensure they adhere to agreements made with defendants. In 2013, two Kansas Supreme Court cases measured whether prosecutors had lived up to those agreements.[740]

1. Recent Plea Agreement Cases

In *State v. Peterson*, the defendant was charged with two counts of sexual exploitation of a child.[741] In exchange for a plea of no contest to one count of attempted sexual exploitation of a child, the prosecutor agreed not to oppose Peterson's motion for a dispositional departure to probation.[742] Additionally, the prosecutor agreed to remain silent at the sentencing hearing except to correct misstatements of fact.[743] At sentencing, a psychologist testified that Peterson was a good candidate for probation.[744] However, his conclusion was based on incomplete information provided by Peterson during evaluation.[745] The prosecutor then cross-examined the psychologist and initially limited cross to filling in the gaps in the incomplete information provided by Peterson.[746] Next, the prosecutor continued the cross-examination and argued that Peterson's lack of candor "should be considered by the court that he cannot or will not address his looking at child pornography or desire to look at child pornography."[747]

Peterson argued that both instances of the prosecutor speaking at sentencing were breaches of the silence provision in the plea agreement. As to the efforts of the prosecutor to fill in the gaps and correct misinformation provided by Peterson, the prosecutor did not breach the agreement.[748] A promise to remain silent in a plea agreement does not

738. State v. Peterson, 293 P.3d 730, 734 (Kan. 2013).
739. *Id*.
740. *Id*. at 730; State v. Urista, 293 P.3d 738 (Kan. 2013).
741. *Peterson*, 293 P.3d at 732.
742. *Id*.
743. *Id*.
744. *Id*.
745. *Id*.
746. *Id*. at 733.
747. *Id*. at 734.
748. *Id*. at 737.

require a prosecutor to remain silent in the face of factual misimpressions presented by the defendant.[749] However, if a prosecutor agrees to remain silent at sentencing, she may not argue against the defendant's efforts to minimize culpability.[750] Therefore, the prosecutor's continued examination after clarifying misimpressions was a breach of the plea agreement.

In *State v. Urista*, the plea agreement provision at issue was a promise by the prosecutor to make a specific sentencing recommendation.[751] The prosecutor half-heartedly made the recommendation, but then proceeded to make comments undermining the recommendation she had just made.[752] In particular, the prosecutor gave her personal opinion of the defendant and his prospects of rehabilitation.[753] The court, looking to the contractual duty of good faith and fair dealing, held that these statements sufficiently undermined the agreed sentencing recommendation to constitute a breach of the plea agreement.[754]

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

K. Arraignment

Section 22-3205 governs the arraignment process in Kansas.[755] The purpose of the arraignment is to present the defendant with the charges against him in order to satisfy the notice requirement of the defendant's due process rights.[756] Subsection (a) of section 22-3205 requires: (1) the arraignment to occur in open court; (2) reading or stating the substance of the charge to the defendant; (3) giving the defendant a copy of the

749. *Id*. at 736–37.
750. *Id*. at 737.
751. State v. Urista, 293 P.3d 738, 741 (Kan. 2013).
752. *Id*. at 742–43.
753. *Id*.
754. *Id*. at 744, 751.
755. KAN. STAT. ANN. § 22-3205.
756. State v. McWilliams, 283 P.3d 187, 193 (Kan. 2012) (Johnson, J., dissenting).

complaint, information, or indictment; and (4) the defendant's plea to the charges brought.[757] Felony offenses require the defendant to be actually present at the arraignment.[758] Misdemeanor offenses allow for defendant to appear by counsel.[759]

Subsection (b) of section 22-3205 allows for arraignment by two-way video conferencing technology in lieu of an actual appearance in court.[760] Defendants must be apprised of their right to be actually present in court, and are not prejudiced by choosing to enforce that right.[761] Under the current subsection (b), arraignment by two-way video conferencing is done at the discretion of the court.[762]

On January 22, 2014, The Committee on Judiciary introduced Senate Bill 290, a bill that proposed to replace the discretionary aspect of subsection (b) of section 22-3205 with mandatory use of two-way video conferencing technology in districts where two-way video conferencing was available.[763] The bill, as introduced, would replace "may" with "shall" and would strike completely the "in the discretion of the court" language.[764] It would also add language limiting the mandatory nature of this rule to districts that have two-way video conferencing technology available.[765]

The Kansas Office of the Budget estimated that this legislation could save counties money by reducing expenditures associated with transporting prisoners.[766] Additionally, the amendment left the defendant's ability to enforce her right to be actually present in the courtroom intact, if requested.[767] The bill, however, never made it out of committee during the 2014 Legislative Session.

757. § 22-3205(a).
758. *Id*.
759. *Id*.
760. *Id*. § 22-3205(b).
761. *Id*.
762. *Id*.
763. S. 290, 85th Leg., Reg. Sess. (Kan. 2014).
764. *Id*.
765. *Id*.
766. Fiscal Note for SB 290 from Jon Hummell, Kansas Interim Director of the Budget, to Jeff King, Chairperson, Senate Committee on Judiciary (January 28, 2014) (on file with author).
767. S. 290, 85th Leg., Reg. Sess. (Kan. 2014).

L. Discovery

Sections 22-3212 and 22-3213 govern criminal discovery in Kansas.[768] Section 22-3213 provides that prosecutorial witness statements are not discoverable until after the witness has testified.[769] Section 22-3212 is the main discovery statute. The basic rule of section 22-3212, codified in subsection (a), is that prosecutors must, upon request, provide to the defendant any relevant: (1) written or recorded statements or confessions made by defendant in prosecution's possession; (2) results of physical and mental examinations and scientific tests made in connection with the case; (3) defendant's recorded testimony before grand jury; and (4) memoranda of any oral confession made by defendant and a list of witnesses to the oral confession.[770] Additionally, subsection (b) of section 22-3212 adds a catchall provision that allows a defendant to discover any photograph books, papers, documents, tangible objects, and buildings or places that have been within the possession or control of the prosecution.[771] Requests under subsection (b) must be material to the case and must not place an undue burden on the prosecution.[772] If the defendant seeks to discover the results of a scientific test or mental or physical examination or pursues discovery under subsection (b), then the prosecution may also pursue certain types of discovery.[773]

In *State v. Marks*, the Kansas Supreme Court was faced with how to interpret the word "defendant" in section 22-3212.[774] Wyandotte County had an open file policy that allowed defense counsel to inspect and make copies of discovery, but no accommodations were made to allow the defendant to personally inspect.[775] The Kansas Supreme Court held, invoking the plain meaning of the word "defendant" in the statute, that the defendant, not just defense counsel, was entitled to personal discovery of the documents.[776] In response to this, the Kansas Legislature pasesed House Bill 2445, which changed the word

768. KAN. STAT. ANN. § 22-3212–13.
769. *Id.* § 22-3213.
770. *Id.* § 22-3212(a).
771. *Id.* § 22-3212(b).
772. *Id*.
773. *Id*. § 22-3212(c).
774. 298 P.3d 1102, 1114 (Kan 2013).
775. *Id*. at 1113.
776. *Id*. at 1115.

"defendant" in section 22-3212 to "defense."[777] This would presumably nullify the ruling in *Marks* by allowing discovery by defense counsel alone.

M. Motions to Suppress

Motions to suppress are governed by section 22-3215 and 22-3216. Section 22-3215 governs the suppression of admissions and confessions, and section 22-3216 governs suppression of illegal evidence obtained in violation of the Fourth Amendment.[778] Both statutes require that, absent certain circumstances, motions to suppress must be filed before trial,[779] and require that defendant allege facts to show she is entitled to relief.[780]

N. Pretrial Conference & Motions in Limine

Section 22-3217 governs pretrial conferences.[781] Pre-trial conferences can occur any time after the charge has been filed, and can be convened upon motion of either party or by the court.[782] The main purpose of the pre-trial conference is to ensure a fair and expeditious trial.[783] One means by which pre-trial conferences do this is through motions in limine.[784] There is no statutory authority to file motions in limine in Kansas, but Kansas courts have inferred that the ability to hear a motion in limine is inherent by virtue of the trial court's statutory power in section 22-3217 to call pre-trial conferences.[785] The main purpose of motions in limine is to ensure that inadmissible prejudicial evidence is not brought up during trial.[786] To that end, a successful motion in limine must not only prove that the evidence in question will be inadmissible at trial, but must also show that the mere offer or mention of that evidence at trial would cause unfair prejudice, confuse the issues, or mislead the jury.[787]

777. H.B. 2445, 85th Leg., Reg. Sess. (Kan. 2014).

778. KAN. STAT. ANN. § 22-3215 (covering admissions and confessions); KAN. STAT. ANN. § 22-3216 (covering illegally obtained evidence).

779. § 22-3215(1); § 22-3216(1).

780. § 22-3215(2); § 22-3216(2).

781. *Id.* § 22-3217.

782. *Id.*

783. *Id.*

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

785. State v. Crume, 22 P.3d 1057, 1067 (Kan. 2001); *Quick*, 597 P.2d at 1112.

786. *Quick*, 597 P.2d at 1112; State v. Shadden, 235 P.3d 436, 446 (Kan. 2010).

787. *Shadden*, 235 P.3d at 446–47.

V. TRIAL RIGHTS

A. Fifth Amendment Issues

The Fifth Amendment states, "no person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."[788] The Amendment provides several important safeguards to criminal defendants, including protection from double jeopardy, a right against self-incrimination, and the guarantee of due process of law. Kansas provides similar protections to criminal defendants in the Kansas Constitution's Bill of Rights and in the Kansas statutes. Section 10 of the Kansas Bill of Rights states, "no person shall be a witness against himself, or be twice put in jeopardy for the same offense." Additionally, section 22-3102 codifies a defendant's privilege against self-incrimination.

1. Self-Incrimination

The Fifth Amendment protection against self-incrimination is generally broadly construed, but has been limited by courts.[789] If a defendant chooses to testify and refuses to answer related questions on cross-examination, the interests of the opposing party and the court will likely prevail over the defendant's Fifth Amendment interests.[790] In 2012, the Kansas Supreme Court found that a defendant's submission to a court-ordered psychiatric evaluation did not waive his Fifth Amendment privileges against self-incrimination.[791] Therefore, the State's use of a court-ordered examination to rebut the defendant's voluntary-intoxication defense violated the defendant's Fifth Amendment rights.[792] The Supreme Court recently considered the Kansas Supreme Court's decision, and issued a unanimous opinion vacating and remanding the case for further proceedings.[793]

788. U.S. CONST. amend. V.

789. *See generally* Maness v. Meyers, 419 U.S. 449, 461 (1975) (citing Counselman v. Hitchcock, 142 U.S. 547, 562 (1892)); Arndstein v. McCarthy, 254 U.S. 71, 72–73 (1920)); *see also* Kansas v. Cheever, 134 S. Ct. 596, 601 (2013).

790. *Cheever*, 134 S. Ct. at 601.

791. State v. Cheever, 284 P.3d 1007, 1023 (Kan. 2012).

792. *Id.*

793. *Cheever*, 134 S. Ct. at 603.

In *State v. Cheever*, the defendant shot and killed a local county sheriff after ingesting methamphetamine.[794] At trial, the defendant presented a voluntary-intoxication defense, alleging his methamphetamine use made it impossible for him to have premeditated the sheriff's murder.[795] In response, the federal court ordered the defendant to submit to a psychiatric examination.[796] The federal case against the defendant was later dismissed, and a state case was re-filed.[797] The defendant again introduced the voluntary-intoxication defense.[798] The defendant presented the testimony of a psychiatric pharmacist to support his defense.[799] In rebuttal, the state presented evidence from the court-ordered mental evaluation and testimony from the psychiatrist that examined the defendant.[800] The defendant argued that the use of the court-ordered psychiatric evaluation violated his Fifth Amendment right against compulsory self-incrimination.[801] The defendant was convicted and sentenced to the death penalty.[802] The Kansas Supreme Court overturned the conviction.[803]

The United States Supreme Court determined that the defendant's Fifth Amendment rights were not violated, and vacated the Kansas Supreme Court's decision.[804] The Supreme Court held in *Buchanan v. Kentucky* that the State may present evidence from a compelled psychiatric examination "where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit an offense."[805] The Kansas Supreme Court acknowledged *Buchanan* in *State v. Cheever*, but applied a slightly different rule not allowing the State to present evidence "unless or until the defendant presents evidence at trial that he or she lacked the requisite criminal intent due to mental disease or defect."[806] The Kansas Supreme Court determined that a voluntary-intoxication defense was not a mental

794. *Cheever*, 284 P.3d at 1014.
795. *Id.*
796. *Id.* at 1015.
797. *Id.*
798. *Id.*
799. *Id.*
800. *Id.* at 1016.
801. *Id.* at 1018.
802. *Id.* at 1007, 1014.
803. *Id.* at 1007, 1023.
804. Kansas v. Cheever, 134 S. Ct. 596, 603 (2013).
805. *Id.* at 601.
806. *Cheever*, 284 P.3d at 1023.

disease or defect under Kansas law, and therefore, the defendant did not waive his Fifth Amendment rights.[807]

In response, the Supreme Court emphasized that the rule developed in *Buchanan* permits rebuttal testimony when the defendant presents evidence of "mental status," which is "a broader term than 'mental disease or defect.'"[808] Therefore, defendants do not need to "assert a 'mental disease or defect' in order to assert a defense based on 'mental status.'"[809] The defendant's voluntary-intoxication defense concerned his mental status because "he used it to argue that he lacked the requisite mental capacity to premeditate."[810] The defendant presented evidence concerning his mental status; therefore, the defendant's Fifth Amendment right against self-incrimination was not violated when the prosecution presented evidence from the court-ordered psychiatric examination to rebut the defendant's intoxication defense.[811]

It is important to note the impact the Court's ruling has on Fifth Amendment privileges and a defendant's presentation of evidence in Kansas. The Court emphasized in its opinion that the admission of this rebuttal testimony dovetails with the Fifth Amendment's requirement that a defendant who testifies in a criminal case must answer related questions on cross-examination. The Court noted that a defendant who "presents evidence through a psychological expert who has examined him" opens himself up to the government's "only effective means of challenging that evidence: testimony from an expert who has also examined him."[812] Therefore, criminal defendants must tread lightly when presenting a defense that was previously found by Kansas courts to fall outside the definition of "mental disease or defect."

2. Immunity

A criminal defendant cannot be compelled to testify if he has invoked his Fifth Amendment privilege against self-incrimination, unless the government promises, "to immunize [the defendant] against use of the testimony in any criminal prosecution against [him]."[813] Kansas has

807. *Id.*
808. Kansas v. Cheever, 134 S. Ct. 596, 602 (2013).
809. *Id.*
810. *Id.*
811. *Id.* at 603.
812. *Id.* at 601.
813. US v. Oyegoke-Eniola, 734 F.3d 1262, 1267 (10th Cir. 2013).

codified the government's ability to grant immunity in section 22-3102 of the Kansas Statutes.[814] County or district attorneys, or the attorney general, may grant a criminal defendant either: (1) transactional immunity, or (2) use and derivative immunity.[815] Transactional immunity grants the defendant protection from prosecution for any crime "which has been committed for which such immunity is granted or for any other transactions arising out of the same incident."[816] Use and derivative immunity prevent the state from using certain testimony against the defendant that was obtained under a grant of immunity.[817]

3. Double Jeopardy

The Fifth Amendment of the United States Constitution and Section 10 of the Kansas Bill of Rights both protect criminal defendants from being subject to double jeopardy.[818] The Kansas Supreme Court recognizes that the language of the two provisions "is not identical," but the court interprets the "Kansas and federal provision as providing the same protection."[819]

a. Generally

The Supreme Court recently reaffirmed a century of precedent stating, "the Double Jeopardy Clause bars retrial following a court-decreed acquittal, even if the acquittal" is based on court error.[820] In *Evans v. Michigan*, the Michigan trial court "entered a directed verdict of acquittal" because the court determined the State did not provide enough evidence on an element of the offense, however the element required was "not actually a required element at all."[821] The Michigan Supreme Court held that the lower court's directed verdict was based on "an error of law that did not resolve any factual element of the charged offense," and therefore the ruling was not "an acquittal for the purposes of double

814. KAN. STAT. ANN. § 22-3102(b)–(c).

815. *Id.*

816. *Id.*

817. *Id.*

818. *See* State v. Hensley, 313 P. 3d 814, 824 (Kan. 2013); U.S. CONST. amend. V. ("be subject for the same offence to be twice put in jeopardy of life or limb"); *see also* KAN. CONST. bill of rights §10 ("no person shall be . . . twice put in jeopardy for the same offense").

819. *Hensley*, 313 P. 3d at 824.

820. Evans v. Michigan, 133 S. Ct. 1069, 1074 (2013).

821. *Id.* at 1073.

jeopardy" and the defendant could be retried.[822] The Supreme Court reversed, holding that the erroneous midtrial acquittal remains "an acquittal for double jeopardy purposes as well."[823]

In its opinion, the Court distinguished the double jeopardy consequences of a court's 'procedural' and 'substantive' rulings.[824] The Court stated that to allow a second trial after an acquittal, even one entered in error, would "wear down" the resources of the defendant so that even if the defendant was innocent he might be found guilty.[825] The Court contrasted an acquittal with the dismissal of a case on procedural grounds unrelated to a defendant's "factual guilt or innocence," stating that such a dismissal does not create the same policy concerns because there is no "expectation of finality."[826] The Court determined that fifty years of Supreme Court precedent indicated that the Michigan court's acquittal went to the question of the defendant's guilt or innocence, and therefore the acquittal precluded a retrial of the defendant on the charge.[827]

Important to the Kansas Legislature, the Court's opinion pointed out a solution to the issue raised in *Evans v. Michigan*, which the Court first offered in *Smith v. Massachusetts*.[828] Jurisdictions are not obligated to allow trial judges "the power to grant a midtrial acquittal."[829] Nevada and Louisiana currently have statutes in place prohibiting this practice.[830] If a jurisdiction disagrees with the Court's outcome in *Evans v. Michigan*, that mid-trial acquittals based on erroneous information prohibit retrials, the jurisdiction may enact laws limiting the ability to issue mid-trial acquittals.

b. Multiplicity

One function of both the Fifth Amendment of the United States Constitution and Section 10 of the Kansas Bill of Rights is to protect criminal defendants from "receiving multiple punishments under different statutes for the same conduct in the same proceeding when the

822. *Id.* at 1074.
823. *Id.* at 1073.
824. *Id.* at 1075.
825. *Id.*
826. *Id.*
827. *Id.* at 1078.
828. *Id.* at 1081; *see also* Smith v. Massachusetts, 543 U.S. 462, 474 (2005).
829. *Evans*, 133 S. Ct. at 1081.
830. *Id.*

legislature did not intend multiple punishments."[831]

In *State v. Schoonover*, the Kansas Supreme Court developed a two-step method for analyzing double jeopardy claims.[832] The court first "determines whether the convictions arose from the same conduct" and then "considers whether by statutory definition there are two crimes or only one."[833] The second prong requires the court to divine whether the legislature intended "punishment for both crimes." Generally, courts apply the same-elements test to determine whether "each statute contains an element not found in the other statute."[834] In *State v. Berberich*, the Kansas Supreme Court determined that a "conviction of both possession of marijuana and possession of marijuana with no tax stamp is permissible."[835] The court recently revisited this holding, and after applying the *Schoonover* analysis to the statute, determined that a conviction of both possession of marijuana and possession of marijuana with no tax stamp violates the Fifth Amendment.[836]

In *State v. Hensley*, the Saline County Sheriff's Office became suspicious of the defendant after receiving several reports of increased "traffic coming and going" from the defendant's house, and a phone call from the defendant's ex-girlfriend claiming the defendant had marijuana in his freezer.[837] A search of the defendant's home and van revealed marijuana, and the defendant was charged with multiple counts of possession including possession of marijuana with no tax stamp affixed and possession of marijuana with intent to sell, deliver, or distribute.[838] Relevant to this discussion, the jury convicted Hensley of both simple possession of marijuana and possession of marijuana without a tax stamp.[839] The Kansas Court of Appeals affirmed the convictions.[840] The defendant appealed his case to the Kansas Supreme Court seeking reversal of the two possession convictions as a violation of the Double Jeopardy Clauses.

The Kansas Supreme Court determined that the defendant's convictions of simple possession and possession with no tax stamp were

831. State v. Hensley, 313 P. 3d 814, 824 (Kan. 2013).
832. *See* State v. Schoonover, 133 P.3d 48, 62 (Kan. 2006).
833. *Hensley*, 313 P.3d at 824 (citing *Schoonover*, 133 P.3d at 48).
834. *Id.* at 824–25.
835. *Id.* at 824.
836. *Id.* at 824–25.
837. *Id.* at 818.
838. *Id.*
839. *Id.* at 819.
840. *Id*.

multiplicitous.[841] The court applied the "two-step double jeopardy analysis" it outlined in *Schoonover*.[842] The court noted that the same-elements test only creates a presumption that the legislature did not want to punish both offenses.[843] The court pointed out that this presumption can be "overridden by legislative history."[844] The court looked to a relevant Kansas statute that indicated the legislature did not intend to punish both offenses, and therefore the court did not consider legislative history.[845] Applying the *Schoonover* framework, the court determined that the defendant's simple possession charge and possession with no tax stamp charge arose from the same conduct and contained the same elements.[846] Therefore, contrary to its prior rulings, the court determined that the defendant's convictions violated the Double Jeopardy Clause.[847] The court reversed the defendant's conviction and sentence for the simple possession charge.[848]

In *State v. King*, the Kansas Supreme Court determined that a defendant's three convictions arising from a single terroristic threat violated the double jeopardy clause.[849] During the defendant's first trial, the jury asked whether "there could be multiple convictions if several people were in the vicinity when [the defendant] uttered the threat."[850] The trial court answered the jury's question "yes."[851] The Kansas Supreme Court applied the *Schoonover* framework to the issue.[852] Because the court determined that the three convictions arose from a single statute, the court moved on to the second prong and applied the "unit of prosecution test."[853] The unit of prosecution test required the court to look at the statutory definition of the crime and determine "what the legislature intended to as the allowable unit of prosecution," because "there can be only one conviction for each allowable unit of

841. *Id.*
842. *Id* at 824.
843. *Id* at 825.
844. *Id.*
845. *Id.*
846. *Id.* at 826.
847. *Id.*
848. *Id.*
849. 305 P.3d 641, 646 (Kan. 2013).
850. *Id* at 657.
851. *Id.*
852. *Id.* at 656.
853. *Id.* at 654.

prosecution."[854] The unit of prosecution test is not reliant on whether there was a single victim or action; rather the test looks to the nature of the conduct proscribed in the statute.[855] If the statute is ambiguous, "the rule of lenity presumes a single action harming multiple victims is only one offense."[856] Because the court concluded that the unit of prosecution under the relevant statute constituted a "single communicated threat," the Kansas Supreme Court determined that "regardless of his intent or the number of people who perceived the threat" the defendant could only be sentenced for one offense.[857] Therefore, the court concluded that the defendant's three convictions and sentences violated the Double Jeopardy Clause.[858]

In 2013, Kansas courts also applied the *Schoonover* analysis to cases as varied as convictions of reckless driving and fleeing while engaged in reckless driving, attempted rape, and rape.[859] In the first case, *State v. Messengale*, the Kansas Court of Appeals determined that the double jeopardy clause was violated, even though the state charged the reckless driving in a separate count, because reckless driving was an element of the fleeing conviction.[860] In the second case, *State v. Weber*, the court determined that the rapist's "inability to accomplish penile penetration" did not constitute an intervening act, and therefore his convictions of rape and the lesser-included offense of attempted rape violated the double jeopardy clause.[861] The court reversed the attempted rape conviction and vacated the sentence.[862] Overall, Kansas courts are using the *Schoonover* framework with increasing frequency. Therefore, it would serve practitioners in Kansas well to become familiar with the case's two-prong analysis and its application to double jeopardy claims.

B. Sixth Amendment Issues

The Sixth Amendment declares, "in all criminal prosecutions, the

854. *Id.* (quoting State v. Schoonover, 133 P.3d 48, 80 (Kan. 2006)).

855. *Id.*

856. *King*, 305 P.3d at 654.

857. *Id.* at 657.

858. *Id.*

859. *See* State v. Messengale, No. 109,351, 2014 WL 349612, at *4 (Kan. Ct. App. Jan. 31, 2014) ("reckless driving here was an element of the eluding offense and, therefore, it was a lesser included offense. It does not matter that the state also charged reckless driving in a separate count.").

860. *Id.*

861. State v. Weber, 304 P.3d 1262, 1267 (Kan. 2013).

862. *Id.* at 1268.

accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."[863] The Sixth Amendment is an important safeguard of criminal defendants' rights at trial.

1. Speedy and Public Trial

a. Speedy Trial

The United States Constitution, Kansas Constitution, and section 22-3402 of the Kansas Statutes guarantee the right to a speedy trial in Kansas. In 1974, Congress codified a criminal defendant's right to a speedy trial in the federal Speedy Trial Act.[864] Congress designed the Act to benefit defendants and to reduce and prevent pretrial delay from "impairing the deterrent effect of punishment."[865] Congress emphasized this point when amending the act in 1979, affirming the Speedy Trial Act was enacted to protect a criminal defendant's Sixth Amendment right to a speedy trial, as well as the societal interest in quickly addressing charges against a criminal defendant.[866]

Section 22-3402 codifies the right to a speedy trial in Kansas. Section 22-3402 states, "if any person charged with a crime and held in jail solely by reason thereof shall not be brought to trial within ninety days after such person's arraignment on the charge, such person shall be entitled to be discharged from further liability to be tried for the crime charged."[867] The statutory right to a speedy trial is measured differently in Kansas than the constitutional right to a speedy trial. Under section 22-3402, the ninety-day speedy trial provision is triggered with the criminal defendant's arraignment.[868] The statute requires that the criminal defendant's trial commence within ninety days "of a valid arraignment."[869] The constitutional right to a speedy trial is not triggered until the criminal prosecution begins, "usually by an indictment, an

863. U.S. CONST. amend VI.
864. Speedy Trial Act of 1974, 18 U.S.C. §§ 3161–3174 (2006).
865. Zedner v. United States, 547 U.S. 489, 501 (2006).
866. *Id.*
867. KAN. STAT. ANN. § 22-3402(a).
868. State v. Breedlove, 286 P.3d 1123, 1129 (Kan. 2012).
869. *Id.*

information, or an arrest, whichever first occurs."[870]

b. Public Trial

The Sixth Amendment of the United States Constitution and section 10 of the Kansas Constitution's Bill of Rights guarantees criminal defendants the right to a public trial.[871] In Kansas, the criminal defendant is allowed to have "a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed."[872] A criminal defendant's right to a public trial implies that the "doors of the courtroom be kept open and that the public, or such portion thereof as may be conveniently accommodated, be admitted, subject to the right of the court to exclude objectionable characters."[873] However, the right to a public trial is not absolute, and there may be certain cases or circumstances that offset the right to a public trial.[874]

In *State v. Cox* the Kansas Supreme Court overturned a defendant's conviction for child molestation, because the district judge cleared the courtroom when the nurse who examined the child victim was on the stand.[875] The defendant suggested to the district judge that the witness give the photographs to the jury rather than display them in the courtroom, but the judge dismissed this suggestion.[876] The courtroom was cleared while the photographs were displayed, and the public was brought back into the courtroom when the photos were taken down.[877] The Kansas Supreme Court agreed with the defendant's argument that the district court's "failure to make adequate findings, balance the competing interests involved, or consider lesser alternatives to closing the courtroom violated [the defendant's] Sixth Amendment right to a public trial under the United States Constitution."[878] Because the district judge failed to support the closing of the courtroom doors without discussing the interests at stake, or considering alternatives, the Kansas

870. State v. Taylor, 594 P.2d 262, 266 (Kan. Ct. App. 1979).

871. U.S. CONST. amend. VI; KAN. CONST. bill of rights §10.

872. KAN. CONST. bill of rights §10.

873. State v. Cox, 304 P.3d 327, 333 (Kan. 2013) (quoting State v. McNaught, 713 P.2d 457, 466 (1986)).

874. Cox, 304 P.3d at 333.

875. *Id.*

876. *Id.*

877. *Id.*

878. *Id.*

Supreme Court could not conduct a proper review.[879] Therefore, the court reversed the defendant's conviction.[880]

2. Trial by Jury

The Sixth Amendment of the United States Constitution guarantees criminal defendants the right to an "impartial jury."[881] While criminal defendants have the right to an impartial jury, the right to a unanimous jury verdict is based in statute.[882] Section 22-3421 codifies a criminal defendant's right to a unanimous jury verdict, stating "if any juror disagrees, the jury must be sent out again; but if no disagreement is expressed, and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case."[883]

The right to trial by an impartial jury provides a fundamental protection for criminal defendants. A criminal defendant is guaranteed the right to a jury trial by a panel of impartial and indifferent jurors.[884] A defendant's due process rights are violated if the jury is not impartial.[885] A juror must issue a verdict "based upon the evidence developed at the trial of a criminal prosecution, regardless of the heinousness of the crime charged, the apparent guilt of the offender, or the station in life which the offender occupies."[886] Under section 22-3423, the court may "order a mistrial at any time if prejudicial conduct, inside or outside the courtroom, makes it impossible to proceed without injustice to either party."[887] However, the party claiming juror misconduct must show that the juror's error substantially prejudiced the criminal defendant's rights.[888]

a. Waiver of Right to Jury

The Constitution guarantees a criminal defendant the right to a jury

879. *Id.* at 335.
880. *Id.*
881. U.S. CONST. amend. VI.
882. State v. Holt, 175 P.3d 239, 245 (Kan. 2008).
883. KAN. STAT. ANN. § 22-3421.
884. State v. Cady, 811 P.2d 1130, 1130 (1991).
885. *Id.*
886. *Id.* at 1139.
887. State v. Pringle, No. 107,874, 2013 WL 2395552, at *2 (Kan. Ct. App. May 24, 2013).
888. *Id.*

trial under the Sixth Amendment.[889] Kansas statutes codify this right under section 22-3403 by requiring all felony cases be tried unless the defendant and the prosecutor, with the court's consent, submit the trial to the court.[890]

A defendant may waive his right to a jury trial.[891] The court and State must agree to the waiver.[892] Because the right is fundamental, however, courts strictly construe waiver in favor of giving the defendant every opportunity for the jury trial.[893]

The court must advise the defendant of his or her right to a jury.[894] This provides a safeguard against an involuntary waiver.[895] The defendant must then personally waive that right, either in writing or in open court.[896] The test for the validity of the waiver is whether defendant made it knowingly and voluntarily.[897] "Knowing" requires that the defendant knew and understood what he or she was doing.[898] Defendants do not necessarily fully understand the terms "jury trial" and "trial to the court" and their consequences because they are terms of art.[899] To determine whether a defendant has waived his right, the court looks at the particular facts and circumstances of the case.[900]

A waiver will not "be presumed from a silent record."[901] In *State v. Raikes*, the defendant was charged with multiple crimes, including driving under the influence, possession or control of a hallucinogenic drug with a prior conviction, and possession or control of depressants.[902] Raikes made a plea deal for the DUI charge only.[903] The written agreement included a waiver of his right to a jury trial, which Raikes signed.[904] Pursuant to the deal, Raikes agreed to complete the drug court

889. See U.S. CONST. amend VI; KAN. CONST. bill of rights § 5, 10.
890. KAN. STAT. ANN. § 22-3403; State v. Raikes, 313 P.3d 94, 96 (Kan. Ct. App. 2013).
891. *Id.* at 97.
892. KAN. STAT. ANN. § 22-3403; State v. Cervantes-Cano, No. 107,179, 2013 WL 1943060, at *3 (Kan. Ct. App. May 10, 2013).
893. *Raikes*, 313 P.3d at 97; *Cervantes-Cano*, 2013 WL 1943060, at *3.
894. *Raikes*, 313 P.3d at 97.
895. *Id.* at 97–98.
896. *Id.* at 97.
897. *Cervantes-Cano*, 2013 WL 1943060, at *3.
898. State v. Beaman, 286 P.3d 876, 882 (Kan. 2012).
899. *Cervantes-Cano*, 2013 WL 1943060, at *4.
900. *Raikes*, 313 P.3d at 97.
901. *Beaman*, 286 P.3d at 882.
902. 313 P.3d at 95.
903. *Id.*
904. *Id.*

program.[905] Failing to complete the program would result in a trial, although Raikes was not told whether that would be a bench trial or a jury trial.[906] Raikes eventually failed to complete the program and was told the case was docketed for a bench trial.[907] During trial, Raikes did not raise an objection about the lack of a jury trial and was sentenced for possession or control of a hallucinogenic drug with a prior conviction.[908] On appeal, Raikes argued that he did not waive his right to a jury trial on the drug charge because the court never told him of his right to a jury trial and because he never waived the right.[909]

The Kansas Supreme Court held that Raikes did have a right to trial by jury on his felony drug charge.[910] Although Raikes waived his rights in the written plea agreement, that was not enough.[911] The court should not have presumed the defendant waived his jury trial right from his silence at the bench trial.[912] The judge needed to explain to Raikes the right he was waiving.[913]

In *State v. Beaman*, the Kansas Supreme Court found that although the district court did not specifically advise the defendant of the right to trial by jury, the district court did explain why he would be better off with a jury trial.[914] The Kansas Supreme Court found that the discussion about the nature and extent of the right to a jury was enough to make the waiver valid.[915] Conversely, in *State v. Cervantes-Cano*, the district court did not have a discussion to ensure the defendant understood the nature and extent of the right to a jury, let alone specifically advise the defendant of his right.[916] In *Cervantes-Cano*, the Kansas Supreme Court expanded its holding in *Beaman* by emphasizing the need for a clear and direct explanation of the right to a jury trial, particularly for defendants who do not speak English and rely on an interpreter.[917]

905. *Id.* at 95.
906. *Id.* at 96.
907. *Id.*
908. *Id.* at 96.
909. *Id.*
910. *Id.* at 97–98.
911. *Id.* at 98.
912. *Id.*
913. *Id.*
914. State v. Beaman, 286 P.3d 876, 884 (Kan. 2012).
915. *Id.*
916. State v. Cervantes-Cano, No. 107,179, 2013 WL 1943060, at *4 (Kan. Ct. App. May 10, 2013).
917. *Id.*

b. Jury Selection

i. Generally

Jury selection, or voir dire, allows parties to select jurors "who are competent and without bias, prejudice, or partiality."[918] The trial court "directs the nature and scope of the voir dire examination."[919]

In federal court, district courts must write plans for random selection of jurors who fairly represent the community.[920] To bring a Sixth Amendment fair cross-section violation claim, a defendant must show (1) that the excluded group "is a distinctive group in the community"; (2) that the representation of the group "is not fair and reasonable in relation to the number of such persons in the community"; and (3) this "under-representation is due to systematic exclusion of the group in the jury selection process."[921] Federal courts have "generally approved of the use of voter registration lists," although a defendant may challenge the use of the list if it systematically excludes "a distinct, cognizable class of persons from jury service."[922]

Each party may "challenge any prospective juror for cause," and "challenges for cause shall be tried by the court."[923]

ii. Preemptory Challenges

Each party is entitled to three peremptory challenges, as outlined in section 22-3412, subject to the limitations of section 60-248.[924] Multiple plaintiffs or multiple defendants are generally categorized as one party when making a challenge.[925] The challenges must not communicate to the juror who is bringing the challenge.[926] Permissible challenges include those "based on generalizations, impressions, or

918. State v. Lizama-Lazo, No. 108, 318, 2013 WL 3491290, at *5 (Kan. Ct. App. July 12, 2013).

919. *Id.*

920. United States v. Williams, No. 06-20047-04-CM, 2013 WL 988089, at *3 (D. Kan. Mar. 12, 2013).

921. *Id.*

922. *Id.* (quoting Washington v. United States, No. 94-2451-GTV, 1996 WL 570198, at *4 (D. Kan. Sept 27, 1996)).

923. KAN. STAT. ANN. § 22-3410.

924. *Id.* § 22-3412; *Id.* § 60-247.

925. 4 Kan. Law & Prac., Code Of Civ. Proc. Anno. § 60-247 (5th ed.).

926. *Id.* § 60-247.

irrationalities."[927]

Although parties may strategically use their peremptory challenges in a variety of ways, jurors have an equal protection right to serve in the judicial process without racial discrimination.[928] Defendants may challenge the State's use of preemptory challenges as racial discrimination under a *Batson* challenge.[929] Generally, these challenges are brought when the defendant believes the State is systematically removing a certain group—historically based on race, but gender and religious discrimination have also been alleged—from the jury pool.[930]

To bring a *Batson* challenge, the defendant must make a prima facie showing that the peremptory challenges were made because of race.[931] The State must then provide a facially valid race-neutral explanation.[932] Whereas the first two steps require a low burden, the third step requires the defendant to show he has proven purposeful discrimination.[933] The court looks at whether the State's stated reasons for excluding the jurors are a pretext for racial discrimination.[934] This analysis may include looking at factors "including the reasons articulated, the way they are articulated," and how they align with the State's other exclusions or inclusions of jurors.[935]

In *State v. Villa-Vasquez*, the Kansas Court of Appeals affirmed the denial of a *Batson* challenge.[936] Villa-Vasquez claimed the State used its peremptory challenges to remove the only two Hispanic potential jurors.[937] The court found that the State offered "racially neutral reasons for both preemptory strikes," including one juror's nonresponsiveness to the questions and concern over the other juror's night-shift work schedule.[938] Villa-Vasquez argued the district court failed to complete the third step of the *Batson* analysis and determine the credibility of the State's racially neutral reasons.[939] However, he failed to preserve that

927. State v. Gann, No. 107,595, 2013 WL 4778151, at *3 (Kan. Ct. App. Sept. 6, 2013).
928. *Id.* at *2.
929. *Id.* at *1–2.
930. *Id.*
931. State v. Villa-Vasquez, 310 P.3d 426, 435 (Kan. Ct. App. 2013).
932. *Id.*
933. *Id.*
934. State v. Gann, No. 107,595, 2013 WL 4778151, at *3 (Kan. Ct. App. Sept. 6, 2013).
935. *Id.* at *4.
936. *Villa-Vasquez*, 310 P.3d at 436.
937. *Id.* at 435.
938. *Id.* at 435–36.
939. *Id.* at 436.

issue on appeal because he did not object to the district court's analysis.[940] Therefore, Villa-Vasquez failed to meet the *Batson* standard.[941]

c. Jury Misconduct

Criminal defendants have a constitutional right to an impartial, competent, and unimpaired jury.[942] The judicial system highly regards the integrity of jury proceedings and works to keep the jury free from outside unauthorized intrusions.[943] Impartial jurors are "the cornerstone of our system of justice and central to the Sixth Amendment's promise of a fair trial."[944]

Juror misconduct includes "communications with jurors from outsiders, witness, bailiffs, or judges," as well as unauthorized behavior such as observing premises or reading articles about the case.[945] Of course, it is "virtually impossible to shield jurors" from all outside factors.[946] Juror misconduct is grounds for a mistrial if the party claiming error can show the misconduct "substantially prejudiced his or her rights."[947] Generally, for example, "misconduct such as inattentiveness or sleeping does not warrant a new trial."[948] Prejudice requires a showing that the "juror missed large portions of the trial, or [whether] the portions missed were particularly critical."[949] If the court receives credible evidence of jury misconduct, it has a duty to mitigate.[950] Credible evidence requires more than just speculation.[951]

In *State v. Salazar-Moreno*, the defendant's wife overheard a juror talking on his phone, making comments about Mexican people.[952] The

940. *Id.*

941. *Id.*

942. United States v. McKeighan, 685 F.3d 956, 973 (10th Cir. 2012).

943. Stouffer v. Trammell, 738 F.3d 1205, 1213 (10th Cir. 2013).

944. *Id.* (quoting United States v. Dutkel, 192 F.3d 893, 894 (9th Cir.1999)).

945. State v. Salazar-Moreno, No. 106,555, 2013 WL 5925894, at *4 (Kan. Ct. App. Nov. 1, 2013) (quoting State v. Fenton, 620 P.2d 813, 818 (Kan. 1980)).

946. *Stouffer*, 738 F.3d at 1214.

947. *Salazar-Moreno*, 2013 WL 5925894, at *5 (quoting State v. Wimbley, 26 P.3d 657, 665 (Kan. 2001)).

948. United States v. McKeighan, 685 F.3d 956, 973 (10th Cir. 2012).

949. *Id.* at 974 (quoting United States v. Freitag, 230 F.3d 1019, 1024 (7th Cir. 2000)).

950. *Stouffer*, 738 F.3d at 1213.

951. *Id.* at 1214.

952. *Salazar-Moreno*, 2013 WL 5925894, at *4.

defendant argued these comments constituted juror misconduct.[953] The court determined this was not juror misconduct, but rather was general bias before trial even began and before the jury was even sworn to hear evidence.[954] The district court dismissed the juror after hearing about this conversation and told the remaining jurors to ignore any hallway comments they had heard.[955] The Kansas Court of Appeals found that the juror's comments did not prejudice the defendant because there was no evidence that any of the other jurors overheard the comments and the defendant never sought to question the jurors about it.[956]

3. Right To Confront Witnesses—Cross Examination

a. Generally

The Confrontation Clause, included in the Sixth Amendment of the United States Constitution, guarantees a criminal defendant the right to confront witnesses testifying against him.[957] The primary purpose of the Confrontation Clause is to give the defendant the opportunity to cross-examine the State's witnesses and attack their credibility.[958] The Kansas Bill of Rights gives defendants the right "to meet the witness[es] face to face."[959]

Crawford v. Washington established that testimonial hearsay statements are inadmissible unless the declarant is unavailable to testify and the defendant had the prior opportunity to cross-examine him or her.[960] Testimonial statements include prior testimony at hearings, trials, or police interrogations. For other statements, the court looks to several factors to evaluate whether the statements are testimonial.[961] In *State v.*

953. *Id.*

954. *Id.*

955. *Id.* at *6.

956. *Id.*

957. U.S. CONST amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him").

958. State v. Friday, 306 P.3d 265, 280–81 (Kan. 2013) (citing State v. Humphrey, 845 P.2d 592, 604 (Kan. 1992)).

959. State v. Gonzalez, Nos. 107,375, 107,376, 2013 WL 5610146, at *3 (Kan. Ct. App. Oct. 11, 2013) (citing KAN. CONST. bill of rights § 10).

960. *Id.*

961. Drennan v. State, No. 108,756, 2013 WL 6726181, at *8 (Kan. Ct. App. Dec. 13, 2013). Other factors 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

Gonzales, a four-year-old witness testified on videotape against the defendant, who was accused of criminal sodomy and indecent liberties with a child at a day care.[962] The child appeared at trial to testify but did not testify about the events at the day care, and the defendant did not ask any questions about the events at the day care either.[963] The defendant argued on appeal that the admission of the videotape violated his opportunity to confront the child witness because the witness did not repeat her statements when she appeared at trial to testify.[964] The court held that because the defendant did cross-examine the witness, the defendant did not forfeit his confrontation right, even though he chose not to cross-examine her about the events in question.[965]

To determine whether the defendant's right has been violated, the court must determine "whether the challenged evidence is hearsay."[966] In *Louis v. State*, the court held that admitting preliminary hearing testimony from an absent witness did not violate the defendant's right to confrontation.[967] The defendant did have an opportunity to confront the witness through cross-examination at the preliminary hearing.[968] Because the right to confront witnesses is fundamental, Kansas courts apply the constitutional harmless error rule: the error is harmless if "the party benefitting from [it] proves beyond a reasonable doubt that the error did not affect the outcome of the trial."[969]

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 from third parties, or was the interview conducted in a formal setting such as in a governmental building?" State v. Jones, 197 P.3d 815, 820 (Kan. 2008) (citing State v. Brown, 173 P.3d 612, 634 (Kan. 2007)).

962. *Gonzales*, 2013 WL 5610146, at *2.

963. *Id.*

964. *Id.* at *3.

965. *Id.*

966. United States v. Kool, No. 13-7033, 2014 WL 260543, at *1 (10th Cir. Jan. 24, 2014) (quoting United States v. Mendes, 514 F.3d 1035, 1043 (10th Cir. 2008)).

967. No. 109,082, 2013 WL 5870165, at *2 (Kan. Ct. App. Oct. 25, 2013).

968. *Id.*

969. State v. West, No.107,865, 2013 WL 5422316, at *9 (Kan. Ct. App. Sept. 27, 2013) (quoting State v. Holman, 284 P.3d 251, 271 (Kan. 2012)).

b. Waiver of Right

A criminal defendant may waive his Confrontation Clause right if he meets the forfeiture by wrongdoing exception.[970] The exception applies when the defendant procures the witness's absence with the specific intent to prevent the witness from testifying.[971] The burden is on the State to show that the defendant had specific intent.[972]

In *State v. Belone*, the defendant was found guilty of murdering his girlfriend.[973] The victim had made previous out-of-court statements to a neighbor, and the investigating officers about past incidents of domestic violence in their relationship.[974] The Kansas Supreme Court, interpreting the 2008 Supreme Court case *Giles v. California*, held that the State did not prove by a preponderance of the evidence that Belone's actions were specifically intended to make the witness unavailable for trial.[975] The statements, therefore, were inadmissible.[976] Further, the error was not harmless because the evidence might have inappropriately contributed to the verdict.[977] The court reversed Belone's conviction.[978]

4. Right To Testify And Present A Defense

a. Generally

A criminal defendant has a constitutional right to testify on his or her own behalf.[979] Courts do not have to "address a silent defendant and inquire whether he or she knowingly and intelligently waives the right to testify."[980] A defendant's conduct can provide a sufficient basis for the court to infer that the defendant waives his or her right to testify.[981]

970. Drennan v. State, No. 108,756, 2013 WL 6726181, at *9 (Kan. Ct. App. Dec. 13, 2013) (citing State v. Jones, 197 P.3d 815, 821 (Kan. 2008)).

971. *Id.* at *9.

972. *Id.*

973. 285 P.3d 378, 381 (Kan. 2012).

974. *Id.* at 380.

975. *Id.* at 381.

976. *Id.* at 382.

977. *Id.* at 383.

978. *Id.*

979. State v. Blomdahl, No. 107,008, 2013 WL 1010299, at *6 (Kan. Ct. App. Mar. 8, 2013) (citing Rock v. Arkansas, 483 U.S. 44, 51–52 (1987)).

980. State v. Breeden, 304 P.3d 660, 672–73 (Kan. 2013) (citing Taylor v. State, 843 P.2d 682, 688 (Kan. 1992)).

981. *Id.* (citing *Taylor*, 843 P.2d at 688).

Judges should not ask the defendant if he is aware of his right to testify because it could influence the defendant's decision.[982] Further, judges "should not interfere with trial strategy."[983]

In *State v. Blomdahl*, the State asked that the defense be precluded from making any statements or questioning witnesses about the defendant's disabilities.[984] The defendant therefore could not give any testimony about his own mental illnesses and rather was allowed only to testify about the common sense of an ordinary person compared to the common sense of someone who had endured a traumatic event.[985] The Kansas Court of Appeals held that the defendant was denied the opportunity to present a defense.[986] Because this error denied the defendant a fair trial, the court found the error was not harmless and reversed his conviction.[987]

5. Right to Counsel

a. Invocation of the Right to Counsel

The Sixth Amendment guarantees criminal defendants assistance of counsel, which includes the right to be represented by a qualified attorney.[988] The defendant has the "right to have counsel present at all critical stages of the criminal proceedings."[989] In addition to the state and federal constitutional guarantees, section 22-4503 codifies the right to assistance of counsel.[990]

While undergoing questioning by government agents, a person must "plainly and directly invoke the right to counsel."[991] Defendant must "make an unambiguous request" for counsel, one that is "sufficiently

982. State v. Blackmon, No. 107,562, 2013 WL 1149719, at *4 (Kan. Ct. App. Mar. 15, 2013) (citing *Taylor*, 843 P.2d at 688).

983. *Id.*

984. *Blomdahl*, 2013 WL 1010299, at *6.

985. *Id.*

986. *Id.*

987. *Id.* at *6–7.

988. United States v. McKeighan, 685 F.3d 956, 965–66 (10th Cir. 2012) (citing Wheat v. United States, 486 U.S. 153, 158 (1988); Caplin & Drysdale, Chartered v. United States, 491 U.S. 617, 624–25 (1989)).

989. Hooks v. Workman, 689 F.3d 1148, 1184 (10th Cir. 2012) (quoting Montejo v. Louisiana, 556 U.S. 778, 786 (2009)).

990. KAN. STAT. ANN. § 22–4503(a).

991. State v. Orange, No. 108,806, 2014 WL 37688, at *7 (Kan. Ct. App. Jan. 3, 2014).

clear that a reasonable police officer understands it to be a request."[992] This invocation is enough; the defendant need not "further clarify his intentions."[993] When this request is made, "all questioning must stop" to protect the defendant's *Miranda* rights.[994] However, a statement that merely "*might* be invoking the right to counsel" is not enough.[995]

b. Personal Choice

i. Right to Counsel of Choice

Defendants have a "*qualified* right to counsel of choice," stemming from the right to choose what kind of defense the defendant wants to present.[996] Notably, however, defendants do not have an absolute right to counsel of choice.[997] It can be limited by the defendant's financial ability.[998] Further, defendants "do not have a right to counsel who declines representation," and defendants may not use crime proceeds to finance their defense.[999] The right to counsel is a right to "an effective advocate," not necessarily the representation defendant prefers.[1000]

In addition to the right to counsel, "a defendant also has the right to 'proceed *without* counsel [if] he voluntarily and intelligently elects to do so.'"[1001] If a defendant is wrongly denied his counsel of choice, no showing of prejudice is necessary to establish constitutional error.[1002]

ii. Right to Appoint New Counsel

An indigent criminal defendant has a right to assistance of counsel but may not "compel the district court to appoint the counsel of [his]

992. United States v. Santistevan, 701 F.3d 1289, 1295 (10th Cir. 2012) (citing Davis v. United States, 512 U.S. 452, 459 (1994)).

993. *Id.*

994. United States v. Simons, No. 13-10080, 2013 WL 6119070, at *2 (D. Kan. Nov. 21, 2013).

995. *Orange*, 2014 WL 37688, at *7 (quoting Davis v. United States, 512 U.S. 452, 458–59 (1994)).

996. United States v. Gordon, 710 F.3d 1124, 1135 (10th Cir. 2013) (quoting United States v. Jones, 160 F.3d 641, 646 (10th Cir. 1998)).

997. United States v. McKeighan, 685 F.3d 956, 966 (10th Cir. 2012) (citing Wheat v. United States, 486 U.S. 153, 159, 164 (1988).

998. *Id.*

999. *Id.*

1000. *Id.*

1001. Marshall v. Rodgers, 133 S. Ct. 1446, 1449 (2013).

1002. *McKeighan*, 685 F.3d at 965–66.

choice."[1003] To obtain new counsel, a defendant must demonstrate "justifiable dissatisfaction," either by "showing a conflict of interest, an irreconcilable disagreement, or a complete breakdown in communication."[1004] This requires "an articulated statement" for the district court to look into the matter further.[1005]

A district judge's refusal to appoint new counsel is reviewed under an abuse of discretion standard.[1006] An abuse of discretion may include a decision that is "(1) arbitrary, fanciful, or unreasonable; (2) is based on an error of law; or (3) is based on an error of fact."[1007] Generally, so long as the court has a reasonable belief that the attorney can still give the defendant reasonable aid, the district court's refusal to appoint new counsel is justified.[1008]

c. Right to Counsel in Probation Hearings

Defendants have a right to counsel when the court adjudicates guilt, establishes eligibility for imprisonment, and determines a prison sentence.[1009] In Kansas, a suspended sentence probation may constitute "a term of imprisonment," giving defendants the constitutional right to counsel.[1010] This right stems from the Due Process Clause of the Fourteenth Amendment, rather than the Sixth Amendment.[1011] Section 22-3716(b) codifies this right and gives defendants the right to be represented by counsel in probation revocation proceedings.[1012]

1003. State v. Wells, 305 P.3d 568, 577 (Kan. 2013).
1004. *Id.*
1005. *Id.* at 578.
1006. *Id.* at 577.
1007. *Id.*
1008. State v. Brewer, 305 P.3d 676, 684 (Kan. Ct. App. 2013) (citing State v. Bryant, 179 P.3d 1122, 1133 (Kan. 2008)).
1009. State v. Tims, 317 P.3d 115, 120 (Kan. Ct. App. 2014) (citing Alabama v. Shelton, 535 U.S. 654, 655 (2002)).
1010. *Id.* at 121.
1011. State v. Galaviz, 291 P.3d 62, 68 (Kan. 2012) (citing Gagnon v. Scarpelli, 411 U.S. 778, 789–90 (1973)).
1012. KAN. STAT. ANN. 22-3716(b).

d. Waiver of Right to Counsel

i. Right to Proceed Pro Se –Self-Representation

A defendant who knowingly and voluntarily chooses to self-represent is allowed to do so, even if it is a detrimental decision.[1013] The waiver of right to counsel requires that the defendant is informed about the disadvantages of self-representation and makes the choice with eyes open.[1014] If the defendant's right to represent himself is violated, he is entitled to a new trial because deprivation of the right cannot be harmless.[1015]

In *State v. Comstock*, the defendant had counsel until the sentencing hearing, where he filed a motion to dismiss counsel and represent himself.[1016] The district judge explained the defendant's rights and what decisions he was entitled to make, as opposed to what decisions counsel should make.[1017] The judge allowed the defendant to speak about his concerns with his counsel but did not ask thorough questioning to determine whether the defendant had intelligently waived his right to counsel.[1018] On appeal, the court found that the district court should have made this inquiry.[1019] The Kansas Court of Appeals vacated and remanded, instructing the district court to ask the defendant if he wished to proceed pro se.[1020]

e. Effective Assistance of Counsel

i. Generally

The right to assistance of counsel includes the right to *effective* assistance of counsel. Effective assistance includes more than the lawyer's mere presence; it requires that the lawyer is loyal to the client and free from conflicts of interest.[1021]

Kansas courts apply the *Strickland* standard to ineffective assistance

1013. United States v. Wallace, 527 F. App'x 784, 787 (10th Cir. 2013).
1014. State v. Comstock, No. 107,467, 2013 WL 1234224, at *2 (Kan. Ct. App. Mar. 22, 2013).
1015. *Id.* at *3.
1016. *Id.* at *1.
1017. *Id.*
1018. *Id.* at *4.
1019. *Id.*
1020. *Id.*
1021. State v. Cheatham, 292 P.3d 318, 327 (Kan. 2013).

of counsel claims.[1022] The *Strickland* test has two prongs.[1023] First, the defendant must establish counsel's performance was deficient and fell below an objective standard of reasonableness.[1024] Second, the defendant must establish counsel's performance prejudiced the defendant to the extent that there is a reasonable probability that the outcome would have been different but for counsel's performance.[1025] Courts strongly presume that counsel's conduct is reasonable, giving high deference to counsel's performance.[1026]

ii. Appellate Counsel

To bring a claim for ineffective assistance of appellate counsel, the defendant must meet a modified *Strickland* standard.[1027] The first prong is the same as the trial court standard: defendant must show the counsel's performance was deficient in that it fell below an objective standard of reasonableness.[1028] The second prong is slightly different; the defendant must show he was prejudiced to the extent there is a reasonable probability the appeal would have been successful but for counsel's deficient performance.[1029]

In the case of a habeas petitioner who alleges his appellate counsel was ineffective because counsel failed to raise an issue on appeal, the court first examines the merits of the omitted issue.[1030] If the omitted issue is meritless, counsel's failure to raise it was not ineffective assistance.[1031] If the issue has merit, the court then applies the *Strickland* test.[1032]

1022. *See id.* at 328 (citing Strickland v. Washington, 466 U.S. 668 (1984)).
1023. Brown v. Goddard, No. 10-3029-SAC, 2012 WL 6681869, at *3 (D. Kan. Dec. 21, 2012) (citing *Strickland*, 466 U.S. at 687.
1024. *Id.*
1025. *Id.*
1026. State v. Brooks, 305 P.3d 634, 638 (Kan. 2013).
1027. Holmes v. State, No. 107,919, 2013 WL 3791660, at *5 (Kan. Ct. App. July 19, 2013).
1028. *Id.*
1029. *Id.*
1030. Brown v. Goddard, No. 10-3029-SAC, 2012 WL 6681869, at *3 (D. Kan. Dec. 21, 2012).
1031. *Id.*
1032. *Id.*

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

Appellate courts review the factual findings to determine whether they are supported by substantial evidence and whether they sufficiently support the district court's legal conclusions.[1033] Appellate courts then review the legal conclusions without any required deference to the district court.[1034]

The appellate court will find the district court abused its discretion if its decision is unsupported by substantial competent evidence, guided by an erroneous legal conclusion, or is arbitrary, fanciful, or unreasonable.[1035]

C. Evidentiary Issues

1. Prior Actions by the Defendant

Section 60-455 of the Kansas Statutes governs the admissibility of evidence of prior acts by a criminal defendant.[1036] Subsection (a) establishes the general rule that evidence of prior crimes or civil wrongs is inadmissible to prove a person's disposition or propensity to commit a crime.[1037] Subsection (b), however, provides that such evidence is admissible if offered for another relevant purpose.[1038] If, for example, the purpose of the evidence is to establish "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" it is admissible.[1039] Moreover, subsection (c) allows the evidence to be admitted to prove the method used by the defendant when the method used in the prior act is "so similar" that one can reasonably conclude that the same person committed both acts.[1040] Finally when a criminal defendant is charged with a sexual offense, subsection (d) further modifies the general rule by allowing evidence of prior sexual misconduct to be admitted on any matter "to which it is relevant and

1033. Mannon v. State, No. 107,421, 2012 WL 6061624, at *5 (Kan. Ct. App. Nov. 30, 2012).
1034. *Id.*
1035. State v. Stovall, 312 P.3d 1271, 1277–78 (Kan. 2013).
1036. KAN. STAT. ANN. § 60-455 (West 2012).
1037. *Id.* § 60-455(a); State v. Prine, 303 P.3d 662, 672 (Kan. 2013).
1038. KAN. STAT. ANN. § 60-455(b).
1039. *Id.* § 60-455(b).
1040. *Id.* § 60-455(c).

probative."[1041]

The Kansas Supreme Court recently clarified the extent to which subsections (c) and (d) of section 60-455 modify the general rule that evidence of prior acts are inadmissible to prove propensity.[1042] In *State v. Prine*, the Kansas Supreme Court reaffirmed its previous holding that prior acts admitted under subsection (c) must be so "strikingly similar" as to constitute a "signature" when compared with the charged crime.[1043] Evidence of prior sexual misconduct is not likely to meet that standard and is especially "susceptible to characterization as propensity evidence."[1044] In an earlier case involving the same defendant, however, the court noted that propensity evidence of sexual misconduct with a child "may possess probative value for juries."[1045] The Legislature responded in a 2009 amendment and explicitly excluded sex offense prosecutions from subsection (c).[1046] Sex crime prosecutions are addressed in subsection (d).[1047]

When a criminal defendant is charged with a sexual offense, evidence of prior sexual misconduct is admissible under subsection (d) on any matter "to which it is relevant and probative."[1048] In *Prine* and again in *State v. Spear*, the Kansas Supreme Court concluded that the legislature intended "to relax the prohibition on evidence of other sexual misconduct to show propensity."[1049] Indeed, the jury may consider the evidence of prior sexual misconduct for propensity so long as it is relevant.[1050] Holding that subsection (d) allows such evidence to be admitted to show propensity calls into question the applicability of Kansas' traditional approach to section 60-455 evidence under *State v. Gunby*.[1051]

Under *Gunby*, evidence admitted under section 60-455 is proper if (1) the evidence is relevant to prove a material fact; (2) the material fact is in dispute; and (3) the probative value of the evidence is not

1041. *Id.* § 60-455(d).
1042. State v. Prine, 303 P.3d 662, 673 (Kan. 2013).
1043. *Id.* at 672.
1044. State v. Prine, 200 P.3d 1, 15 (Kan. 2009).
1045. *Id.*
1046. KAN. STAT. ANN. § 60-455; *Prine*, 303 P.3d at 672.
1047. KAN. STAT. ANN. § 60-455(d).
1048. *Id.*
1049. *Prine*, 303 P.3d at 672; State v. Spear, 304 P.3d 1246, 1253 (Kan. 2013); State v. Breeden 304 P.3d 660, 668 (Kan. 2013).
1050. *Prine*, 303 P.3d at 674.
1051. State v. Gunby, 144 P.3d 647, 655 (Kan. 2006).

substantially outweighed by the risk of undue prejudice.[1052] Moreover, evidence admitted under section 60-455 requires an instruction to the jury that they may only consider the evidence for its admitted purpose and not to show a propensity to commit the crime charged.[1053] Finally, an error improperly admitting evidence under section 60-455 is not reversible if the error is harmless.[1054]

The holding in *Prine* changes the calculus for subsection (d).[1055] The court concluded that evidence admitted under subsection (d) does not require a limiting instruction because the jury can consider the evidence for propensity so long as it is relevant.[1056] Moreover, if the trial court improperly admits the evidence under subsections (b) or (c), the error may be harmless and not reversible because the evidence could possibly have been admitted under subsection (d).[1057]

2. Defendant's Silence

Consistent with the United States Supreme Court's holding in *Doyle v. Ohio*, evidence of a defendant's silence after an arrest is inadmissible in Kansas.[1058] Pursuant to the *Miranda* requirement, a defendant must be warned that they have the right to remain silent and anything they say can and will be held against them in a court of law.[1059] As the Kansas Supreme Court explained, "[t]he corollary is that if a duly warned person *does* exercise the right to remain silent, then anything that person did *not* say, i.e., the person's silence, cannot and will not be used against them in a court of law.[1060]

3. Evidence Implicating Third Parties

Although Kansas historically followed different rules of admissibility for evidence that implicates a third party, the Kansas

1052. *Prine*, 303 P.3d at 673 (Kan. 2013) (citing State v. Prine, 200 P.3d 1, 8–10 (Kan. 2009)); *Gunby*, 144 P.3d at 655.

1053. State v. Reid, 186 P.3d 713, 721 (Kan. 2008) (citing *Gunby*, 144 P.3d at 655).

1054. *Gunby*, 144 P.3d at 660.

1055. *Prine*, 303 P.3d at 675.

1056. *Id.* at 674.

1057. *Id.* at 675.

1058. 426 U.S. 610, 611 (1976).

1059. State v. Kemble, 238 P.3d 251, 261 (Kan. 2010).

1060. *Id.*; *see also* State v. Tully, 262 P.3d 314, 324 (Kan. 2011) ("*Doyle* and its progeny. . . stand for the principle that a defendant's silence *induced by government action* cannot be used to impeach his credibility.") (quoting State v. Massey, 795 P.2d 344, 347 (Kan. 1990)).

Supreme Court rejected vague distinctions between direct and circumstantial evidence.[1061] Instead, evidence that implicates a third party is admissible if it "effectively connect[s] the third party to the crime charged" given the "totality of facts and circumstances in a given case . . . ."[1062] Otherwise, evidence implicating a third party is irrelevant and inadmissible.[1063]

4. Eyewitness Identification

a. Admissibility

Eyewitness identification is admissible if, first, the police procedure used to obtain the identification was not "unnecessarily suggestive."[1064] If the procedure was proper, the court must then consider whether there was a substantial likelihood of misidentification under the totality of the circumstances.[1065]

A police procedure is unnecessarily suggestive if it highlights information about a certain individual or otherwise leads a witness to identify that individual.[1066] Although Kansas courts have previously used the words "impermissibly" "unduly" and "unnecessarily" interchangeably to describe the suggestive behavior of police, the Kansas Supreme Court in *State v. Cruz* stressed the importance of the phrase "unnecessarily suggestive" in the first step of the analysis.[1067] The court noted that the circumstances may necessitate a more suggestive procedure by police.[1068]

To determine whether there was a substantial likelihood of misidentification under the totality of the circumstances the court must consider the eight factors discussed in *State v. Corbett*.[1069] Despite some earlier confusion as to the importance of one of the factors (level of

1061. State v. Inkelaar, 264 P.3d 81, 99 (Kan. 2011) (citing State v. Marsh, 102, P.3d 445, 468–69 (Kan. 2004)) (rejecting the distinction based on whether the State's case is based on direct or circumstantial evidence).

1062. State v. Cox, 304 P.3d 327, 336 (Kan. 2013).

1063. *Id.*

1064. State v. Cruz, 307 P.3d 199, 208 (Kan. 2013) (quoting State v. Mitchell, 275 P.3d 905, 910 (Kan. 2012)).

1065. *Id.*

1066. State v. Corbett, 130 P.3d 1179, 1190 (Kan. 2006).

1067. *Cruz*, 307 P.3d at 208.

1068. *Id.*

1069. *Corbett*, 130 P.3d at 1190.

certainty of the witness), all eight factors are valid in determining the likelihood of misidentification.[1070]

b. Jury Instructions

Although all of the *Corbett* factors are valid considerations for admissibility, not all should necessarily be included in jury instructions.[1071] When evaluating the reliability of the witnesses' identification, jurors should not be instructed to consider the witnesses' level of certainty when the identification was made.[1072] Such an instruction suggests that jurors should give more weight to a confident witness, despite no evidence that confidence and accuracy are correlated.[1073]

c. Witness Psychological Examination

In Kansas, a criminal defendant is entitled to a psychological examination of the complaining witness if there are compelling circumstances that justify the examination.[1074] To determine whether such compelling circumstances exist, Kansas courts consider the totality of the circumstances and the following non-exclusive list of factors: (1) whether the complaining witness' version of the facts can be corroborated; (2) whether the witness demonstrates mental instability; (3) whether the witness demonstrates a lack of veracity; (4) whether the witness has made similar charges against others that are proven to be false; (5) whether the defendant's motion for a psychological examination appears to be a fishing expedition; and (6) whether the witness has an unusual response when asked what it means to be truthful.[1075]

5. Cross-Examination

A criminal defendant, under the Sixth Amendment Confrontation

1070. State v. Mitchell, 275 P.3d 905, 911 (Kan. 2012).
1071. *Id.* at 912–13.
1072. *Id.*; State v. Cruz, 307 P.3d 199, 211–12 (Kan. 2013) (citing *Mitchell*, 275 P.3d at 911–13).
1073. *Mitchell*, 275 P.3d at 912–13.
1074. State v. Berriozabal, 243 P.3d 352, 362–63 (Kan. 2010) (citing State v. Gregg 602 P.2d 85 (Kan. 1979); State v. Price 61 P.3d 676 (Kan. 2003)).
1075. *Berriozabal*, 243 P.3d at 363; State v. Sprung 277 P.3d 1100, 1110 (Kan. 2012).

Clause, has a right to confront a witness who testifies against him.[1076] This right is satisfied by the opportunity to cross-examine the witness.[1077] However, the Confrontation Clause does not guarantee the defendant the right to cross-examine the witness to whatever extent he might wish.[1078] Indeed, the trial judge has discretion to impose reasonable limits upon cross-examination "based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."[1079]

In *Crawford v. Washington*[1080], the Supreme Court explained that certain out-of-court or hearsay statements, if admitted at trial, violate the defendant's Sixth Amendment right to confront the witness.[1081] However, such statements do not violate the Confrontation Clause if the State shows that the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness.[1082] Moreover, to implicate the defendant's Sixth Amendment rights, the statement must be testimonial.[1083]

The Kansas Supreme Court recently considered whether a certificate of calibration for an Intoxilyzer machine is testimonial hearsay and subject to *Crawford*.[1084] Relying on Supreme Court cases applying *Crawford*,[1085] the Kansas Supreme Court concluded that a certificate of calibration is not testimonial because it "is not created for the purpose of prosecuting any particular defendant, but rather it is designed for use in criminal prosecutions generally."[1086] Thus, in that case, the certificate did not violate the Confrontation Clause because it was not testimonial.[1087]

1076. U.S. CONST. amend. VI.

1077. State v. Laturner, 218 P.3d 23, 26 (Kan. 2009).

1078. Delaware v. Van Arsdall, 106 S.Ct. 1431, 1435 (1986).

1079. State v. Corbett, 130 P.3d 1179, 1192 (Kan. 2006); State v. Atkinson, 80 P.3d 1143, 1150 (Kan. 2003) (citing *Van Arsdall*, 475 U.S. 673 (1986)).

1080. 541 U.S. 36 (2003).

1081. *Crawford*, 541 U.S. at 68.

1082. *Id.*

1083. State v. Benson, 287 P.3d 927, 929 (Kan. 2012) (citing *Crawford*, 541 U.S. at 68).

1084. State v. Johnson, 301 P.3d 287, 298 (Kan. 2013); *Benson*, 287 P.3d at 932.

1085. *See Benson*, 287 P.3d at 930–932 (discussing Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009) and Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011)).

1086. *Benson*, 287 P.3d at 931 ("[the certificate was] not created for the purpose of prosecuting any specific defendant or for the purpose of establishing the elements of any specified criminal offense.").

1087. *Id.*

6. Proof Beyond a Reasonable Doubt

The State has the burden of proving the defendant's guilt beyond a reasonable doubt.[1088] To meet that burden, the State must prove each element of the crime charged beyond a reasonable doubt.[1089] The Kansas Supreme Court has consistently held that jury instructions defining the meaning of reasonable doubt are not necessary because the term is sufficiently clear.[1090] However, inclusion of such an instruction is not necessarily reversible error.[1091]

D. Actions by Different Players During a Trial

1. Prosecutors

a. Prosecutorial Discretion/Selective Prosecution

Generally, a prosecutor has discretion to charge any offense for which he has probable cause if he believes he can meet the burden of proof.[1092] The prosecutor's decision to charge, however, is subject to constitutional restrictions and cannot be based on impermissible factors such as race, sex, religion, or exercise of statutory or constitutional right.[1093] A defendant seeking to show that the prosecutor's decision to charge was based on an impermissible factor—or selective or discriminatory prosecution—must show that those that are similarly situated are not generally prosecuted for the conduct for which the defendant is being prosecuted.[1094] In addition, the defendant must show that he has been intentionally and purposefully singled out.[1095]

1088. Miller v. State, 318 P.3d 155, 163 (Kan. 2014).

1089. *Id.* (citing State v. Hall 14 P.3d 404 (Kan. 2000)).

1090. State v. Stevenson, 298 P.3d 303, 309 (Kan. 2013) (citing State v. Mack, 612 P.2d 158 (Kan. 1980), *disapproved on other grounds by* State v. Warren, 635 P.2d 1236 (Kan. 1981)).

1091. *See id.* (noting that it is strongly recommended that a trial judge use the PIK instructions as written; however, "modifications can be made '[i]f the particular facts in a given case require modification") (citation omitted).

1092. United States v. Bradshaw, 580 F.3d 1129, 1135 (10th Cir. 2009).

1093. United States v. Curtis, 344 F.3d 1057, 1064 (10th Cir. 2003) (quoting United States v. Andersen, 940 F.2d 593 (10th Cir. 1991)).

1094. State v. Gant, 201 P.3d 673, 679–90 (Kan. 2009) *abrogated on other grounds by* State v. Sampson, 301 P.3d 276 (Kan. 2013).

1095. *Id.* at 80 (citing State ex rel. Murray v. Palmgren, 646 P.2d 1091 (Kan. 1982)).

i. Prosecutorial Misconduct

If a defendant claims that a prosecutor has committed misconduct, the defendant must first show that the prosecutor's comments went beyond the wide latitude that prosecutors are afforded in discussing the evidence.[1096] If the comments were improper, the court must determine whether the comments prejudiced the jury and denied the defendant a fair trial.[1097] Kansas courts consider the following factors to determine if the improper comments denied the defendant a fair trial: (1) whether the comments were "gross and flagrant"; (2) whether they were motivated by "prosecutorial ill will"; and (3) whether the evidence in the case was so "direct and overwhelming" that the misconduct would have had little affect on the jurors.[1098] The Kansas Supreme Court has noted that no single factor controls the outcome.[1099]

When prosecutorial misconduct has occurred, Kansas courts will not uphold a conviction unless the prosecutor shows that the misconduct was harmless.[1100] To show that the misconduct was harmless the prosecutor must show beyond a reasonable doubt that the misconduct, in light of the entire record, did not affect the verdict.[1101] Moreover, the Kansas Supreme Court has noted that "[t]he State bears a higher burden to demonstrate harmlessness when the error is of constitutional magnitude."[1102]

ii. Undue Influence

A defendant has a right to a fair trial, and an "essential ingredient" of a fair trial is the right to present a defense.[1103] Within a defendant's right to present a defense is the right to present the testimony of witnesses.[1104] A prosecutor cannot substantially interfere with a defense witness's decision to testify without depriving the defendant of his right to a fair

1096. State v. Akins, 315 P.3d 868, 875 (Kan. 2014) (citing State v. Bridges, 306 P.3d 244 (Kan. 2013).

1097. *Id.*

1098. *Id.*

1099. *Id.*

1100. *Id.*

1101. *Id.* (citing Chapman v. California 386 U.S. 18 (1967); State v. Ward, 256 P.3d 801, 820 (Kan. 2011)).

1102. *Id.* (citing State v. Bridges, 306 P.3d 244 (Kan. 2013)).

1103. United States v. Pablo, 696 F.3d 1280, 1295 (10th Cir. 2012).

1104. *Id.* ("a witness may freely invoke his privilege against self incrimination even at the expense of the defendant's right to present a defense.")

trial.[1105] A prosecutor substantially interferes if he "actively discourages a witness from testifying through threats of prosecution, intimidation, or coercive badgering."[1106]

2. Trial Judges

Trial court judges are allowed broad discretion in trial proceeding and, generally, errors made by the trial court judge will not be grounds modifying a judgment unless it affects a substantial right of a party.[1107] As the Kansas Supreme Court has explained: "[the court] determine[s] if there is a reasonable probability that the error did or will affect the outcome of the trial in light of the entire record."[1108]

a. Admissibility of Evidence

If evidence is relevant, rules governing the admission or exclusion of evidence are often subject to the trial court's discretion, although some may be applied as a matter of law.[1109] A trial court abuses its discretion if: (1) "no reasonable person would have taken the view adopted by the trial court"; (2) the discretion is guided by an error of law; or (3) there is not competent evidence to support the factual finding on which the discretion is based.[1110] In addition, the party seeking to admit the evidence must provide the trial judge with a specific basis for the admission so the judge can consider the argument and avoid reversible error.[1111]

b. Jury Instructions

A trial judge must instruct the jury on the law including every essential element of the charge.[1112] Parties may suggest instructions they wish to go to the jury although the trial judge is not bound by their

1105. *Id.*
1106. U.S. v. Serrano, 406 F.3d 1208, 1216 (10th Cir. 2005).
1107. KAN. STAT. ANN. § 60-261.
1108. State v. Akins, 315 P.3d 868, 875 (quoting State v. Friday, 306 P.3d 265, 273 (Kan. 2013)).
1109. State v. Cline, 283 P.3d 194, 199 (Kan. 2012) (quoting State v. Oliver, 124 P.3d 493, 497 (Kan. 2005 *overruled on other grounds by* State v. Anderson, 197 P.3d 409 (Kan. 2008)).
1110. State v. Nelson, 294 P.3d 323, 325–26 (Kan. 2013) (quoting State v. Ward, 256 P.3d 801 (Kan. 2011)).
1111. State v. Tague, 298 P.3d 273, 278 (Kan. 2013).
1112. State v. Richardson, 224 P.3d 553, 558 (Kan. 2010).

proposals.[1113] However, "if an instruction is legally appropriate and factually supported, a [trial judge] errs in refusing to grant a party's request to give the instruction."[1114] Still, a trial judge's failure to give an appropriate instruction is not always reversible error.[1115] In other words, the failure to give an appropriate instruction may be a harmless error if it does not affect a substantial right of the defendant.[1116]

c. Allen Instructions

Trial judges may give additional jury instruction to avoid a mistrial and encourage the jury to agree on a verdict.[1117] These instructions are known as *Allen* instructions—named after the Supreme Court case that first addressed their validity.[1118] The Kansas Supreme Court has generally shown disapproval for *Allen*-type instructions that come after the jury deliberations are in progress[1119] because they cannot encourage the jury to compromise the integrity of the verdict.[1120] Accordingly, to determine whether an *Allen*-type instruction is improper, appellate courts consider the timing of the instruction, length of jury deliberations, language of the instructions, and whether they were presented with other jury instructions.[1121]

E. Potential Trial Actions

1. Motion for Acquittal

Under section 22-3419(1), if the evidence is insufficient to sustain the crime charged, the court must enter a judgment of acquittal.[1122] The court may do so on motion by the defendant or on its own motion,[1123]

1113. *See* State v. Plummer, 283 P.3d 202, 207 (Kan. 2012) (explaining that a trial judge does not err in refusing to include a lesser offense requested by the defendant, but that the evidence should be viewed in the light most favorable to the defendant).

1114. *Id.*

1115. *Id.*

1116. *Id.*

1117. State v. Makthepharak, 78 P.3d 412, 417 (Kan. 2003).

1118. *See* Allen v. United States, 164 U.S. 492 (1896).

1119. State v. Boyd, 481 P.2d 1015, 1019 (Kan. 1971); *see also Makthepharak*, 78 P.3d at 417 (collecting cases).

1120. United States v. Cornelius, 696 F.3d 1307, 1321 (10th Cir. 2012).

1121. *Id.*

1122. KAN. STAT. ANN. § 22-3419(1); State v. Dinh Loc Ta, 290 P.3d 652, 657 (Kan. 2012).

1123. KAN. STAT. ANN. § 22-3419(1).

however, the "decision to grant a motion for judgment of acquittal is not discretionary."[1124] The trial judge, however, cannot substitute his judgment for the jurors.[1125] Instead, the judge should review all the evidence in the light most favorable to the prosecution.[1126] When viewed in that light, if no rational fact finder could find the defendant guilty beyond a reasonable doubt, judgment of acquittal is warranted.[1127]

2. Questions from the Jury

After the case is submitted to the jury, the jurors must be kept together under charge of a duly sworn officer until they agree on the verdict.[1128] The court, however, may allow them to separate at its discretion.[1129] If allowed to separate, the jurors must be warned that it is their duty not to communicate with anyone about the subject of the trial.[1130] While in deliberations, the officer shall not allow any communications to made to them unless ordered by the court and only the jury may be present in the room during deliberations.[1131] If the jury wishes to be informed on the law or evidence from the case, they may request it from the court.[1132] The information must then be read or exhibited in the presence of the defendant "unless he voluntarily absents himself, and his counsel and after notice to the prosecuting attorney."[1133]

In *State v. Burns*[1134] the Kansas Supreme Court suggested that even if the defendant has not waived the right to be present, it is not necessary to answer the question in open court.[1135] However, the court corrected this statement in *State v. King.*[1136] The court concluded that section 22-3420(3) of the Kansas statutes "plainly mandates" that the question shall be answered in the presence of the defendant.[1137] Moreover, the court rejected the contention that questions of law or evidence are treated

1124. *Din Loc Ta*, 290 P.3d at 657.
1125. *Id.*
1126. *Id.*
1127. State v. Finch, 244 P.3d 673, 678 (Kan. 2011).
1128. KAN. STAT. ANN. § 22-3420(1).
1129. *Id.*
1130. *Id.* § 22-3420(2).
1131. *Id.* § 22-3420(1).
1132. *Id.* § 22-3420(3).
1133. *Id.*
1134. 287 P.3d 261(Kan. 2012).
1135. *Id.* at 268.
1136. 305 P.3d 641, 652 (Kan. 2013).
1137. *Id.*

differently under the statute.[1138] The court concluded, "any question from the jury concerning the law or evidence pertaining to the case must be answered in open court in the defendant's presence unless the defendant is voluntarily absent."[1139]

When there is a violation of section 22-3420(3) the harmless error analysis should be applied.[1140] Moreover, the more rigorous standard—the federal constitutional harmless error standard—may apply if the acts or omissions violating section 22-3420(3) also violate the defendant's Sixth Amendment right to be present at every critical stage of his or her trial.[1141]

3. Mistrial

Section 22-3423 of the Kansas statutes allows a district court to order a mistrial for a number of reasons.[1142] Appropriate reasons for a mistrial include: inevitable reversal because of a legal defect, prejudicial conduct that will result in injustice, a hung jury, false statements of jurors during *voir dire*, and pending determination of the defendant's competency.[1143] A district court's ruling on a mistrial is reviewed by appellate courts for abuse of discretion.[1144]

In *State v. Harris*[1145] the Kansas Supreme Court considered whether a mistrial was appropriate due to prejudicial conduct.[1146] The court noted that section 22-3423 creates a two-step process: first, the court must determine whether the proceeding suffered a "fundamental failure."[1147] The court then must consider whether it is possible to continue without an injustice.[1148] Consistent with the abuse of discretion standard, an appellate court reviewing a mistrial ruling must divide the inquiry into two parts: "(1) Did the district court abuse its discretion when deciding if there was a fundamental failure in the proceeding? and (2) Did the district court abuse its discretion when deciding whether the conduct

1138. *Id.*
1139. *Id.*
1140. *Id.*
1141. State v. Herbel, 299 P.3d 292, 300 (Kan. 2013).
1142. KAN. STAT. ANN. § 22-3423.
1143. *Id.* § 22-3423(1).
1144. State v. Harris, 306 P.3d 282, 290 (Kan. 2013).
1145. 306 P.3d 282 (Kan. 2013).
1146. *Id.*
1147. *Id.*
1148. *Id.*

caused prejudice that could not be cured or mitigated through jury admonition or instruction, resulting in injustice?"[1149]

V. SENTENCING

A. Federal Sentencing

The Federal Sentencing Guidelines, originally made effective in 1987, sought to inject honesty, uniformity, and proportionality into the federal sentencing system,[1150] in light of the four major goals of criminal punishment: "deterrence, incapacitation, just punishment, and rehabilitation."[1151] The guidelines apply to more than ninety percent of felon and Class A misdemeanor cases tried in federal courts.[1152] The drafters of the guidelines used extensive empirical data to prescribe narrow guidelines for sentencing, while also aiming to avoid undue complexity.[1153] The guidelines' most important function is to prescribe categories based on the nature of the offense and the nature of the offender, the intersection of which results in a sentencing range.[1154] A sentencing court may depart from the guidelines only where it finds "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described."[1155] Although the Sentencing Commission expects departures to occur infrequently, it notes that when courts do so a number of times, this may signal to the Commission that it needs to revise the ever-evolving guidelines.[1156] The list of grounds for departure laid out in the guidelines is non-exclusive.[1157] An *ex post facto* violation occurs where a defendant is sentenced under guidelines made effective the events constituting the basis for the crime, even where the guidelines become effective before sentencing.[1158]

1149. *Id.*
1150. U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 (2013).
1151. *Id.* § 1A1.1.
1152. *Id.* § 1A1.5.
1153. *Id.* § 1A1.3.
1154. *Id.*
1155. *Id.* § 1A1.4(b) (quoting 18 U.S.C. § 3553(b) (2010)).
1156. *Id.*
1157. *Id.*
1158. Peugh v. United States, 133 S. Ct. 2072, 2084 (2013).

B. Kansas Sentencing

1. Sentencing Determination

Kansas felonies are bifurcated into those covered by the sentencing grids and those that are not covered by the grids—the latter are colloquially known as "off-grid" felonies.[1159] There are no presumptive sentences for off-grid felonies, and subject to certain exceptions, such as the potential for the death penalty in the case of capital murder,[1160] they result in life imprisonment.[1161] Off-grid felonies include first degree murder,[1162] terrorism,[1163] illegal use of weapons of mass destruction,[1164] treason,[1165] and a host of crimes where the offender is at least eighteen years old and the victim is younger than fourteen,[1166] including human trafficking,[1167] rape,[1168] and indecent liberties with a child.[1169]

For those crimes that are not off-grid felonies, Kansas utilizes sentencing guidelines similar to those used by federal courts, such that sentences are based on two factors: the criminal history of the defendant and the severity of the crime.[1170] The sentencing ranges are different for drug crimes versus nondrug crimes, and each category has its own sentencing grid.[1171] Based on the nature of the crime committed, the sentencing judge determines the applicable criminal history score, determines the applicable crime severity, and then finds the box at the intersection of those two factors, which gives the presumptive sentence. Although the sentencing judge has discretion to prescribe a sentence anywhere within the presumptive range, it is recommended that the sentencing judge start in the middle of the range, and then make upward or downward adjustments based on aggravating and mitigating factors sufficient to warrant a departure from the presumptive range.[1172]

1159. *See* KAN. STAT. ANN. § 21-6806(c), (d).
1160. *See id.* § 21-6617.
1161. *Id.* § 21-6806(c), (d).
1162. *See id.* § 21-5402.
1163. *See id.* § 21-5421.
1164. *See id.* § 21-5422.
1165. *See id.* § 21-5901.
1166. *See id.* § 21-6806(d).
1167. *See id.* § 21-5426.
1168. *See id.* § 21-5503.
1169. *See id.* § 21-5506.
1170. *See id.* §§ 21-6804(c) (nondrug crimes) -6805(d) (drug crimes).
1171. *Id.* § 21-6804(a), -6805(a).
1172. *Id.* §§ 21-6804(e)(1), -6805(c)(1).

A sentencing judge may only depart from the presumptive range if he finds "substantial and compelling reasons" for a departure, and he must state such reasons on the record.[1173] Additionally, any fact that leads to an upward departure, other than a prior conviction, must be proven beyond a reasonable doubt by a jury.[1174] The list of aggravating and mitigating circumstances potentially warranting an upward or downward departure are nonexclusive.[1175] A victim's request before the court for leniency can in itself be sufficient for a downward departure—even though it is not listed as a mitigating factor under section 21-6815(c)(1)—provided that the request is substantial.[1176] A departure is appealable.[1177]

a. Criminal History

A defendant's criminal history classification is located on the horizontal axis of the sentencing grid.[1178] For both nondrug and drug crimes, the criminal history categories range from "A" (most extensive history—3+ Person Felonies) to "I" (least extensive history—1 Misdemeanor or No Record). The criminal history is based on prior convictions, which include, amongst other types of convictions, person and nonperson felony adult and juvenile convictions and adjudications, person misdemeanor adult convictions, and nonperson Class A misdemeanor adult convictions.[1179] For purposes of determining criminal history, "three prior adult convictions or juvenile adjudications" for certain person misdemeanors are equal to one "adult conviction or one juvenile adjudication of a person felony."[1180] If the offender does not admit his criminal history in open court, then it must be proven by a preponderance of the evidence at the sentencing hearing.[1181] Although lack of criminal history is not an enumerated mitigating factor under the

1173. *Id.* § 21-6815(a).
1174. *Id.* § 21-6815(b).
1175. *See id.* § 21-6815(c)(1), (2).
1176. State v. Hines, 294 P.3d 270, 278 (Kan. 2013).
1177. *See infra* notes 74–80 and accompanying discussion.
1178. *See* §§ 21-6804(a), -6805(a).
1179. *Id.* § 21-6810(a). *See also id.* § 21-6803(c) (defining "criminal history" as "an offender's criminal record of adult felony, class A misdemeanor, class B person misdemeanor or select misdemeanor convictions and comparable juvenile adjudications at the time such offender is sentenced").
1180. *Id.* § 21-6810(a).
1181. *Id.* § 21-6814(a).

general list of mitigating circumstances,[1182] lack of criminal history itself can serve as a mitigating factor justifying a downward departure from a mandatory 25- or 40-year sentence under Jessica's Law—[1183]however, a court denying a departure regarding Jessica's Law despite clear lack of criminal history does *not* abuse its discretion.[1184]

Following conviction, the sentencing court orders the court services officer to prepare the presentence investigation report."[1185] The report's contents are limited to certain enumerated contents,[1186] and it contains all prior adult convictions and juvenile adjudications that bear on the defendant's criminal history.[1187] If the report calls for presumptive imprisonment, then it also contains this presumptive range of imprisonment.[1188] If the defendant challenges any aspect of the report before the court has established the defendant's criminal history, then the State bears the burden of proving its criminal history worksheet; if the defendant challenges the criminal history worksheet *after* it is established by the court, he bears the burden of showing the disputed portion by a preponderance of the evidence.[1189] The presentence report can also be used when the sentencing court is considering aggravating or mitigating circumstances.[1190] Mere notation of criminal charges in the presentence report is insufficient in itself to find that a crime was sexually motivated.[1191] An unexpected criminal history score in the presentence report, after reliance on a much lower presumptive range, may constitute grounds for remand for determination for withdrawal where the defendant is able to show, in good faith, that he relied on exclusion of a prior crime when he entered into a plea agreement.[1192]

1182. *See id.* § 21-6815(c)(1).

1183. *See id.* § 21-6627(d)(2)(A).

1184. State v. Remmert, 316 P.3d 154, 161 (Kan. 2014).

1185. § 21-6813(a).

1186. *Id.* § 21-6813(b) ("Each presentence report . . . shall be *limited* to the following information . . . .") (emphasis added).

1187. *Id.* § 21-6813(b)(5).

1188. *Id.* § 21-6813(b)(7).

1189. *Id.* § 21-6814(c).

1190. *Id.* § 21-6815(d)(2).

1191. *In re* K.B., 48 P.3d 389, 393 (Kan. Ct. App. 2012).

1192. State v. Garcia, 283 P.3d 165, 167, 172 (Kan. 2012). The *Garcia* court remanded for determination of whether defendant could withdraw his plea because it was unsure whether the trial court applied the correct standard, which requires analysis under section 22-3210(b) and the 3 *Edgar* factors. *Id.* at 172.

b. Hard 40/50 Sentences

Kansas law also provides for sentences of minimum lengths for certain off-grid felonies, colloquially known as "hard 50" (or hard 25 or hard 40) sentences. The sentences are known as such because a defendant is not eligible for parole until after the mandatory minimum term.[1193] For instance, a defendant convicted of rape or another sex crime involving a victim younger than fourteen, receives a mandatory minimum sentence of twenty-five years;[1194] a defendant receives a mandatory minimum term of forty years for his second offense.[1195] A defendant convicted of first degree, premeditated murder for acts committed before July 1, 1999 receives a "hard 40"; a defendant convicted of the same crime after that date receives a "hard 50."[1196] To receive a mandatory minimum term, all aggravating factors—which must be listed on the record—must not be outweighed by any existing mitigating circumstances.[1197] Previously, the sentencing judge could perform this analysis.[1198] The judge may only issue a downward departure from the prescribed "hard" sentence if he finds "substantial and compelling reasons" after reviewing mitigating circumstances, and he must record such reasons on the record.[1199]

In *Alleyne v. United States*, the Supreme Court sent waves across the criminal justice system when it ruled that "[b]ecause mandatory minimum sentences increase the penalty for a crime, any fact that increases the mandatory minimum is an 'element' that must be submitted to the jury."[1200] This finding flowed from an underlying belief that an aggravating factor "constitutes an element of a separate . . . offense" that, under the Sixth Amendment, must be submitted to a jury.[1201] Thus, as a practical result, sentencing judges are no longer allowed to weigh aggravating factors that play into the decision to impose a sentence with a mandatory minimum term. This decision sent the Kansas legislature scrambling to draft new legislation that would pass constitutional muster

1193. *See, e.g.*, § 21-6623(c).
1194. *Id.* § 21-6627(a)(1).
1195. *Id.* § 21-6627(b)(1).
1196. *Id.* § 21-6623.
1197. *Id.* § 21-6620(c)(5).
1198. *See* KAN. STAT. ANN. § Supp. 21-6620.
1199. KAN. STAT. ANN. § 21-6627(d)(1).
1200. 133 S. Ct. 2151, syl. ¶ 1 (2013) (overruling Harris v. United States, 536 U.S. 545 (2002)).
1201. *See id.* at 2162.

under the new *Alleyne* standard.[1202] Less than three months after the *Alleyne* decision, in a special session, the Kansas Legislature cured the then-defective hard 50 sentence.[1203] The bill amended, amongst other provisions, the right of a judge to find that aggravating circumstances are not outweighed by mitigating circumstances—the jury must now make this determination.[1204] To impose a hard sentence, the jury must reach a unanimous decision, and must state the aggravating circumstances, which are statutorily-limited,[1205] on the record.[1206] In order to assuage fears that certain offenders sentenced under the old hard 50 statute would escape a hard 50 sentence,[1207] the Kansas legislature made the amendments retroactive.[1208]

c. Aggravating and Mitigating Circumstances

Aggravating and mitigating circumstances present strong grounds for a sentencing judge to impose a sentence anywhere within the presumptive range, although, as noted above, a judge has discretion to sentence anywhere within the presumptive range without such factors.[1209] Aggravating and mitigating circumstances are necessary to justify either an upward or downward departure, and such circumstances leading to a departure must be specifically stated on the record.[1210] The sentencing judge may take into consideration aggravating and mitigating

1202. For typical article conveying the sense of unease that *Alleyne* could invalidate the Kansas Hard 50 law, see Hurst Liviana, *Supreme Court ruling threatens to invalidate Kansas hard 50 sentences*, KAN. CITY STAR (July 13, 2013), http://www.kansascity.com/2013/07/13/4343090/supreme-court-ruling-threatens.html (expressing concern that the *Alleyne* decision could invalidate the sentence given to Scott Roeder, who was convicted of killing notorious abortion doctor George Tiller, because Roeder's hard 50 sentence is currently on appeal).

1203. *See* 2013 Kan. Sess. Laws 1st Spec. Sess., ch. 1 (2002).

1204. *See* KAN. STAT. ANN. § 21-6620(c)(5) (2013).

1205. *See id.* § 21-6624.

1206. *Id.* § 21-6620(c)(5).

1207. *See, e.g.*, Laviana, *supra* note 1203.

1208. § 21-6620(d), (e) (providing that the amendment is generally retroactive, that defendants whose convictions and sentences were final before the *Alleyne* decision have no recourse under the amended version of the law, and that defendants convicted before the amendment but whose sentence was later vacated will be resentenced under the amended version). *See also* Engelhardt v. Heimgartner, No. 11-3179-SAC, 2014 WL 352789, at *7–8 (D. Kan. Jan. 31, 2014) (habeas corpus action recognizing that because defendant was sentenced under the old version of the hard 50 scheme whereby the judge could find for aggravating factors, there was no constitutional infraction where the sentencing judge did so).

1209. *See supra* note 23 and accompanying text.

1210. KAN. STAT. ANN. § 21-6815(a).

circumstances obtained from a wide variety of sources: (1) evidence from the sentencing proceeding; (2) the presentence investigation report; (3) "written briefs and oral arguments" from either party; and (4) any other evidence that is "relevant[,] . . . trustworthy[,] and reliable."[1211] When determining whether one or more aggravating circumstances justify an upward departure, sentencing judges must consider the victim impact statement.[1212]

d. Consecutive & Concurrent Sentences

When imposing sentences for different crimes on a defendant at the same time, a sentencing court generally has discretion to decide whether to order them to run concurrently or consecutively—the court's silence generally results in concurrent sentences.[1213] However, certain exceptions impose mandatory consecutive terms, such as mandatory consecutive sentences where a defendant commits a crime while on probation for a felony.[1214] Although the sentencing judge has discretion in certain cases to impose consecutive sentences, his choice is limited by certain factors,[1215] and he should seek proportionality between the sentence on one hand, and harm caused by and culpability recognized by the defendant on the other.[1216]

e. Jail Time Credit

The secretary of corrections has specific authority to draft regulations governing good time calculations and a "good time credit" system.[1217] Inmates may earn "good time credits" through, for instance, acceptance of past culpability, positive work participation, and receipt of a general education diploma.[1218] Good time reduction is, however, limited to either fifteen or twenty percent of the sentence.[1219] Two cases

1211. *Id.* § 21-6815(d).
1212. *Id.* §§ 21-6815(c)(2) (nondrug crimes), -6816(b) (drug crimes).
1213. *Id.* § 21-6606(a).
1214. State v. Canier, No. 107,121, 2012 WL 5305685, at *1 (Kan. Oct. 19, 2012).
1215. *See* KAN. STAT. ANN. § 21-6819(b).
1216. *Id.* § 21-6819(b).
1217. *Id.* § 21-6821(a).
1218. *Id.* § 21-6821(a), (e)(1)(A).
1219. *Id.* § 21-6820(b)(2)(A) (fifteen percent limit "for a crime committed on or after July 1 1993" and a twenty percent limit "for a nondrug severity level seven through ten crime" and certain drug crimes committed "on or after Jan. 1, 2008.").

recently expanded an inmate's right to receive a good time credit reduction. In *State v. Sult*, in a case of first impression, the Kansas Court of Appeals held that an inmate's court-ordered time spent in a state hospital counted towards the jail time credit because the defendant was "not free to leave."[1220] In *State v. Hopkins*, the Kansas Supreme Court again interpreted the good time credit broadly, ruling that the defendant, who had spent time in a residential drug abuse treatment program for one crime, was entitled to good time credit for a *separate crime*.[1221]

2. Sentence Modification

Both the defendant and the state may appeal the trial court's decision to depart from the presumptive sentencing range.[1222] An appellate court may correct an illegal sentence at any time.[1223] Review of a sentence *within* the presumptive range is not possible, however, nor is review of a sentence pursuant to a plea agreement.[1224] However, an appellate court may have jurisdiction to consider a presumptive sentence when it appears that the sentencing judge misunderstood his statutory authority to issue a downward departure.[1225] When considering the propriety of the departure, the standard of review on appeal is limited to whether the departure was supported by evidence on the record constituting "substantial and compelling reasons for departure."[1226] An appeals court may review a claim alleging that the departure was tainted by partiality, that the court improperly included or excluded a prior conviction or prior juvenile adjudication, or that the court erred in classifying the severity of the current or any past crime.[1227] Recently, the Kansas Supreme Court backtracked on past precedent when it ruled that appellate courts *do* have jurisdiction to consider sentencing appeals for off-grid crimes (such as murder) because these off-grid sentences are not really "presumptive sentences" within the meaning of section 21-6820(c) (formerly section

1220. No. 108,532, 2013 WL 3455806, at *8–9 (Kan. Ct. App. July 5, 2013).

1221. 285 P.3d 1021, 1025–26 (Kan. 2012) (finding that former section 21-4614a(a), which provided good time credit for time spent in "residential facility" and "residential services" programs, included the time spent by the defendant in a residential drug abuse treatment program unrelated to the crime being charged). Section 21-4614a(a) has since been repealed.

1222. KAN. STAT. ANN. § 21-6820(a).

1223. *Id.* § 22-3504(1).

1224. *Id.* § 21-6820(c).

1225. State v. Warren, 304 P.3d 1288, 1292 (Kan. 2013) (remanding the case for resentencing).

1226. KAN. STAT. ANN. § 21-6820(d).

1227. *Id.* § 21-6820(e).

21-4721(c)).[1228] As such, the defendant in *State v. Ross* received the benefit of review where his sentences for felony murder—an off-grid crime—and kidnapping were imposed consecutively.

3. Constitutional Challenges

The Kansas Constitution, like the United States Constitution, bans cruel or unusual punishment.[1229] Even if not cruel and unusual, Kansas courts have determined that a punishment is unconstitutional "if it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity."[1230] Whether a sentence is unconstitutional in its length is controlled by a three-part test first set forth in *State v. Freeman*: "(1) [t]he nature of the offense and the character of the offender," (2) "punishments imposed in [the same] jurisdiction for more serious offenses," and (3) "punishments [imposed] in other jurisdictions for the same offense."[1231] In the past year, many defendants have challenged lifetime postrelease supervision as violating the Kansas Constitution, but each appeal is decided on its own merits.[1232] Many defendants sentenced to a hard 25 sentence under Jessica's Law for rape, aggravated sodomy, indecent liberties with a child, and other sexually-motivated crimes with a minor victim likewise challenged Jessica's Law as unconstitutional.[1233] Interestingly, in the most recent constitutional challenge to Jessica's Law, the Kansas Court of Appeals categorically rejected the argument that *Freeman* factors two and three weighed against the constitutionality of Jessica's Law, instead refusing to consider these factors' application to the facts of the case at hand based on Jessica's Law compliance with these factors *in another*

1228. State v. Ross, 289 P.3d 76, 84–85 (Kan. 2012) (explicitly rejecting the contrary holdings in *State v. Ware*, 938 P.2d 197 (Kan. 1997)), and *State v. Flores*, 999 P.2d 919 (Kan. 2000) (which labeled off-grid crimes as "presumptive sentences" under former section 21-4721).

1229. U.S. CONST. amend. 8; KAN. CONST. § 9.

1230. State v. Seward, 297 P.3d 272, 275 (Kan. 2013) (citing State v. Gomez, 235 P.3d 1203, syl. ¶ 9 (Kan. 2010)).

1231. *Id.* at 275 (citing State v. Freeman, 574 P.2d 950, 956 (Kan. 1978)).

1232. *See, e.g.*, State v. Johnson, No. 109,042, 2013 WL 6164594, *2–*4 (Kan. Ct. App. Nov. 22, 2013) (affirming constitutionality of sentence); State v. Himmelwright, No. 105,561, 2013 WL 5870032, *1–*6 (Kan. Ct. App. Oct. 25, 2013) (affirming constitutionality of sentence). *Cf.* State v. Proctor, No. 104,697, 2013 WL 6726286, at *1 (Kan. Ct. App. Dec. 13, 2013) (finding lifetime postrelease supervision unconstitutional *as applied* in the case at hand, and distinguishing recent Kansas Supreme Court cases that had held to the contrary).

1233. *See, e.g.*, State v. Britt, 287 P.3d 905, 916–18 (Kan. 2012); State v. Swint, No. 107,516, 2013 WL 6839354, at *16–*18 (Kan. Ct. App. Dec. 27, 2013); Marler v. State, No. 108,797, 2013 WL 5870049, at *9–*13 (Kan. Ct. App. Oct. 25, 2013).

case.[1234] Going forward, this type of analysis, while probably done in the interest of efficiency, may make it less likely that a defendant can challenge the constitutionality of his own sentence; instead, Kansas courts may be content to find that a certain sentencing scheme's constitutionality one decision categorically precludes others from bringing the same argument on the facts of their own cases.

VII. POST-TRIAL ISSUES

A. Appeals

Generally, an appellate court only has jurisdiction to consider evidentiary errors where there was a specific objection to the alleged error(s) during the trial.[1235] However, in certain scenarios, objection is not necessary for issue preservation, such as in death penalty cases.[1236] Although the statute does not expressly require that the objection be made *during* the trial, the court in *Adamson v. Bicknell* construed the statute in such a way, ruling that challenging an evidentiary decision in a motion in limine was insufficient for preservation.[1237]

1. New Trial

The court may grant a defendant's motion for a new trial only "if required in the interest of justice."[1238] However, strict time limitations apply: a defendant must file the motion within two years after final judgment based on newly-discovered evidence, but in all other cases, he must file the motion within fourteen days after the court issues its final judgment.[1239] A trial court's decision on a defendant's motion for a new trial is reviewed for an abuse of discretion.[1240] Two common grounds for a new trial are often asserted: ineffective assistance of counsel and newly discovered evidence. The latter requires the defendant to establish that

1234. *See Swint*, 2013 WL 6839354, at *18 (citing State v. Britt, 287 P.3d 905 (Kan. 2012); State v. Woodard, 280 P.3d 203 (Kan. 2012)).

1235. KAN. STAT. ANN. § 60-404; State v. Huffmier, 301 P.3d 669, syl. ¶ 1 (Kan. 2013).

1236. *See* State v. Cheever, 284 P.3d 1007, 1019 (Kan. 2012) (rev'd on other grounds) (citing former section § 21-4227(b)).

1237. 287 P.3d 274, 283–84 (Kan. 2012). Although this is a civil case, the court's analysis on this issue turned on the same statute that imposes the preservation requirement for criminal appeals.

1238. KAN. STAT. ANN. § 22-3501(1).

1239. *Id.* Once submitted, the court must issue a decision on the motion for a new trial within 45 days. *Id.* § 22-3501(2).

1240. State v. Holt, 313 P.3d 826, syl. ¶ 1 (Kan. 2013).

(1) the evidence could not have been produced at trial with reasonable diligence and (2) presence of the evidence is material and "would be likely to produce a different result upon retrial."[1241] The former requires the defendant to show that (1) counsel was "constitutionally deficient" and (2) this deficiently prejudiced his defense to the point of denying him a fair trial.[1242]

2. Sufficiency of Evidence

In analyzing sufficiency of evidence, an appellate court determines whether, "viewed in the light most favorable to the prosecution," a rational fact finder could have found guilt beyond a reasonable doubt;[1243] if an alternative means crime is involved, then this standard applies to each of the alternative means presented.[1244] Generally, in performing a sufficiency analysis, an appellate court will refuse to reweigh the evidence and credibility of witnesses.[1245] In *State v. Hargrove*, the court ruled that in performing its sufficiency analysis, it may even consider evidence introduced to support a crime for which the defendant was not ultimately convicted.[1246]

3. Judgment of Acquittal

Acquittal is proper where the evidence is insufficient to obtain a conviction for one or more charged crimes.[1247] A court may order a judgment of acquittal upon its own motion or that of the defendant, and the court may order acquittal after either side rests its case, before the

1241. State v. Rojas-Marceleno, 285 P.3d 361, 373 (Kan. 2012) (citing State. v. Fulton, 256 P.3d 838, 843 (Kan. 2011); State v. Cook, 135 P.3d 1147, 1166 (Kan. 2006)).

1242. State v. Wilson, No. 108,274, 2013 WL 6726263, at *8 (Kan. Ct. App. Dec. 13, 2013) (citing State v. Cheatham, 292 P.3d 318, syl**.** ¶ 3 (Kan. 2013)).

1243. State v. McWilliams, 283 P.3d 187, 190 (Kan. 2012) (quoting State v. Hall, 257 P.3d 18, 22 (Kan. 2007)).

1244. State v. Jackson, 305 P.3d 685, 694–95 (Kan. Ct. App. 2013) (citations omitted). This idea has come to be known as the "super-sufficiency" standard. *See* Carol A. Beier, *Lurching Toward the Light: Alternative Means and Multiple Acts Law in Kansas*, 44 WASHBURN L.J. 275, 283, 294, 296–99 (2005).

1245. State v. Srack, 314 P.3d 890, 897 (Kan. 2013) (citing State v. Hall, 257 P.3d 272, 285 (Kan. 2012)).

1246. 293 P.3d 787, 810–12 (Kan. Ct. App. 2013) (affirming conviction for attempted aggravated burglary based partly on evidence that defendant damaged property while attempting the crime; although defendant was found not guilty of criminal damage to property, this evidence was still relevant to his intent to commit a felony under the burglary charge).

1247. KAN. STAT. ANN. § 22-3419(1) (2013).

verdict, or after the verdict.[1248] If a guilty verdict is reached, the defendant must file the motion for acquittal within seven days.[1249] An appellate court lacks jurisdiction to consider a motion for reconsideration of denial of the original motion filed more than seven days after the jury reaches a verdict.[1250]

B. Post-Conviction Remedies

1. Habeas Corpus

A prisoner may file a writ of habeas corpus only to allege that: (1) his sentence was contrary to the laws of Kansas or the United States, (2) "the court [lacked] jurisdiction to impose [the] sentence," or (3) "the sentence was in excess of the [legal] maximum."[1251] If the court grants habeas relief, it may vacate the judgment and discharge or resentence the prisoner, grant a new trial, or order another type of correction.[1252] Relief is generally only available within one year of (1) a final order on appeal or termination of appellate jurisdiction or (2) "denial of a petition for writ of certiorari to the United States [S]upreme [C]ourt or issuance of [the Supreme Court's] final order."[1253] The court may extend the time period "only to prevent a manifest injustice."[1254] Proposed legislation would limit the court's discretion in finding "manifest injustice" to an analysis of "why the prisoner failed to file the motion within the one-year time limitation,"[1255] and it would also add specific provisions for habeas relief in a death sentence case where none currently exist.[1256] Last year, the Kansas Supreme Court backtracked from a previous holding giving a defendant the absolute right to be physically present at his habeas hearing.[1257] The court replaced this absolute right with a multifactor test

1248. *Id.* § 22-3419.

1249. *Id.* § 22-3419(3).

1250. State v. Mitchell, 316 P.3d 172, *4 (Kan. Ct. App. 2014) (unpublished table disposition).

1251. KAN. STAT. ANN. § 60-1507(a). The federal counterpart in habeas law is 28 U.S.C. § 2255 (2008).

1252. *Id.* § 60-1507(b).

1253. *Id.* § 60-1507(f).

1254. *Id.*§ 60-1507(f)(2).

1255. S.B. 257, 85th Leg., Reg. Sess. (Kan. 2014).

1256. *Id.*

1257. Fischer v. State, 295 P.3d 560, syl. ¶ 2, 567 (Kan. 2013) (abandoning the rule established in *State v. Webber*, 218 P.3d 1191, 1194 (Kan. Ct. App. 2009), that a defendant has an absolute right to be present at his habeas hearing, and remanding for determination whether the district court erred in only allowing the defendant to participate by telephone).

more consistent with section 60-1507(b).[1258]

2. Post-Conviction DNA Testing

In its current form, section 21-2512 grants a defendant convicted of first degree murder or rape the right to petition the court for DNA testing, provided that the state possesses the biological material, the biological material is related to the prosecution, and the DNA testing was not previously performed or was performed with methods less likely to lead to probative results.[1259] If the test results are favorable to the defendant, then the court may choose to take one of several actions, including holding a hearing (notwithstanding any independent bar to such hearing), vacating the judgment, or granting a new trial.[1260] A greater class of defendants will soon receive the right to petition the court for post-conviction DNA testing under this statute.[1261] In *State v. Cheeks*, the Kansas Supreme Court ruled that this statute is partially unconstitutional because it fails the rational basis test: those convicted of second degree murder are similarly situated to those convicted of first degree, yet do not receive the protection of the statute in its current form.[1262] Although proposed legislation would extend the post-conviction DNA testing right to all defendants accused of murder, it also requires that the DNA test "exonerate"—not merely be favorable to—the petitioner in order for the court to order corrective action.[1263]

1258. *Id.* at 570–71 (laying out relevant factors and noting that section 60-1507(b) gives the court the power to decide the motion "without requiring the production of the prisoner at the hearing").

1259. KAN. STAT. ANN. § 21-2512(a).

1260. *Id.* § 21-2512(f)(2).

1261. *See* State v. Cheeks, 310 P.3d 346, 356 (Kan. 2013).

1262. *Id.* at 356.

1263. S.B. 40, 85th Leg., Reg. Sess. (Kan. 2013). The word "exonerate" in this context means "to conclusively establish that the petitioner did not engage in the conduct that is the subject of the petitioner's conviction." *Id*.