Criminal Procedure Survey*

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I. INTRODUCTION

This year's Survey is more narrative than previous surveys, and has changed in two significant ways. First, the Survey is not simply an exhaustive list of Kansas cases decided in the last year. Instead, this year's Survey provides an overview of each area of Kansas criminal procedure. Recent decisions are discussed and incorporated when applicable and supplemented with United States Supreme Court and Kansas precedent.

Second, this year's Survey was designed with the goal of providing a more academically beneficial experience for Law Review staff members. Each staff member involved added commentary to his or her section, analyzing either the public policy implications of the court's decision or the soundness of its reasoning.

II. POLICE INVESTIGATION

A. Introduction to the Fourth Amendment

The Fourth Amendment to the United States Constitution provides that:

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

Although these two protections—freedom from unreasonable searches and seizures, and the mandate that warrants meet certain requirements—are contained in separate clauses, the Supreme Court has intertwined the two clauses by indicating a clear preference for warrants. In *Katz v. United States*,[2] the Court stated that searches conducted without prior approval by either a judge or magistrate are per se unreasonable under the Fourth Amendment, "subject only to a few specifically established and well-delineated exceptions."[3] In application, the provisions of the Fourth Amendment apply to actions of both federal and state governments.[4]

B. Scope of the Fourth Amendment

1. Limits to the Fourth Amendment's Scope

Only governmental action can constitute a search or a seizure within the meaning of the Fourth Amendment.[5] The Amendment "'was intended as a restraint upon the activities of *sovereign authority*, and was not intended to be a limitation upon . . . [non]governmental agencies.'"[6]

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1. U.S. CONST. amend. IV.
2. 389 U.S. 347 (1967).
3. *Id.* at 357.
4. Although the Fourth Amendment was originally drafted to govern the actions of the federal government, its provisions have been extended to the states through the Due Process Clause of the Fourteenth Amendment. Mapp v. Ohio, 367 U.S. 643, 655 (1961).
5. Georgia v. Randolph, 126 S. Ct. 1515, 1541 (2006) (Thomas, J., dissenting).
6. *Id.* (quoting Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (emphasis added)).

Therefore, where a search or seizure is conducted by a private individual, the action does not fall within the scope of the Fourth Amendment.

Similarly, the Fourth Amendment applies only to "searches" and "seizures."[7] "If the behavior at issue fails to qualify as a 'search' or 'seizure,' the matter, as far as the Fourth Amendment is concerned, is over. Police need not establish that their behavior was reasonable or supported by a warrant, or met any other Fourth Amendment standard."[8]

2. Searches and Seizures

A "search" occurs when an expectation of privacy—one that society is prepared to consider as reasonable—is infringed.[9] A "seizure" of property occurs within the meaning of the Fourth Amendment "when there is some meaningful interference with an individual's possessory interests" in property.[10] Likewise, "[a] person is seized when an officer accosts the person and restrains [her] freedom to walk away."[11] A person can be seized without actually being placed under arrest.[12]

a. Traffic and Vehicular Stops as Searches

i. The Requirement of Reasonable Suspicion

"A traffic stop is a seizure within the meaning of the Fourth Amendment."[13] In order to stop a moving vehicle, an officer, at the time of the stop, must possess "articulable facts sufficient to constitute reasonable suspicion."[14] To determine whether reasonable suspicion of criminal activity existed to justify the stop, courts use a totality of the circumstances evaluation.[15] "Although an officer's reliance on a mere 'hunch' is insufficient to justify a [traffic] stop," courts will consider

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7. U.S. CONST. amend. IV.

8. George Dery III, *Remote Frisking Down to the Skin: Government Searching Technology Powerful Enough to Locate Holes in Fourth Amendment Fundamentals*, 30 CREIGHTON L. REV. 353, 358–59 (1997).

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

10. *Id.*

11. State v. Hill, 130 P.3d 1, 7 (Kan. 2006) (citing State v. Boone, 556 P.2d 864 (Kan. 1976)).

12. *Id.*

13. State v. Anderson, 136 P.3d 406, 410 (Kan. 2006) (citing State v. Slater, 986 P.2d 1038 (Kan. 1999); State v. Mitchell, 960 P.2d 200 (Kan. 1998); State v. McKeown, 819 P.2d 644 (Kan. 1991)).

14. *Id.*

15. State v. Poage, 129 P.3d 641, 644 (Kan. Ct. App. 2006).

both the quantity and quality of information possessed by an officer, as well as the information's degree of reliability.[16] Additionally, in evaluating the facts purportedly supporting reasonable suspicion, courts consider not only the facts known independently by the officer executing the stop, but also the facts known collectively by other officers involved in the investigation.[17] "A traffic violation provides an objectively valid reason to effectuate a traffic stop, even if the stop is pretextual."[18]

In *State v. Poage*, a convenience store clerk contacted the Olathe police department at 3:00 A.M., reporting that someone was trying to buy large quantities of materials commonly used to manufacture methamphetamine, and that this person "'had been doing that for several months.'"[19] Based on this information, the responding officer telephoned a nearby convenience store and learned that a person in a vehicle matching the description given by the first clerk had purchased or just tried to purchase other precursor materials.[20] The first officer then radioed a second officer located near the second convenience store, gave him a description of the vehicle and tag number, and told him to stop the vehicle if he saw it.[21] At approximately 3:30 A.M., the second officer stopped Poage's vehicle and determined that his license was suspended.[22] Poage was arrested, his vehicle was towed, and during an inventory search, numerous precursor materials were found.[23] Upon questioning, Poage admitted that "'he was basically driving around town purchasing items for a gentleman named Steve or Steven and that . . . Steve was going to use those items to manufacture methamphetamine.'"[24]

At trial, Poage was convicted of driving a vehicle with a suspended license and attempted "possession of pseudoephedrine, ephedrine, and phenylpropanolamine with intent to use the product as a precursor to any illegal substance."[25] On appeal, the court considered the merit of Poage's motion to suppress contraband found in his possession subsequent to the traffic stop and, in particular, whether the arresting officers possessed reasonable suspicion that Poage was committing,

16. *Id.*
17. *Id.*
18. *Anderson*, 136 P.3d at 410–11.
19. *Poage*, 129 P.3d at 643.
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*

about to commit, or had previously committed a crime.[26] In upholding the trial court's denial of Poage's motion, the Kansas Court of Appeals found that the "officers had reasonable suspicion from the facts known to them collectively at the time of the stop that Poage may have been engaged in criminal activity."[27] In reaching this conclusion, the court indicated that the totality of the circumstances—including numerous attempts at multiple locations to purchase matches with red phosphorus strike plates, the quantity of matches purchased or attempted to be purchased, reliable information that this was a pattern of activity extending for several months, the fact that the defendant made the purchases in a different county relative to his home, and the fact that he made the purchases in the early morning hours—led it to resolve the question in favor of the State.[28]

ii. Investigatory Detention

Once a "driver has produced a valid license and proof that he or she is entitled to operate the car," officers must allow the driver "to proceed on his or her way" without subjecting the driver to further delay or additional questioning.[29] "Further questioning is permissible only if (1) the encounter between the officer and the driver ceases to be a detention, but [instead] becomes consensual, and the driver voluntarily consents to additional questioning or (2) during the traffic stop, the officer gains a reasonable and articulable suspicion that the driver is engaged in illegal activity."[30] "In determining whether an encounter between an officer and a citizen has ceased to be a detention and has instead become a consensual encounter, [a court] consider[s] whether a reasonable person in the [citizen]'s position would feel free 'to disregard the police and go about his [or her] business.'"[31]

In analyzing investigatory detention situations, courts look at "the totality of the circumstances in [the] light of common sense and ordinary human experience."[32] Several objective factors that weigh towards a finding of continued detention include "the presence of more than one

26. *Id.* at 644.

27. *Id.* at 645.

28. *Id.*

29. State v. Anderson, 136 P.3d 406, 411 (Kan. 2006).

30. State v. Hayes, 133 P.3d 146, 152 (Kan. Ct. App. 2006) (citing State v. DeMarco, 952 P.2d 1276, 1282 (Kan. 1998)).

31. *Id.* (quoting State v. Reason, 951 P.2d 538, 542 (Kan. 1997)).

32. *Poage*, 129 P.3d at 644.

officer, the display of a weapon, physical contact by an officer, or use of a commanding tone of voice."[33] A court may also "consider whether the officer informed the [individual] subject to the traffic stop of the freedom to depart."[34]

b. Standing to Object to a Search or Seizure

i. Residents and Overnight Guests

As a general rule, a premise's overnight guests and residents have an expectation of privacy and standing to object to a search of the residence.[35] In *State v. Porting*, Eugene Hanson was released from prison after serving an eighteen-month sentence.[36] As a condition of his release, Hanson was required to reside at his mother's house.[37] At the time, Hanson's former girlfriend, defendant Porting, also resided with Hanson's mother.[38] Hanson suspected that Porting was using drugs, and, at the time of his release, he requested that officers search his mother's residence for contraband.[39] Officers subsequently entered the home without requesting any additional consent, conducted a search, and discovered methamphetamine and drug paraphernalia in the possession of both Porting and Porting's overnight male guest.[40] "Both defendants filed motions to suppress the evidence obtained during the search on the grounds that Hanson did not have authority to consent to the search."[41] Prior to reaching the ultimate issue of third-party consent, the Kansas Supreme Court found that both defendants, as a resident of the premises and an overnight guest, had a valid expectation of privacy and therefore had standing to challenge the search of the home.[42]

33. *Hayes*, 133 P.3d at 152 (citing State v. Moore, 124 P.3d 1054, 1061 (Kan. Ct. App. 2005)).
34. *Id.*
35. State v. Porting, 130 P.3d 1173, 1176 (Kan. 2006).
36. *Id.* at 1175.
37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 1176.

ii. Standing of a Passenger Who Leaves Her Purse in Car

In *State v. Groshong*,[43] a case of first impression, the Kansas Supreme Court held that "a law enforcement officer may search a passenger's purse left in a vehicle [if] the passenger exits . . . [and] makes no effort to retrieve the purse before probable cause to search the vehicle develops."[44] During a routine traffic stop, the patrolling officer had the defendant exit the vehicle and sit near the car.[45] When the defendant exited the front passenger seat, she failed to take her purse with her.[46] The patrolling officer subsequently conducted a safety check of the vehicle and spotted a small bag containing marijuana between the front seats.[47] When the officer announced that he intended to search the rest of the vehicle—approximately three to five minutes after the defendant had exited—the defendant requested her purse.[48] The officer refused her request, searched the defendant's purse, and found marijuana and a smoking pipe inside.[49] The defendant filed a motion to suppress the evidence, claiming that the search violated her Fourth Amendment rights.[50]

The Kansas Supreme Court noted that the issue at hand fell into a gap between established case law.[51] In its analysis, the court acknowledged two general competing principles: that where probable cause justifies the search of the vehicle, law enforcement officers may also search a passenger's belongings left inside the vehicle, as long as the belongings are capable of concealing the object of the search;[52] and that an individual maintains a heightened privacy interest in a purse when it is attached to the owner.[53] However, the court found persuasive the fact that when the defendant exited the car, she left her purse in the vehicle

43. 135 P.3d 1186 (Kan. 2006).

44. *Id.* at 1191.

45. *Id.* at 1187–88.

46. *Id.* at 1188.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.* at 1190; *see also* Wyoming v. Houghton, 526 U.S. 295, 307 (1999) (concluding that law enforcement officers can search a passenger's belongings inside a vehicle as long as they are "capable of concealing the object of the search"); State v. Boyd, 64 P.3d 419, 427 (Kan. 2003) (finding that an officer cannot search a passenger's purse while searching a vehicle when the officer has ordered the owner of the purse to leave it in the vehicle).

52. *Groshong*, 135 P.3d at 1189.

53. *Id.* (citing *Boyd*, 64 P.3d at 427).

and did not immediately assert a privacy interest in it.[54] The court concluded that because the defendant waited until after the officer had established probable cause to search the vehicle before asserting claim to the purse, she no longer had standing to claim Fourth Amendment protections.[55]

The court's holding in *Groshong* is very narrowly tailored. It purports to apply only when a passenger fails to retrieve a purse, or at least assert a possessory interest in the item, before probable cause to search the vehicle develops. However, despite the fine line that the court has drawn, its decision is likely to cut a deeper path. Of all of the items that a passenger in a vehicle carries, a purse will contain the passenger's most intimate and personal belongings. Therefore, the owner of the purse should be entitled to heightened privacy expectations in the sanctity of its contents. If, during a traffic stop, the owner is ordered to exit the car, she may forget to take her purse with her, or in the alternative, she may leave the purse in the car, not realizing that she is effectively forfeiting her privacy interests in the purse and her standing to object to a search. If courts are willing to recognize a heightened privacy interest in a purse that is attached to the owner, it is a legal fiction that the same purse, when sitting in a vehicle only a few feet away, is not protected by the same privacy interest.

C. Arrest

"[A] person is considered to be under arrest when he or she is physically restrained or when he or she submits to the officer's custody for the purpose of answering for the commission of a crime."[56] The test used to determine "whether there was an arrest is not based on the officer's subjective belief."[57] Rather, the test is based on what a reasonable person would believe under the totality of the circumstances surrounding the incident.[58]

1. Kansas Arrest Law

Under Kansas law, a police officer may arrest a person without a warrant if "[t]he officer has probable cause to believe that the person is

54. *Id.* at 1191.
55. *Id.*
56. State v. Hill, 130 P.3d 1, 7 (Kan. 2006) (citing KAN. STAT. ANN. §§ 22-2202(4), -2405(1)).
57. *Id.* at 8.
58. *Id.* (citing State v. Morris, 72 P.3d 570, 576–77 (Kan. 2003)).

committing or has committed [a] felony."[59] "If a warrantless arrest is challenged by a defendant, 'the burden is on the State to justify the arrest was not only authorized by the statute, but that it was permissible under the Fourth Amendment to the United States Constitution.'"[60] "'The constitutional validity of a warrantless arrest depends on whether the arresting officer had probable cause to believe that the person arrested had committed a felony.'"[61]

2. Requirement of Probable Cause

The Supreme Court of Kansas has defined probable cause as the "reasonable belief that a specific crime has been committed and that the defendant committed the crime."[62] In determining whether probable cause existed, the court considers the totality of the circumstances.[63] "Probable cause to arrest exists when the facts and circumstances within the arresting officer's knowledge are sufficient to assure a person of reasonable caution that an offense has been or is being committed and the person being arrested is or was involved in a crime."[64] "This includes 'all of the information in the officer's possession, fair inferences therefrom, and any other relevant facts, even if they may not be admissible on the issue of guilt.'"[65] In addition, the court also considers "'the seriousness of the alleged offense and the exigency of the situation, as where immediate arrest seems desirable because of the likelihood that the suspect will flee the jurisdiction.'"[66]

3. *State v. Oliver*

In *State v. Oliver*, the Supreme Court of Kansas considered whether officers had probable cause to support the warrantless arrest of the defendant.[67] The case involved the investigation of a quadruple homicide in Wichita.[68] Before arresting Oliver, the police knew that he

59. KAN. STAT. ANN. § 22-2401(c) (Supp. 2006) (punctuation omitted).

60. State v. Oliver, 124 P.3d 493, 502 (Kan. 2005) (quoting State v. Aikins, 932 P.2d 408, 419 (Kan. 1997)).

61. *Id.* (quoting *Aikins*, 932 P.2d at 419–20).

62. *Id.* (citing State v. Abbott, 83 P.3d 794, 797 (Kan. 2004)).

63. *Id.*

64. State v. Hill, 130 P.3d 1, 9 (Kan. 2006).

65. *Oliver*, 124 P.3d at 502 (quoting *Abbott*, 83 P.3d at 797).

66. *Id.* (citing *Aikins*, 932 P.2d at 420).

67. *Id.* at 497.

68. *Id.*

and one of the victims, Raeshawnda Wheaton, shared a violent romantic history.[69] They also knew that Oliver was a gang member and that two of the victims were affiliated with a rival gang.[70] There had been no forced entry into the home where the murders took place, leading police to believe that the shooter was probably familiar with the victims.[71] Additionally, "[w]hile at the crime scene, a police officer had received a sheet of paper with [the] defendant's name written on it from an unidentified person."[72] Parents of the victims also reported that Oliver had pulled a gun on Wheaton and had threatened to kill her two days prior to the murders.[73] Finally, police searched a house associated with Oliver and found a handgun of the same caliber as one of the weapons used during the homicide.[74] At trial, following Oliver's warrantless arrest, the defendant was convicted of two counts of first-degree premeditated murder and two counts of felony murder.[75]

On appeal, Oliver argued that the facts known to the police at the time of his arrest "were insufficient to supply probable cause for a warrantless seizure of his person."[76] After considering all of the information in the possession of the police and other circumstances—including Oliver's failure to inquire about Wheaton, officers' reasonable belief that Oliver might leave Wichita, and the seriousness of the crimes under investigation—the court concluded that Oliver's warrantless arrest met both Kansas statutory and constitutional requirements.[77]

It has been argued that allowing a warrantless arrest "bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search."[78] However, in cases like *Oliver*, this argument is less convincing. Balancing the interests involved only validates the outcome of the court's holding. Although Oliver did have a valid interest in having a magistrate decide whether enough evidence existed to support the issuance of a warrant for his arrest, the community's cumulative interest in immediately arresting a quadruple-homicide suspect legitimately outweighed his personal

69. *Id.* at 498.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 501.
76. *Id.* at 502.
77. *Id.* at 503.
78. Beck v. Ohio, 379 U.S. 89, 96 (1964).

interests. Additionally, following Oliver's detainment, his arrest was still subject to judicial review on the issue of whether probable cause existed. In the end, Oliver still received procedural protections, but these protections were justifiably postponed in light of the public's interest in arresting a potentially violent suspect before he possibly fled or committed another crime.

D. Search Warrants

1. Knock-and-Announce

Under the knock-and-announce rule, law enforcement officers, before searching a residence, are generally required to "announce their presence and provide residents an opportunity to open the door."[79] However, courts have held that it is not necessary to knock and announce when "'circumstances presen[t] a threat of physical violence,' or if there is 'reason to believe that evidence would likely be destroyed if advance notice were given,' or if knocking and announcing would be 'futile.'"[80]

In *Hudson v. Michigan*, the United States Supreme Court addressed the issue of whether a violation of the knock-and-announce rule requires the suppression of all evidence found during a subsequent search.[81] Police obtained a warrant authorizing a search for drugs and firearms at the home of the petitioner, Booker Hudson.[82] When the police arrived to execute the warrant, they announced their presence, but then only waited about three to five seconds before turning the knob of the unlocked front door and entering Hudson's home.[83] Once inside, the police found large quantities of drugs, including cocaine rocks in Hudson's pockets.[84] Police also found a loaded gun lodged between the cushion and the armrest of the chair in which Hudson was sitting.[85] Hudson moved to suppress all of the incriminating evidence, arguing that the premature entry violated his Fourth Amendment rights.[86] The trial court granted

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79. Hudson v. Michigan, 126 S. Ct. 2159, 2162 (2006) (citing Wilson v. Arkansas, 514 U.S. 927, 931–32 (1995)).

80. *Id.* at 2162–63 (quoting *Wilson*, 514 U.S. at 936; citing Richards v. Wisconsin, 520 U.S. 385, 394 (1997)) (alteration in original).

81. *Id.* at 2163. In *Wilson v. Arkansas*, the Court had previously declined to decide this issue. *Wilson*, 514 U.S. at 937 n.4.

82. *Hudson*, 126 S. Ct. at 2162.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

Hudson's motion but, on appeal, was reversed.[87] Hudson was subsequently convicted of drug possession.[88]

The State of Michigan conceded that the entry constituted a violation of the knock-and-announce requirement, allowing the Court to focus solely on remedy.[89] In a five-to-four decision, the Court held that violations of the knock-and-announce rule do not justify suppressing the evidence of guilt.[90] The Court noted that suppression of evidence has always been used as a last resort and that the exclusionary rule generates substantial social costs.[91] These costs include sometimes setting the guilty free and the dangerous at large.[92] In addition, the Court stated that the constitutional violation of an illegal *manner* of entry was *not* a but-for cause of obtaining the evidence; police would have executed the warrant they had obtained and would have discovered the gun and drugs inside the petitioner's house regardless of the illegal manner of entry.[93] Finally, the Court indicated that the knock-and-announce rule has never protected an individual's interest in preventing the government from seeing or taking evidence described in a warrant.[94] The Court concluded that because the interests that were violated in the case—protection of human life where an unannounced entry provokes violence in self-defense, protection of property, and interests of privacy and dignity—had nothing to do with the seizure of the evidence, the exclusionary rule is inapplicable.[95]

The Court's holding in *Hudson* seriously erodes the requirement of knocking and announcing before executing a search warrant. Indeed, a substantial deterrent to performing no-knock entries has been washed away, whereas the incentives to forgo the requirement—fearing that a suspect will flee, minimizing life-threatening resistance, or concealing or destroying evidence of a crime—still remain intact. Under the Court's ruling, if police possess a valid search warrant, there really is no effective penalty to deter officers from entering a residence prematurely. They are no longer restrained by the fear that evidence found following knock-and-announce violations will be excluded. The Court suggests that a deterrent to knock-and-announce violations still lies in civil rights

87. *Id.*
88. *Id.*
89. *Id.* at 2163.
90. *Id.* at 2168.
91. *Id.* at 2163 (citing United States v. Leon, 468 U.S. 897, 907 (1984)).
92. *Id.*
93. *Id.* at 2164.
94. *Id.* at 2165.
95. *Id.*

violation suits,[96] but this alternative's effectiveness in preventing constitutional violations remains to be seen.

2. Anticipatory Warrants

An anticipatory warrant is a warrant based upon an affidavit that at some future time, certain evidence of crime will be located at a specified place.[97] Most anticipatory warrants subject their execution to some condition precedent other than the passage of time—often called a "triggering condition."[98] These warrants are no different in principle from ordinary warrants. They require a magistrate to determine that it is now probable that contraband, evidence of a crime, or a fugitive will be on the described premises when the warrant is executed in the future.[99] For a conditioned anticipatory warrant to comply with probable-cause requirements, it must be true not only that if the triggering condition occurs there is a fair probability that contraband or evidence of a crime will be found in a particular place, but also that there is probable cause to believe the triggering condition will occur.[100]

In *United States v. Grubbs*, the Supreme Court addressed the issue of whether anticipatory warrants were lawful.[101] The case revolved around the purchase of a videotape containing child pornography from a website operated by an undercover postal inspector.[102] Officers from the Postal Inspection Service arranged a controlled delivery of the videotape to Grubbs's residence.[103] Prior to the videotape's delivery, an inspector submitted a search warrant application to a magistrate judge with an affidavit describing the operation in detail.[104] The judge issued the warrant and two days later the videotape was delivered.[105] Postal inspectors then executed the warrant, detained Grubbs, and searched his home for contraband.[106] Grubbs subsequently moved to suppress evidence seized during the search, arguing that because the triggering condition which would have established probable cause had not yet been

96. *Id.* at 2166–68.
97. United States v. Grubbs, 126 S. Ct. 1494, 1498 (2006).
98. *Id.*
99. *Id.* at 1500.
100. *Id.* (citing Illinois v. Gates, 462 U.S. 213, 238 (1983)).
101. *Id.* at 1497.
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 1498.
106. *Id.*

satisfied when the warrant was issued, the anticipatory warrant contravened the Fourth Amendment's provision that "'no Warrants shall issue, but upon probable cause.'"[107]

In rejecting his argument and finding the warrant valid, the Court noted that "[b]ecause the probable-cause requirement looks to whether evidence will be found *when the search is conducted*, all warrants are, in a sense, 'anticipatory.'"[108] The Court found that the occurrence of the triggering event—successful delivery of the videotape to Grubbs's residence—would plainly establish probable cause for the search.[109] In addition, the Court found that the inspector's affidavit established probable cause to believe the triggering condition would be satisfied.[110] The Court reasoned that although it was possible that Grubbs could have refused delivery of the videotape he had ordered, that was unlikely.[111] Therefore, the Court concluded that the magistrate possessed a substantial basis for finding that probable cause existed.[112]

E. Exceptions to the Warrant Requirement

The Fourth Amendment to the Constitution instructs that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[113] Warrantless searches and seizures are per se unreasonable unless they fall within a recognized exception.[114] Kansas recognizes eight exceptions to the warrant requirement. These include "consent, search incident to a lawful arrest; stop and frisk; probable cause plus exigent circumstances, the emergency doctrine, inventory searches, plain view or [touch], and administrative searches of closely regulated businesses."[115] This subpart addresses these exceptions as they are currently applied in Kansas.

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107. *Id.* at 1499.

108. *Id.*

109. *Id.* at 1500.

110. *Id.*

111. *Id.*

112. *Id.*

113. U.S. CONST. amend. IV.

114. *See* State v. Rupnick, 125 P.3d 541, 547 (Kan. 2005) ("[A] warrantless seizure is per se unreasonable unless it falls within a recognized exception."); State v. Canaan, 964 P.2d 681, 687 (Kan. 1998) ("Unless a search falls within one of a few exceptions, a warrantless search is per se unreasonable." (citing Katz v. United States, 389 U.S. 347, 357 (1967))).

115. *Rupnick*, 125 P.3d at 547.

1. Consent

Consent issues arise in several contexts, including consent to search and consent to questioning. Consent is defined as an "agreement, approval, or permission as to some act or purpose."[116] Voluntary consent is "[c]onsent that is given freely and that has not been coerced."[117]

a. Voluntariness Requirement

Any consent given must be given "voluntarily, intelligently, and knowingly, and proved by a preponderance of the evidence."[118] *State v. Kermoade* reaffirms the voluntariness requirement: "we must still consider if the subsequent consent to search was voluntary."[119] Totality of the circumstances applies when determining voluntariness: "the essential inquiry . . . is whether [the consent] was the product of the accused's free and independent will."[120] To determine this, a court should consider whether any threats or coercive tactics were used by authorities, whether the person was informed of his right to deny consent, and the intelligence of the person being searched.[121] Regardless, "knowledge of the right to refuse consent is not a prerequisite to a finding of voluntariness."[122]

b. Search of a Home

While the Fourth Amendment to the United States Constitution and Section 15 of the Kansas Constitution Bill of Rights both prohibit warrantless entries into homes,[123] "'[t]he prohibition does not apply . . . to situations in which voluntary consent has been obtained, either from the individual whose property is searched . . . or from a third party who possesses common authority over the premises.'"[124] In *State v. Porting*,

116. BLACK'S LAW DICTIONARY 323 (8th ed. 2004).

117. *Id.*

118. State v. Dwyer, 14 P.3d 1186, 1188 (Kan. Ct. App. 2000).

119. State v. Kermoade, 105 P.3d 730, 736 (Kan. Ct. App. 2005).

120. *Id.*

121. State v. Moore, 124 P.3d 1054, 1064 (Kan. Ct. App. 2005).

122. *Id.* (citing State v. Holmes, 102 P.3d 406 (Kan. 2004)).

123. *See* Payton v. New York, 445 U.S. 573, 576 (1980) (stating the Fourth Amendment prohibits warrantless or nonconsensual entry); State v. Mendez, 66 P.3d 811, 817 (Kan. 2003) (analogizing Section 15 of the Kansas Constitution Bill of Rights to the Fourth Amendment).

124. State v. Porting, 130 P.3d 1173, 1176 (Kan. 2006) (quoting Illinois v. Rodriguez, 497 U.S. 177, 181 (1990)).

Hanson, a recent parolee, was required to take up residence with his mother in the home he had lived in for several years prior to his time in prison.[125] Hanson requested that his supervising officer make a sweep of the house for drugs "because he knew [the defendant,] Porting, [was] rumored to be using drugs at the house."[126] Without getting any additional consent from Hanson's mother or defendants Porting and Angel, the officer conducted a search whereupon he found defendants in possession of methamphetamines and drug paraphernalia.[127] Both the trial court and a split Kansas Court of Appeals denied defendants' motions to suppress by finding that Hanson's consent was a valid third-party consent "because he was a resident of the house based on his physical presence and intent to remain there permanently,"[128] despite not having lived there for eighteen months.[129] In reversing the court of appeals, the Kansas Supreme Court relied on the court of appeals's erroneous application of *State v. Ratley*.[130] *Ratley* applies to spousal consent to search and sets forth factors to consider when determining if common authority or a sufficient relationship exists to qualify as valid consent.[131] When applying these factors to the case at hand, the Kansas Supreme Court found that there was no marital relationship or any actual or intended joint occupancy of the house.[132] It also demonstrated that the record was silent as to whether Hanson had any legal interest in the residence, how long he lived there prior to his incarceration, whether he left any personal effects at the residence, whether he had conferred with the residents of the home about his planned return, or whether he had a key to the residence.[133] Based on the deficiencies in the record—that "there was no evidence of current *joint* occupancy, no spousal relationship giving rise to common authority, and no mutual use of or access to the residence for the past 18 months"—the court reversed and remanded.[134]

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125. *Id.* at 1175.

126. *Id.*

127. *Id.*

128. *Id.* at 1176.

129. *Id.* at 1175.

130. 827 P.2d 78 (Kan. Ct. App. 1992).

131. *Porting*, 130 P.3d at 1177–78 (quoting *Ratley*, 827 P.2d at 80, 81). These factors include: the nonoccupying spouse's retention of a key to the premises; the nonoccupying spouse's access to the property; changed locks; the length of time the nonoccupying spouse is away from the premises; whether the nonoccupying spouse left personal property on the premises; and the reason for the nonoccupying spouse's departure. *Id.* at 1178.

132. *Id.* at 1178.

133. *Id.*

134. *Id.*

While the court was correct in its decision given the stipulated facts, the case may have easily gone the other way had the State provided more evidence of Hanson's relation to the residence. The court focused on Hanson's relationship to defendant Porting, his former girlfriend, but took no notice of his relation to the residence by way of his mother, another resident in the home. Just as the court applied the *Ratley* factors to the boyfriend/girlfriend relationship, it could just as easily have applied those same factors to the mother/son relationship. Had the State argued this in the alternative, it may have been able to sustain a worthy drug conviction.

2. Search Incident to a Lawful Arrest

The Kansas Supreme Court ruled "[w]arrantless searches incident to an arrest are permissible."[135] The Kansas legislature codified this rule at chapter 22, section 2501 of the Kansas Statutes. It reads:

> [w]hen a lawful arrest is effected a law enforcement officer may reasonably search the person arrested and the area within such person's immediate presence for the purpose of (a) [p]rotecting the officer from attack; (b) [p]reventing the person from escaping; or (c) [d]iscovering the fruits, instrumentalities, or evidence of the crime.[136]

Following *Chimel v. California*, a leading United States Supreme Court case involving search incident to an arrest, the Kansas Court of Appeals stated "[t]he purpose for allowing searches of an arrestee and the immediately surrounding area is to allow law enforcement officers to remove any weapons and to prevent the concealment or destruction of evidence."[137] These purposes are directly in line with section 2501. However, despite the statute, Kansas courts have continually contradicted each other regarding what rule to follow when evaluating searches incident to arrests.

State v. Press stood for confirming the adoption of a broader, bright-line-rule view of *New York v. Belton* "in which articles found in a vehicle's passenger compartment are deemed to have been within the recent occupant's (arrestee's) control, justifying a warrantless search."[138]

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135. State v. Abbott, 83 P.3d 794, 796 (Kan. 2004) (citing State v. Payne, 44 P.3d 419 (Kan. 2002)).

136. KAN. STAT. ANN. § 22-2501 (Supp. 2006).

137. State v. Davis, 11 P.3d 1177, 1180 (Kan. Ct. App. 2000) (citing Chimel v. California, 395 U.S. 752, 763 (1969)).

138. State v. Press, 685 P.2d 887, 892 (Kan. Ct. App. 1984).

The court in *State v. Box*, however, chose to follow *Chimel*, which determined the scope of searches incident to arrests need be "'strictly tied to and justified' by the circumstances which rendered its initiation permissible."[139] It also chose to follow *State v. Tygart*, which set out specific factors to be considered when "deciding a motion to suppress evidence regarding the reasonableness of the scope of a vehicle search incident to a valid arrest."[140] *Press* found section 2501 inapplicable[141] and *Box* merely quoted it before moving on to its case law analysis.[142] The Kansas Court of Appeals has finally clarified exactly what courts should be doing when examining a search incident to an arrest where previous attempts have failed. In *State v. Anderson*, the Kansas Supreme Court recognized that the Kansas statute may be more narrow and restrictive than nationally established Fourth Amendment case law, but that this point was of no consequence because one cannot ignore the plain language of the Kansas statute.[143] Recently, in reference to the *Tygart* factors, *State v. Vandevelde* has given courts a better explanation of how to apply the Kansas statute and case law—more expansive than that given in *Anderson*—stating that "[a]lthough [the *Tygart*] factors are helpful when considering the reasonableness of the scope of the search, our Supreme Court has made clear that a search incident to a lawful arrest may be conducted only for one of the three purposes under K.S.A. 22-2501."[144] The court must first look to the statute to determine if the search was lawful before it can use factors and other case law to determine if the scope of the search was reasonable.[145]

Vandevelde has finally accomplished what Kansas courts should have done years ago. By establishing a solid rule lower courts can follow, fewer convictions will be questioned based on the previous wavering views on this issue. As a result, time and the state's money will no longer be wasted in courts to determine an issue that should have been clear from the start.

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139. State v. Box, 17 P.3d 386, 389 (Kan. Ct. App. 2000) (quoting *Chimel*, 395 U.S. at 762).

140. *Id.* (citing State v. Tygert, 524 P.2d 753 (Kan. 1974)); *see also id.* at 391 ("Our holding here is specifically based upon *Chimel* and *Tygart* and the unique facts of this case and not based on the bright line rule of *Belton* and *Press*.").

141. *See Press*, 685 P.2d at 899 ("K.S.A. 22-2501 is merely a statement of a proposition of general law and refers only to a warrantless incident to arrest search.").

142. *Box*, 17 P.3d at 388.

143. State v. Anderson, 910 P.2d 180, 184 (Kan. 1996).

144. State v. Vandevelde, 138 P.3d 771, 778 (Kan. Ct. App. 2006).

145. *See id.* ("Therefore, it must first be determined in this case whether the search of Vandevelde's truck was done for one of the purposes under K.S.A. 22-2501 . . . .").

3. Probable Cause Plus Exigent Circumstances

a. Vehicle Searches

As well as recognizing the general probable-cause-plus-exigent-circumstances exception to the warrant requirement, Kansas recognizes the more-specific automobile exception.[146] Before officers partake in any warrantless search, "exigent circumstances must also exist which would justify an immediate search. A commonly applied exigent circumstance is the 'automobile exception' that allows officers to search an automobile without a warrant when there is probable cause to justify a search."[147] More specifically, there must be "probable cause to believe there is evidence of a crime [contained within] the automobile,"[148] and "the mobility of the vehicle itself provides the exigent circumstances."[149] The scope of the search based on probable cause is broad: "if probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle, including containers which may conceal the object of the search."[150] However, if an officer searching has particular knowledge about a specific container and he finds that container within the automobile, he or she may not open it without a warrant.[151]

An example of probable cause to search an automobile is when an officer encounters a strong odor of marijuana emanating from the automobile.[152] The smell of marijuana serves as the probable cause and the fact that it is coming from a mobile automobile is the exigent circumstance. This situation is differentiated from when an officer approaches a home, a resident answers, and the officer smells marijuana. While there may be probable cause, albeit weak, there must still be a showing of exigent circumstances; the smell alone is not enough.[153] This result is rational because "'[t]he expectation of privacy, with respect to one's automobile, is significantly less than the privacy expectation relating to one's home.'"[154]

146. State v. Delgado, 143 P.3d 681, 684 (Kan. Ct. App. 2006).

147. *Vandevelde*, 138 P.3d at 780–81.

148. State v. Davis, 78 P.3d 474, 479 (Kan. Ct. App. 2004).

149. *Delgado*, 143 P.3d at 684.

150. State *ex rel.* Love v. One 1967 Chevrolet El Camino Bearing VIN # 136807Z141367, 799 P.2d 1043, 1049 (Kan. 1990).

151. *Id.*

152. *Delgado*, 143 P.3d at 684.

153. *Id.* at 684–85.

154. *Id.* at 685 (quoting State v. Conn, 99 P.3d 1108, 1114 (Kan. 2004)).

b. Hot Pursuit into Third Party's Home

Kansas follows the well-established rule of *Payton v. New York* that "'for Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within.'"[155] Kansas also adheres to the rule that an arrest warrant, on its own, is not enough to enter a *third party's* home.[156] What happens when an arrest warrant, probable cause, exigent circumstances, and a third party's home combine? *State v. Thomas* was a case of first impression in the Kansas Supreme Court.[157] The case asks:

> Does the Fourth Amendment to the United States Constitution or § 15 of the Kansas Constitution Bill of Rights prohibit the entry of law enforcement officers into a home when officers are in hot pursuit of the subject of a felony arrest warrant who has fled from a public area into the house, even though the arrestee does not own or reside in the house, and even though the officers do not have a search warrant for the house?[158]

Because the Supreme Court of the United States has not addressed this issue specifically as it has done in various other exceptions to the warrant requirement, the Kansas Supreme Court relied on *Steagald v. United States* in its determination that entry into a third party's home based on hot pursuit and an arrest warrant is constitutional.[159]

The Kansas Supreme Court was correct in its decision based on *Steagald*'s recognition that despite the general prohibition of entry into a third party's home based solely on an arrest warrant, consent and exigent circumstances can be shown to legitimize the entry. Following *Minnesota v. Olson*, in which the United States Supreme Court held hot pursuit alone justifies a warrantless intrusion into a home,[160] the Kansas Supreme Court has recognized "hot pursuit" as an example of an exigent circumstance.[161] As a result, evidence found in plain view, while pursuing and apprehending the suspect subject to the arrest warrant, is

155. State v. Thomas, 124 P.3d 48, 52 (Kan. 2005) (quoting Payton v. New York, 455 U.S. 573, 602–03 (1980)).

156. *See id.* at 52–53 (reaching this conclusion by analyzing the United States Supreme Court's decision in *Steagald v. United States*, 451 U.S. 204 (1981)).

157. *Id.* at 51.

158. *Id.*

159. *Id.* at 52–53.

160. Minnesota v. Olson, 495 U.S. 91, 100 (1990).

161. *Thomas*, 124 P.3d at 55.

admissible against the owner of the home, despite him neither being a target of the arrest warrant nor his home subject to any planned search.[162] The owner of the home should not be exempt from criminal prosecution merely because it was unfortunate a pursuit ended in his home. If there is evidence of a crime, and the owner is responsible for that evidence, he should be subject to and prepared to face the consequences.

4. Emergency Doctrine

Mincey v. Arizona set out the rationale for the emergency doctrine as follows:

> Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid. . . . "The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency."[163]

Kansas requires the satisfaction of a three-part test before a warrantless entry based on emergency will be excused.[164] First, there must be "'reasonable grounds to believe that there is an emergency at hand and an immediate need for [police] assistance for the protection of life or property.'"[165] An objective standard is used to determine whether the officer's belief was reasonable: would a reasonable and prudent officer have acted similarly?[166] Second, "'[t]he search must not be primarily motivated by intent to arrest and seize evidence.'"[167] Lastly, a "reasonable basis, approximating probable cause, to associate the emergency with the area to be searched," must be shown.[168]

Thankfully, Kansas courts apply the emergency doctrine with a certain level of scrutiny. Because it would be quite easy for an officer to explain a situation in a manner that could reasonably be believed to have been deemed an emergency, applying this doctrine to the "t" helps deter abuse in the system. Even if two of the three prongs in the three-part test

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162. *See id.* at 57 (denying "Thomas' motion to suppress evidence based upon the alleged unauthorized entry into a third-party residence" upon such facts).

163. Mincey v. Arizona, 437 U.S. 385, 392 (1978) (quoting Wayne v. United States, 318 F.2d 205, 212 (D.C. Cir. 1963)) (internal citations omitted).

164. State v. Drennan, 101 P.3d 1218, 1231 (Kan. 2004).

165. *Id.* (quoting State v. Mendez, 66 P.3d 811, 820 (Kan. 2003)).

166. *Id.*

167. *Id.* (quoting *Mendez*, 66 P.3d at 820).

168. *Id.* (quoting *Mendez*, 66 P.3d at 820).

are met, the Kansas Supreme Court has refused to apply the emergency exception to the warrant requirement; all three prongs must be satisfied.[169]

There is a distinct difference between the emergency doctrine and exigent circumstances:[170] "'[T]he emergency aid doctrine is triggered when the police enter a dwelling in the reasonable, good-faith belief that there is someone within in need of immediate aid or assistance.'"[171] There is no probable cause that would trigger a warrant because police are not there to "'arrest, search, or gather evidence.'"[172] Even if possible "criminal activity might account for the feared danger in a given case, the primary motive of the police will not be to search for evidence of a crime, but rather to render assistance."[173] Conversely, when justifying a search with exigent circumstances, there must first be a showing of probable cause that would justify the issuance of a search warrant.

5. Inventory Searches: Vehicles

State v. Teeter tells us that "[i]nventory searches of vehicles serve three purposes: the protection of the owner's property while it remains in police custody, the protection of the police against claims or disputes over lost or stolen property, and the protection of the police from potential danger."[174] For the police to establish that an inventory search was legal, they must first show they gained lawful possession of the vehicle.[175] The police must have "express authority" or "reasonable grounds" to impound a vehicle.[176] Two cases are instructive. *State v. Boster*, a 1975 case, sets forth examples which give rise to "reasonable grounds." These include

> the necessity for removing (1) an unattended-to car illegally parked or otherwise illegally obstructing traffic; (2) an unattended-to car from the scene of an accident when the driver is physically or mentally incapable of deciding upon steps to be taken to deal with his property, as in the case of the intoxicated, mentally incapacitated or seriously injured driver; (3) a car that has been stolen or used in the commission of a

169. *See Mendez*, 66 P.3d at 822 (demonstrating the court's strict adherence to the emergency doctrine's three-prong test).

170. *Id.* at 820.

171. *Id.* (quoting State v. Jones, 947 P.2d 1030, 1037 (Kan. Ct. App. 1997)).

172. *Id.* (quoting *Jones*, 947 P.2d at 1037).

173. *Jones*, 947 P.2d at 1037.

174. State v. Teeter, 819 P.2d 651, 653 (Kan. 1991).

175. *Id.*

176. State v. Vandevelde, 138 P.3d 771, 783 (Kan. Ct. App. 2006).

> crime when its retention as evidence is necessary; (4) an abandoned car; (5) a car so mechanically defective as to be a menace to others using the public highway; (6) a car impoundable pursuant to ordinance or statute.[177]

State v. Fortune instructs that "[o]nly when a vehicle is found illegally parked and unattended, or where the person responsible for its possession is unable . . . or unwilling to instruct the arresting officers as to the vehicle's disposition or some other legal reason justifying impoundment exists should the officers assume control over the vehicle."[178] Both cases have recently been cited to determine the validity of inventory searches.[179] However, the overarching rule that seems to be applied to determine whether an impoundment is lawful is a totality of the circumstances test.[180]

Police do not have a right to indiscriminantly search a vehicle within their control—"[t]he search must be for the purpose of establishing an inventory . . . 'not . . . a ruse for a general rummaging in order to discover incriminating evidence.'"[181] As a practical matter, though, "[o]fficers are permitted to exercise judgment in conducting an inventory search and it does not have to be conducted in an all or nothing fashion."[182] Without a stricter rule on how inventory searches are to be conducted, these searches are open to abuse. The Kansas Supreme Court should take advantage of the next opportunity it has to review this issue and outline a better, narrower rule that officers must apply. Perhaps it could tell officers that the search must be for the purpose of establishing inventory but must not go beyond what a reasonable officer would do when conducting an inventory search. Applying a reasonableness standard rather than allowing the officers to "exercise judgment" transforms the rule from an individual standard—one officer's judgment is surely different from another's—to a collective standard.

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177. State v. Boster, 539 P.2d 294, 299 (Kan. 1975), *overruled on other grounds by* State v. Fortune, 689 P.2d 1196 (Kan. 1984).

178. *Fortune*, 689 P.2d at 1203.

179. *See* State v. Shelton, 93 P.3d 1200, 1206 (Kan. 2004) (relying on both *Fortune* and *Boster*); *Vandevelde*, 138 P.3d at 783 (relying on *Fortune*).

180. *Shelton*, 93 P.3d at 1207.

181. *Id.* at 1209 (quoting Florida v. Wells, 495 U.S. 1, 4 (1990)).

182. *Id.*

6. Plain View/Plain Feel

In 2002, the Supreme Court of Kansas set out two different standards for the plain view exception to the warrant requirement. *State v. Graham* instructs that

> [u]nder the plain view exception to the search warrant requirement, a law enforcement official can seize evidence of a crime if "(1) the initial intrusion which afforded authorities the plain view is lawful; (2) the discovery of the evidence is inadvertent; and (3) the incriminating character of the article is immediately apparent to search authorities."[183]

However, *State v. Payne* instructs: "'[u]nder the plain view doctrine, if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant.'"[184] Despite "immediately apparent" connoting a one-hundred percent belief, "'[t]he legality of a law enforcement officer's seizure of property in plain view . . . is immediately apparent if there is *reasonable or probable cause* to associate the property with criminal activity.'"[185] Finally, while the two standards are seemingly alike, the *Payne* standard fails to include that the discovery of the evidence must be inadvertent. The court has yet to resolve this inconsistency. *State v. Graham* is the better standard; without it, pretextual stops will continue based solely upon an officer's hunch.

The plain view exception has been extended in two ways. First, it has been extended to work side-by-side with the emergency doctrine exception. Once it is established that a law official's entry is permissible, he "may seize any evidence that is in plain view during the course of [his] legitimate emergency activities."[186] Second, it has been extended to include "plain feel."[187]

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183. State v. Graham, 46 P.3d 1177, 1180–81 (Kan. 2002) (quoting State v. Canaan, 964 P.2d 681, 689 (Kan. 1998)).

184. State v. Payne, 44 P.3d 419, 427 (Kan. 2002) (quoting State v. Wonders, 952 P.2d 1351, Syl. ¶ 3 (Kan. 1998)).

185. *Id.* (quoting *Wonders*, 952 P.2d at Syl. ¶ 11) (emphasis added).

186. State v. Horn, 91 P.3d 517, 526 (Kan. 2004).

187. State v. Mendez, 66 P.3d 811, 818 (Kan. 2003).

7. Stop-and-frisk

Both the Kansas Constitution Bill of Rights and the *Fourth Amendment to the United States Constitution* assure each person's right to be secure in his or her person and property against unreasonable searches and seizures.[188] The law has recognized four types of encounters that occur between police officers and citizens.[189] The first type of encounter is consensual and is not considered a seizure.[190] The second type of encounter is an investigatory detention or *Terry* stop.[191] During an investigatory detention, a police 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.'"[192] The officer may demand the person's name and address and an explanation of the person's actions.[193] In addition, the officer may frisk the person for weapons if done for the officer's safety.[194] The third type of encounter is a public safety stop, which allows a law enforcement officer to approach an individual to check on his or her welfare. For this type of encounter, the officer must be able to articulate facts that indicate a concern for public safety.[195] The fourth type of encounter is an arrest.[196] To arrest an individual, a law enforcement officer must have a warrant, probable cause to believe there is a warrant for the person's arrest, or probable cause to believe that the person is committing, has committed, or is about to commit a crime.[197]

In *State v. Parker*, the Kansas Supreme Court held that a defendant would not have felt free to disregard the police and go about his business because his friend had just been searched and arrested. Consequently, that was the point the officers' encounter with defendant became an investigatory detention.[198] After receiving a report of men "hanging out" in a garage at an apartment complex, a Wichita police officer decided to

188. State v. Parker, 147 P.3d 115, 119 (Kan. 2006).
189. *Id.*
190. *Id.*
191. *Id.*; *see also* Terry v. Ohio, 392 U.S. 1, 18, 20 (1968) (allowing stops under reasonable suspicion).
192. *Parker*, 147 P.3d at 119 (quoting KAN. STAT. ANN. § 22-2402(1) (1995)).
193. *Id.* (citing § 22-2402(1)).
194. *Id.* (citing § 22-2402(2)).
195. *Id.*
196. *Id.*
197. *Id.* (citing KAN. STAT. ANN. § 22-2401 (Supp. 2006)).
198. *Id.* at 122.

see what the men were doing.[199] He drove his police car to the complex and up the driveway leading to the garage.[200] When the officer arrived at the garage, two men (one later identified as Mikkel Parker) approached the driver's side of the patrol car before the officer exited his vehicle.[201] The officer noticed that Parker was concealing his right hand and became concerned Parker was armed.[202] The officer exited the vehicle and asked both men to lift their shirts and turn around so he could determine if they were armed.[203] Once he confirmed that neither man had weapons, the officer asked one of the men (who identified himself as Hoover) if he had anything illegal.[204] Hoover replied he had a marijuana cigarette.[205] At that point, another officer arrived on the scene and searched Hoover.[206] During the search, the officer found a bag of marijuana and arrested Hoover while Parker watched.[207]

After Hoover was arrested, a third officer arrived on the scene and was asked to stay with Parker.[208] Parker then began acting "nervous, fidgeting and putting his hands in his pockets despite [the officer's] request for Parker to keep his hands out of his pockets."[209] Parker asked if he could leave and was advised he could not.[210] One of the officers then asked if Parker had "'anything on him.'"[211] Parker replied in the negative, but consented to being checked for drugs. He then pulled what appeared to be a plastic baggie from his pants pocket.[212] Parker then fled and the officers ran after him.[213] Once the police forced Parker to the ground, he discarded the plastic baggie and the officers retrieved it.[214] The contents were later confirmed to be crack cocaine.[215] Parker was subsequently charged and convicted of possession of cocaine.[216]

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199. *Id.* at 118.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Id.*
211. *Id.*
212. *Id.* at 118–19.
213. *Id.* at 119.
214. *Id.*
215. *Id.*
216. *Id.*

The majority determined that Parker consented to a search by complying with the police officer's request for him and Hoover to lift their shirts to show they were not armed.[217] The majority focused its analysis on determining when the officers made such a showing of authority that Parker would reasonably believe he was not free to leave.[218] The court held that this happened when Parker's companion, Hoover, was placed under arrest.[219] Furthermore, the court held that the evidence was insufficient to establish a reasonable suspicion that defendant had committed, was committing, or was about to commit a crime.[220] Consequently, the police had illegally detained Parker at the time when the officer asked him if he could check him for any contraband or drugs.

In a concurring opinion, Justices Beier, Allegrucci, and Lockett agreed with the court's holding that this became a stop-and-frisk search when the officer asked the defendant and his companion to lift their shirts so that the officer could be sure about whether they were armed. "This was a *Terry* search for the protection of the officer, and defendant's prompt compliance cannot be logically or legally equated with consent. Because the officer possessed no reasonable suspicion at that point in time to justify such a search, defendant's *Fourth Amendment* rights were violated."[221]

The logic of the concurring opinion is much more persuasive than that of the majority. The majority held in one sentence that "[a]lthough asking them to lift their shirts can be considered a search, both Hoover and Parker consented to the search by immediately complying with [the officer's] request without objection."[222] For its authority, the court cited two cases.[223] The first, *United States v. Baker*,[224] held that an officer was performing a reasonable *Terry* search by having a defendant raise his shirt above a suspicious-looking bulge.[225] The second, *Coronado v. State*,[226] held that "asking [a] defendant to raise her shirt was an unreasonable search because *there was no reasonable suspicion that she*

217. *Id.* at 122.
218. *Id.*
219. *Id.*
220. *Id.* at 123.
221. *Id.* at 124–25 (Beier, J., concurring) (citing Terry v. Ohio, 392 U.S. 1, 18 (1968)) (internal citation omitted).
222. *Id.* at 122 (majority opinion).
223. *Id.*
224. 78 F.3d 135 (4th Cir. 1996).
225. *Id.* at 138.
226. 79 P.3d 311 (Okla. Crim. App. 2003).

was armed and dangerous."[227] That case also heavily used *Terry* in its analysis to determine the search was not reasonable and, therefore, was not a valid *Terry* exception.[228] Consequently, even if having Parker lift his shirt to show he was not armed was a reasonable *Terry* stop (it is doubtful the police officer had a reasonable suspicion that the defendants were armed and dangerous), it still did not fall under the consent exception to the Fourth Amendment. What we have, then, is the Kansas court justifying a search as consensual by finding it similar to *Terry* searches when they are completely different exceptions to the Fourth Amendment.

In *State v. Hill*,[229] the Kansas Supreme Court drew one distinction between a *Terry* stop and an arrest. A police officer was watching a suspected drug house while waiting for the issuance of a search warrant.[230] While he was waiting, he noticed two individuals get into a truck and drive away from the house.[231] As the truck drove away, the officer decided to follow it.[232] The officer followed the truck to a convenience store where the defendant parked and went inside while the other occupant remained in the vehicle. [233] When Hill left the convenience store and drove to another location, the officer continued to follow the truck.[234] Subsequently, Hill stopped the truck in the street and let his passenger out.[235]

"Because he was concerned that the two would separate and get away, [the officer] exited his vehicle, drew his gun, ordered Hill out of the truck, and then commanded Hill and [his companion] to lie on the ground."[236] "Other officers immediately arrived on the scene" and were told to handcuff Hill and his passenger.[237] "The officers then searched [both men] for weapons and contraband."[238] None were found on Hill.[239]

Both men were subsequently questioned and Hill was arrested for and convicted of the manufacture of methamphetamine.[240] He

227. *Parker*, 147 P.3d at 122 (citing *Coronado*, 79 P.3d at 312) (emphasis added).
228. *Coronado*, 79 P.3d at 311–12.
229. 130 P.3d 1 (Kan. 2006).
230. *Id.* at 4.
231. *Id.*
232. *Id.* at 5.
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.*

unsuccessfully argued, to the district judge, that he was arrested without probable cause when the officer ordered him to get out of the pickup at gunpoint, handcuffed him, frisked him, and interrogated him.[241] On appeal, "Hill argued . . . that the trial court should have suppressed both his statements to the police and the house key found in his pocket because they were obtained during an unreasonable search in violation of his *Fourth Amendment* rights."[242]

Not surprisingly, the Kansas Supreme Court held a defendant handcuffed at gunpoint was under arrest and, therefore, the officer needed probable cause to arrest the defendant to avoid suppression of resulting evidence.[243] While the detaining officer testified he did not believe the defendant was under arrest at the time,[244] the court relied on the totality of the circumstances test laid out in *State v. Morris*.[245] It then concluded that the encounter between the defendant and the police officer was an arrest "based on what a reasonable person would believe under the totality of the circumstances surrounding the incident."[246] Using this test, the Kansas Supreme Court concluded that an individual handcuffed at gunpoint is under arrest.[247] Consequently, the court held that this case did not fall under the *Terry* stop exception to the warrant requirement.[248]

According to chapter 22, section 2405 of the Kansas Statutes, "[a]n arrest is made by an actual restraint of [a] person . . . or by his submission to custody."[249] While it may strike one as self-evident that being handcuffed at gunpoint is an "actual restraint of a person" and, consequently, an arrest, the trial court, nevertheless, got this one wrong and the Kansas appellate courts appropriately corrected the error.

F. Administrative Searches and Seizures

The United States Court of Appeals for the Tenth Circuit placed a limit on the ability of Kansas to enforce a provision of a law allowing for the random searching of a noncommercial vehicle reasonably believed to

241. *Id.*
242. *Id.* at 6.
243. *Id.* at 7.
244. *Id.*
245. *Id.* (citing State v. Morris, 72 P.3d 570, 576–77 (Kan. 2003)).
246. *Id.* at 8.
247. *Id.*
248. *Id.* at 12–13.
249. KAN. STAT. ANN. § 22-2405(1) (1995).

be commercial in nature.[250] Under Kansas law, individuals using commercial vehicles are subject to random administrative searches to check for compliance with safety regulations.[251] In *United States v. Herrera*, a Kansas state trooper encountered the defendant in a pickup truck driving east on the Kansas Turnpike.[252] "The trooper believed Herrera's truck to be a commercial vehicle under Kansas law because it had 'dual wheels on the back and a utility bed with a heavy lift hydraulic lifter on the back, and also there was a sign on the back, a paint sign for a paint company.'"[253] The vehicle, however, fell one pound short of the weight required to be designated a commercial vehicle.[254] After stopping the defendant, the state trooper arrested Herrera because he could not produce proof of insurance as required under Kansas law.[255] "The trooper then conducted an inventory search of the truck, in preparation for towing the truck from the highway following [the defendant's] arrest. During that inventory search, the state trooper discovered twenty-three kilograms of cocaine hidden amidst building materials in the truck's bed."[256]

"[T]he Government [did] not seek to justify its stop of [the defendant] based upon the existence of probable cause or reasonable suspicion that he was involved in criminal activity. Rather, the Government justifie[d] the stop only as a random regulatory inspection."[257] "An administrative search is . . . premised on the individual subject to the warrantless seizure and search knowingly and voluntarily engaging in a pervasively regulated business, and on the existence of a statutory scheme that puts that individual on notice that he will be subject to warrantless administrative seizures and searches."[258]

The court went on to conclude that because the defendant's truck was not a commercial vehicle subject to the Kansas regulatory scheme, that scheme could not justify the state trooper's stopping the defendant.[259] Because that is the only justification the Government offered for this stop, it violated the Fourth Amendment.[260]

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250. United States v. Herrera, 444 F.3d 1238, 1246–48 (10th Cir. 2006).
251. *Id.* at 1241 (citing KAN. STAT. ANN. § 74-2108(b) (1995)).
252. *Id.* at 1240–41.
253. *Id.*
254. *Id.* at 1241.
255. KAN. STAT. ANN. § 40-3104(a) (Supp. 2006); *Herrera*, 444 F.3d at 1241.
256. *Herrera*, 444 F.3d at 1241.
257. *Id.* at 1246.
258. *Id.*
259. *Id.* at 1248.
260. *Id.*

While there are no published Kansas cases on point, it seems likely Kansas courts would agree with this result. When it last addressed the issue of administrative searches, the Kansas Court of Appeals relied heavily on the United States Supreme Court's ruling that "[i]ndividuals engaged in a closely regulated industry have a significantly reduced *expectation* of privacy."[261] Because the justification hinges on the voluntariness of engagement in activity that will subject an individual to warrantless searches, it stands to reason that a person not engaging in such activity has not waived any of his or her expectations of privacy and the whole justification for the exception evaporates.

It is important to note that this is not a departure or narrowing of the administrative search exception to the warrant requirement. The Tenth Circuit made it clear that this exception is alive and well in Kansas when it decided *United States v. Rios-Pinela*.[262] In this case, the defendant was stopped by a Kansas Highway Patrolman while driving a truck tractor-semi trailer on Interstate-35 near Emporia, Kansas.[263] The patrolman making the stop was a certified Commercial Vehicle Safety Alliance (CVSA) inspector and was required to inspect fifty commercial motor vehicles annually.[264] "He first saw the commercial vehicle as it exited the Kansas turnpike in Emporia, Kansas. He noticed that it was from Arizona and that it had an extremely high DOT number, indicating that the trucking company was newly formed. About five minutes later, he saw the tractor-trailer fueling . . . ." [265] He ran the truck and trailer tags, and learned that they were registered to two individuals from Phoenix, not the company whose name was on the truck.[266] The Kansas trooper then "left the area to back up another trooper on a stop, then returned to the tollgate where he saw the truck enter the turnpike and drive north. He then stopped defendant's vehicle for the sole purpose of conducting a CVSA inspection."[267] The stop eventually led to the discovery of several bundles of cocaine.[268]

The defendant filed a motion to suppress or, alternatively, a motion to dismiss claiming that the initial stop violated his Fourth Amendment

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261. State v. Bone, 6 P.3d 914, 916 (Kan. Ct. App. 2000) (citing New York v. Burger, 482 U.S. 691, 700–02 (1987)) (emphasis added).

262. No. 06-40073-01-SAC, 2006 WL 2710330 (D. Kan. Sept. 30, 2006).

263. *Id.* at *1.

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at *2.

rights.[269] The court held that because the defendant was "driving a truck tractor-semi trailer through Kansas, defendant subjected himself to the [Kansas] laws regulating motor carriers."[270] The court also found that Kansas "pervasively" regulates its motor carriers of property for hire.[271] The court then went on to see whether this fell under the umbrella of a regulatory search.

The court used a three-part test to determine whether a warrantless inspection in a closely regulated business is reasonable.[272] First, there must be a "substantial" government interest in creating the scheme authorizing the inspection.[273] "'Second, the warrantless inspections must be necessary to further the regulatory scheme.'"[274]

> "Finally, the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant. In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers."[275]

The court then found that Kansas motor carrier inspection laws serve a substantial government interest, the stop performed by the patrol officer was necessary to further that interest, and the regulations perform the same basic functions as a warrant.[276] Therefore, there was no violation in the initial stop of the vehicle by the trooper.[277]

This case seems appropriately decided. The only difference between *Rios-Pinela* and *Herrera* is the voluntary waiver of Fourth Amendment protection. Here, unlike *Herrera*, the driver waived his Fourth Amendment protection by voluntarily engaging in a heavily regulated business.

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269. *Id.* at *1.
270. *Id.* at *2.
271. *Id.*
272. *Id.* at *3 (citing United States v. Herrera, 444 F.3d 1238, 1246 (10th Cir. 2006)).
273. *Id.* (citing *Herrera*, 444 F.3d at 1246).
274. *Id.* (quoting *Herrera*, 444 F.3d at 1246).
275. *Id.* (quoting *Herrera*, 444 F.3d at 1246).
276. *Id.*
277. *Id.*

G. *Exclusionary Rule*

The United States Supreme Court decided in *Hudson v. Michigan* that evidence obtained in violation of the knock-and-announce rule does not necessarily need to be excluded from trial.[278] The Court held that evidence seized in violation of the knock-and-announce rule could be used against a defendant in a later criminal trial consistent with the Fourth Amendment.[279] Furthermore, the Court held that judges cannot suppress such evidence for a knock-and-announce violation alone.[280]

Unlike previous cases addressing the knock-and-announce requirement, the Court did not need to address the question of whether the knock-and-announce rule was violated, as the State of Michigan conceded the violation at trial.[281] The question before the Court was regarding the remedy that should be afforded Hudson for the violation.[282] The majority noted that the Court first adopted an *exclusionary rule* for evidence seized without a warrant in *Weeks v. United States*.[283] This rule was later applied to the states in *Mapp v. Ohio*,[284] but limited by later decisions.[285] After discussing these decisions, the Court wrote:

> [E]xclusion may not be premised on the mere fact that a constitutional violation was a "but-for" cause of obtaining evidence. Our cases show that but-for causality is only a necessary, not a sufficient, condition for suppression. In this case, of course, the constitutional violation of an illegal *manner* of entry was *not* a but-for cause of obtaining the evidence.[286]

The Court then distinguished evidence seized in warrantless searches from evidence seized in searches that violated the knock-and-announce rule, noting that:

> Exclusion of the evidence obtained by a warrantless search vindicates [the] entitlement [of citizens to shield "their persons, houses, papers, and effects" from the government's scrutiny]. The interests protected

278. Hudson v. Michigan, 126 S. Ct. 2159, 2164 (2006).
279. *Id.* at 2170–71.
280. *Id.* at 2171.
281. *Id.* at 2163.
282. *Id.*
283. *Id.* (citing Weeks v. United States, 232 U.S. 383 (1914)).
284. *Id.* (citing Mapp v. Ohio, 367 U.S. 643 (1961)).
285. *Id.* at 2163–64.
286. *Id.* at 2164.

> by the knock-and-announce requirement are quite different—and do not include the shielding of potential evidence from the government's eyes.[287]

The interests protected by the knock-and-announce rule, according to the Court, are to protect police officers from surprised residents retaliating in presumed self-defense, to protect private property from damage, and to protect the "privacy and dignity" of residents.[288] The Court noted that the knock-and-announce rule "has never protected . . . one's interest in preventing the government from seeing or taking evidence described in a warrant."[289]

The majority opinion noted that the social costs outweighed the deterrent benefits of excluding evidence for knock-and-announce violations.[290] The Court stated that "suppression of all evidence[] amount[s] in many cases to a get-out-of-jail-free card."[291] The Court then stated that exclusion of evidence has little or no deterrent effect, especially considering that deterrents—*civil action*s against the police department and internal discipline for officers—already exist.[292] The Court concluded with praise for the "increasing professionalism" of the police force over the last half-century, which it noted makes some of the concerns expressed in past decisions obsolete.[293]

Perhaps the most important part of the decision came from Justice Kennedy's concurrence. Agreeing in part with Justice Scalia's majority opinion—that a violation of the knock-and-announce rule does not require a court to exclude seized evidence—Justice Kennedy emphasized that the Court has not disregarded the knock-and-announce rule through its decision and that the exclusionary rule continues to operate in other areas of criminal law per the Court's precedent.[294] Justice Kennedy, agreeing with the majority that civil remedies and internal police discipline are adequate deterrents for knock-and-announce violations, went on to note that if a pattern of police behavior emerges that demonstrates disregard for the knock-and-announce rule, "there would be reason for grave concern."[295]

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287. *Id.* at 2165.
288. *Id.*
289. *Id.*
290. *Id.* at 2165–66.
291. *Id.* at 2166.
292. *Id.* at 2166–68.
293. *Id.* at 2168.
294. *Id.* at 2170 (Kennedy, J., concurring).
295. *Id.* at 2170–71.

It seems that the reason law enforcement has experienced "increasing professionalism" is that police departments fear having improperly gathered evidence excluded at trial. Without this disincentive, fear of public pressure or personal safety will provide police officers with substantially less incentive to knock and announce their presence before entering the homes of suspected criminals.

While the United States Supreme Court was narrowing application of the exclusionary rule, the Kansas Supreme Court was expanding the rule to include fruits of a warrant executed in a county where the issuing judge lacked authority. In *State v. Rupnick*,[296] police received a warrant from a magistrate judge residing in Wabaunsee County to examine the contents of the defendant's laptop computer.[297] The search warrant was then executed in Shawnee County.[298] The police subsequently performed a search of the computer's hard drive pursuant to the warrant and retrieved several dozen stolen computer files.[299]

After finding that the initial warrantless seizure of the laptop was excepted from the warrant requirement,[300] the court determined that the subsequent search of the hard drive did not fit into any of the warrant exceptions.[301] Consequently, the warrant needed to be valid for the hard drive search to stand. In evaluating the validity of the search warrant, the court determined it did not meet the requirements of chapter 22, section 2503 of the Kansas Statutes, stating a warrant is only valid when executed in the county in which the signing judge presides.[302] The court then addressed whether the error was a harmless "technical irregularity" under section 2511.[303] It concluded the warrant's "execution outside the jurisdiction designated by the statute was not a mere technical irregularity. It affected the substantial rights of the defendant, enabling his conviction on a felony."[304] Thus, concluded the court, the evidence from that illegal search should have been excluded.[305]

While it would be easy to conclude that a judge issuing a warrant from the wrong county is a mere "technical irregularity" under section 2511, the court was correct in striking it down. Had the court ruled that

296. 125 P.3d 541 (Kan. 2005).
297. *Id.* at 546.
298. *Id.*
299. *Id.* at 546–47.
300. *Id.* at 548.
301. *Id.* at 550.
302. *Id.* at 550–52 (citing KAN. STAT. ANN. § 22-2503 (1995)).
303. *Id.* at 551.
304. *Id.* at 552.
305. *Id.*

complete noncompliance with section 2503 was only a "technical irregularity," it would have effectively invalidated the statute by judicial fiat when there was no compelling reason to do so.

H. Police Interrogations

1. Custodial Interrogations

Miranda warnings are usually required when a person is in custody and subject to interrogation.[306] The right to remain silent must first be waived in order for a confession to be admissible in a court proceeding.[307] However, Kansas courts have maintained that some confessions can be voluntary when made before the *Miranda* warnings have been given, making them admissible. In *State v. Stevens*, a police officer was investigating a possible criminal trespass when he noticed a Jeep parked in the street.[308] Two people were sitting in the Jeep and the officer saw the driver get out, stumble, and walk unsteadily toward the residence.[309] The officer approached the man, the defendant Stevens, and began to speak with him.[310] Smelling alcohol, the officer asked Stevens if he had been drinking and Stevens admitted he had.[311] The officer then asked why Stevens had gotten out of the driver's side of the car, but Stevens did not respond.[312] After finding alcoholic beverage containers in the car, the officer once again told Stevens he suspected him of driving under the influence and Stevens admitted to drinking and driving.[313] After refusing to complete sobriety tests, Stevens declared "he was driving, that [Officer] Justice was going to do what he wanted, and that to 'go ahead and get through with it.'"[314] Stevens was then arrested.[315]

Stevens argued on appeal—after a jury convicted him of operating or attempting to operate under the influence of alcohol—that his statement made to the officer should be suppressed because it was made during a

306. Berkemer v. McCarty, 468 U.S. 420, 434 (1984).

307. State v. Stevens, 138 P.3d 1262, 1274 (Kan. Ct. App. 2006), *review granted*, No. 05-94187-AS, 2006 Kan. LEXIS 743 (Kan. Dec. 19, 2006).

308. *Id.* at 1267.

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

custodial interrogation without a *Miranda* warning.[316] The appellate court did not agree and decided that Stevens was not in custody when he commented that he had been drinking and driving.[317] When determining whether statements are made while a person is in custody, the court looks at whether a "'reasonable person in the suspect's position would have understood the situation.'"[318] In this case, the officer was at the scene to check on the trespass call when he noticed Stevens and began talking to him.[319] Stevens's admission to drinking and driving was voluntary—he had not been arrested, nor was he restrained from acting in a certain way.[320] Therefore, Stevens was not in custody and was not subject to an interrogation, thus his confession was allowed.[321]

The logic the court used to uphold the confession is flawed. The court placed heavy emphasis on the fact that the officer was not there to investigate a possible drunk driver, but a trespass call. This fact should not matter. The officer obviously had the authority to arrest Stevens if he admitted to something even when the officer was simply there to investigate another crime. The court should have looked more into whether Stevens felt free to leave in this situation and placed less emphasis on why the officer was at the scene in the first place.

a. Defining Custodial Interrogations

The Kansas Court of Appeals decided another case, defining custodial interrogation and when *Miranda* warnings must be read. In *State v. Woolverton*,[322] the defendant was arrested for making harassing phone calls to the mother of his child.[323] The mother had originally called the defendant to ask why he had not picked up their daughter for visitation.[324] After an argument, she hung up on him.[325] The defendant began to repeatedly call her back until she finally just let her voicemail pick up the calls.[326] The voicemails he left were angry and threatening.

316. *Id.* at 1267, 1274.
317. *Id.* at 1274.
318. *Id.* (quoting State v. Jacques, 14 P.3d 409, 420 (Kan. 2000)).
319. *Id.*
320. *Id.*
321. *Id.*
322. 131 P.3d 1253 (Kan. Ct. App. 2006), *review granted*, 2006 Kan. LEXIS 704 (Kan. Nov. 8, 2006).
323. *Id.* at 1257.
324. *Id.* at 1256–57.
325. *Id.* at 1257.
326. *Id.*

On one particular message, the defendant threatened to kill the mother.[327] The police traveled from Johnson County, Kansas to Missouri where the defendant lived to talk about the incident.[328] The defendant asked if he had to speak with the officers and they told him that they would return with a warrant to take him to the police station if he did not.[329] The officers also told Woolverton that he would not be going to jail and he was free to return to his apartment after they were done talking.[330] At this time, the defendant confessed to the threatening phone calls.[331] During the questioning, his girlfriend came out of the apartment to check on him.[332] The interview lasted about an hour, there were no handcuffs or weapons drawn, and Woolverton was not taken into custody after it was over.[333] At a later time, police arrested and charged Woolverton with criminal threat and telephone harassment.[334]

The defendant argued that this encounter was a custodial interrogation and that he was never *Mirandized*.[335] The trial court found that the defendant was not in custody when the statements were made, and, therefore, admitted the statements into evidence.[336] In his appeal, Woolverton argued he was under custodial interrogation because a reasonable person would not have felt free to leave in the same circumstances.[337] The court looked to many factors to determine whether Woolverton was under custodial interrogation: when and where the interrogation occurred, the length of time of the interrogation, how many officers were present, whether he was being questioned as a suspect or a witness, what each person said during the encounter, whether there was actual restraint or something comparable to restraint, how he got to the place of questioning, and the events that happened after the interrogation (*i.e.* if the person was free to leave or was taken to jail).[338] The appellate court affirmed that Woolverton was not in custody.[339] The interview location was chosen by the defendant, there were no handcuffs, and other

327. *Id.*
328. *Id.* at 1262.
329. *Id.*
330. *Id.*
331. *Id.* at 1263.
332. *Id.*
333. *Id.*
334. *Id.* at 1257.
335. *Id.* at 1263.
336. *Id.*
337. *Id.*
338. *Id.*
339. *Id.* at 1264.

people like the defendant's girlfriend could come check on him.[340] Further, he was also allowed to return to his apartment after the interview.[341] While the officers did tell him that he could either speak with them then or they would get a search warrant, this indicated to Woolverton that he had a choice to talk to the officers or not.[342] The defendant was not in custody, and, therefore, did not need *Miranda* warnings.

b. Invocation of Right to Remain Silent

In *United States v. Nelson*,[343] the court decided that statements made after *Miranda* warnings, but before the defendant actually invoked his right to silence, would be allowed to be used in trial.[344] In *Nelson*, the police arrested the defendant, Mr. Nelson, served a search warrant, searched his apartment, and returned to the police station.[345] At this point Nelson was read his *Miranda* warnings and asked if he would sign a waiver of rights.[346] The defendant changed the subject, asking instead about the search of his apartment.[347] The detective responded by presenting a list of drugs found in the apartment to Nelson.[348] He replied with "'I guess I'm ready to go to jail then.'"[349]

The defendant challenged this statement as a product of a custodial interrogation.[350] The district court denied this argument because the statement was not a direct response to any question put forth by a police officer, thus there was no interrogation.[351] The defendant asserted that a conversation can be an interrogation even without direct questioning if the police use other words or actions they "'know are reasonably likely to elicit an incriminating response from the suspect.'"[352] The Tenth Circuit did not agree with this argument based on the facts presented.[353] The defendant never answered the officer's question about waiving his

340. *Id.*
341. *Id.*
342. *Id.*
343. 450 F.3d 1201 (10th Cir. 2006), *cert. denied*, 127 S. Ct. 326 (2006).
344. *Id.* at 1211–12.
345. *Id.* at 1210.
346. *Id.*
347. *Id.*
348. *Id.*
349. *Id.* (emphasis omitted).
350. *Id.*
351. *Id.*
352. *Id.* at 1211 (quoting United States v. Rambo, 365 F.3d 906, 909 (10th Cir. 2004)).
353. *See id.* (finding this case distinguishable from *Rambo*).

rights, but rather asked another question about his apartment.[354] After the defendant had made his statement, the officer quickly ended the conversation.[355] The *Miranda* warnings had been given before the statement was made, but Nelson had never invoked his right to silence.[356] Therefore, even if this had been a custodial interrogation, the officers still did not violate *Miranda*.[357] While Nelson tried to avoid this by saying the statement itself was an invocation of his right to silence, the court decided that the statement was too ambiguous for a reasonable police officer to understand that it was meant to be an invocation of the right to remain silent.[358]

While this particular case was decided correctly based on the facts, the decision could lead to a slippery slope of admitting statements after *Miranda* warnings are given, but before a waiver of the right to remain silent has been obtained. The right to remain silent should be an absolute right that can only be waived by the person in custody. If courts allow statements to become admissible when the person in custody has not actually waived his or her rights, this could lead to a *Miranda*-loophole increasingly used by officers. Officers who know this loophole may soon find ways to get incriminating statements to become admissible without actually asking direct questions. This technique could be dangerous and is contrary to the primary purpose of the right to remain silent—to protect people in custody.

2. Interpreters

Kansas courts upheld the decision that an interpreter is not automatically required during an interrogation if English is not the primary language of the person in custody. A totality of the circumstances test is used instead. In *State v. Pham*,[359] the defendant was arrested for breaking into a family's home, tying up the family members, stealing jewelry, and fatally shooting one of the family members.[360] Pham was arrested and asked if he needed an interpreter. He replied he did not.[361] The officer then gave Pham his *Miranda* warnings by having

354. *Id.*
355. *Id.*
356. *Id.*
357. *Id.*
358. *Id.* at 1211–12.
359. 136 P.3d 919 (Kan. 2006).
360. *Id.* at 927–28.
361. *Id.* at 927.

Pham read them off a card.[362] The defendant argued on appeal that not providing him an interpreter was a violation of chapter 75, section 4351(e) of the Kansas Statutes.[363] The statute declares that an interpreter should be given to a person who is about to be interrogated and English is not his or her primary language.[364] It also states that "'the trial court must still determine whether an in-custody statement was freely, voluntarily and knowingly given, with knowledge of the Miranda rights.'"[365] Having an interpreter does not automatically guarantee the admissibility of a confession and the totality of circumstances test must still be used.[366] Here, Pham's interrogation had been videotaped.[367] The district court held that there was no evidence of a significant amount of misunderstanding.[368] Pham had lived in America for more than twenty years and the totality of circumstances indicated that an interpreter was not needed and that the confession was made knowingly and voluntarily.[369]

3. Confessions Following an Arrest Without Probable Cause

The Kansas Supreme Court decided that it is possible for an arrest without probable cause to so taint a confession from an interrogation that the confession is inadmissible even if the person being interrogated had been *Mirandized.* In *State v. Hill*,[370] the defendant, Hill, was arrested on a drug charge and read his *Miranda* rights.[371] After the warnings, the defendant admitted in a subsequent interrogation that he had used methamphetamines during a particular time period.[372] The arrest, however, was thrown out for lack of probable cause.[373] Therefore, the question was whether, since the arrest was not valid, the subsequent confessions and statements should also be excluded. The court laid out four factors to consider when determining this issue: whether the *Miranda* warnings were given, the immediacy of the arrest and the

362. *Id.*
363. *Id.* at 930.
364. *Id.*
365. *Id.* at 931 (quoting State v. Zuniga, 703 P.3d 805, 808 (Kan. 1985)) (emphasis omitted).
366. *Id.*
367. *Id.*
368. *Id.* at 931–32.
369. *Id.* at 932.
370. 130 P.3d 1 (Kan. 2006).
371. *Id.* at 5.
372. *Id.*
373. *Id.* at 12.

subsequent statements, the flagrancy of the wrongdoing of the officers, and any other circumstances that should be taken into account on a case-by-case basis.[374]

The court applied the four-factor test to the facts and held the defendant's statements should be suppressed. First, nine hours elapsed between the arrest and the interrogation when Hill was not free to leave.[375] There were also no intervening events to separate the unlawful arrest and the interrogation.[376] The only event in between was a search of the apartment where the defendant had allegedly manufactured methamphetamine.[377] Therefore, the unlawful arrest and the interrogation directly related to each other.[378] The only factor that favored allowing the statements in were that the defendant was *Mirandized*.[379] This one factor, however, was not enough. The Kansas Supreme Court decided that when there is no intervening event to separate the unlawful arrest and the statements made during an interrogation, the statements are inadmissible.[380]

4. Duties of Police Officers During Interrogations

a. Obligation to Protect Suspect from Making a Statement

A police officer is under no obligation to stop or protect a suspect from making an incriminating statement. In *State v. Sykes*,[381] an officer had been driving around a neighborhood when he noticed the defendant waving at another car to pull over.[382] The officer observed the defendant Sykes approach the car and extend his hand to the driver.[383] In his hand, there appeared to be a plastic bag with off-white rocks in it.[384] Another officer approached, asked if he could pat the defendant down, and then decided to search his pockets.[385] In the pockets, there were plastic bags

374. *Id.* at 13.
375. *Id.*
376. *Id.* at 14.
377. *Id.*
378. *Id.*
379. *Id.* at 13.
380. *Id.* at 14.
381. 132 P.3d 485 (Kan. Ct. App. 2006), *review denied*, No. 05-94075-A, 2006 Kan. LEXIS 504 (Kan. Sept. 19, 2006).
382. *Id.* at 490.
383. *Id.*
384. *Id.*
385. *Id.*

which contained what appeared to be crack cocaine.[386] Sykes was placed under arrest.[387] As the officers were about to carry out a field test on the rocks, Sykes motioned to the officer and told the officer that "the rocks would test positive as cocaine and . . . he had planned to sell the cocaine to make some money because he was out of work."[388] Sykes was given his *Miranda* warnings after making these statements.[389]

The defendant tried to suppress the statements made before the *Miranda* warnings.[390] The district court denied this motion.[391] Sykes argued on appeal that the officer had a duty to read *Miranda* directly after Sykes told him the rocks would test positive for cocaine and before confessing an intent to sell the cocaine.[392] The Kansas Court of Appeals noted the police were not allowed to say or do anything that they reasonably knew would likely extract a damaging statement.[393] Here, though, the officer did not try to elicit any information, and it was Sykes who called the officer over to talk.[394] The court of appeals decided that "[a] suspect's privilege against self-incrimination does not impose a duty upon police officers to prevent the suspect from making incriminating statements."[395] The court further discussed that the *Miranda* warnings were enforced in order to prevent coercive methods for interrogation.[396] The police officer in this case was not required to interrupt the defendant with *Miranda* warnings before he made further voluntary statements.[397]

b. Fairness of Officer Tactics

The Kansas Supreme Court also ruled on a case significant to the fairness of police tactics during interrogation. In *State v. Ackward*,[398] the defendant was arrested for felony murder.[399] The defendant argued that his statements to the police were involuntary on many different

386. *Id.*
387. *Id.*
388. *Id.*
389. *Id.*
390. *Id.* at 496.
391. *Id.*
392. *Id.*
393. *Id.* at 497.
394. *Id.*
395. *Id.*
396. *Id.*
397. *Id.*
398. 128 P.3d 382 (Kan. 2006).
399. *Id.* at 385.

grounds.[400] The test to decide this issue of voluntariness is the totality of circumstances.[401]

First, the defendant argued that the duration of the interrogation was long and led to his statements not being voluntary.[402] He claimed that the interrogation lasted around nine hours.[403] The court decided the extended nature of the interrogation did not infringe on the defendant's rights because he was given numerous breaks.[404] The court also noted that the defendant could not be successful in arguing that he felt isolated from the outside world, because he was able to have his cell phone on during the questioning.[405] Finally, the court did not find persuasive defendant's argument that he was coerced based on his age or intellect. He was twenty years old at the time of the questioning and could communicate with the police about the matter; thus the court held there was no coercion, and the statements were voluntary.[406]

The court next addressed whether the officers handled the interrogation fairly.[407] The defendant made many arguments contending that they did not. First, the defendant claimed that the police officers gave him false information to coerce a confession, such as telling him there were eyewitnesses who saw him at the location of the shooting, that there was a police report showing that the defendant always carried a gun, and that his hands would be swabbed to check for gun residue, which would inform the police whether he had shot a gun in the past forty-eight hours.[408] The Kansas Supreme Court noted previous cases holding that false information alone was not fatal to confessions, and that there must be other factors present for the statements to be involuntary.[409]

The next fairness issue involved the religious references that the police made to the defendant.[410] The police officers engaged in a religious discussion with the defendant about the afterlife.[411] The court stated that the defendant was not so immature that he could not handle

400. *Id.* at 387.
401. *Id.*
402. *Id.* at 388.
403. *Id.*
404. *Id.*
405. *Id.*
406. *Id.*
407. *Id.*
408. *Id.*
409. *Id.* at 389.
410. *Id.*
411. *Id.*

the religious discussions.[412] The religious references continued even after the defendant had asked for an attorney, but statements made during this portion of the questioning were already suppressed by the trial court.[413] Regarding the admissible statements, the court, in considering the age of the defendant, decided that religious references alone could not be considered fatal to the statements.[414]

Finally, the defendant argued the officers lied about the law in two ways.[415] First, he claimed they lied about the benefits for the defendant if he confessed.[416] The officers indicated that if the defendant confessed, he would receive more lenient treatment.[417] The defendant cited cases in which the courts had decided that confessions were not voluntary if they were coerced through hope or false benefit.[418] The Kansas Supreme Court, however, cited a case in which the officers told a defendant that his lack of cooperation would work to his detriment.[419] Even in that circumstance, the court said the officer's statement does not make "the confession involuntary per se."[420] Therefore, the statement here was not coerced by false benefit.[421] The second alleged misrepresentation of the law was that the officer stated that the defendant would be better off if the shooting had occurred in certain ways.[422] During interrogation the police officer began distinguishing to the defendant the difference between first-degree murder and reckless homicide, and the difference in punishments between the two.[423] The court recognized that this probably was misleading.[424] The officer indicated that the homicide might have been a case of self-defense, but that defense would not apply in this case, because the victim was shot in the back.[425] The intent of the officer was to make the defendant think this defense applied to him.[426] The court, however, still decided that the statements by the officer were more

412. *Id.* at 390.
413. *Id.*
414. *Id.*
415. *Id.* at 390–91.
416. *Id.* at 390.
417. *Id.*
418. *Id.*
419. *Id.* at 390–91.
420. *Id.* at 391.
421. *Id.* at 392.
422. *Id.* at 391.
423. *Id.*
424. *Id.*
425. *Id.* at 392.
426. *Id.*

exaggeration than false statements.[427] The court also noted that if the defendant had been a law enforcement official, the defense would have applied to him.[428] Therefore, under the totality of the circumstances, the statements were found to be voluntary and admissible in court.[429]

The Kansas Supreme Court in *Ackward* did not correctly apply the totality of the circumstances test. The court stated that the trial court:

> found Ackward was mature, did not appear to be under stress, and was not swayed by religious references or misstatements of law or fact. The religious references were subtle, and the mistakes in fact and law were not egregious, and in some cases they were more an exaggeration rather than false . . . . There was no evidence that Ackward had a low IQ or below normal intelligence.[430]

This analysis by the court, though, does not add up. Earlier in the opinion, the court discussed how certain factors alone did not make the statements coerced or unfair. It appears, though, that there were many different factors in the analysis that, while they alone would not have made the statements fatal, under the totality of circumstances, these factors should have caused the statements to be suppressed.

First, the court glazed over the issue that the officer misrepresented the defenses that the defendant could use. As a result, the defendant probably thought that self-defense could apply to him, when in actuality the defense would not have applied to this defendant. The court even admits this was a misrepresentation, but the court leaves it at that and just reiterates the totality of circumstances test without much more consideration to this factor.[431]

The main argument, though, is that the defendant's statements were likely coerced by other factors. When combined, these factors indicate that the statements should have been suppressed. The court misanalyzed the misrepresentation resulting from the promising of benefits to the defendant. The defendant here could have argued that his statement was directly influenced by the hope of benefiting from confessing, coupled with the false information offered by the police, which probably led him to fear that the police had more information than they did. This reasoning is arguably coercive. Without the false information and the hope of better treatment, the defendant might not have confessed and was

427. *Id.*
428. *Id.*
429. *Id.*
430. *Id.*
431. *Id.*

therefore coerced. By arguing this factor along with the false information that the officers provided, the confession should not have been admitted.

I. Witness Psychological Examination

Recently, the Kansas Supreme Court, for the first time, decided a case involving a psychological examination of a noncomplaining witness.[432] Under Kansas law, trial courts have discretion to decide whether to require a witness to undergo psychological examination.[433] In *State v. Cook*, the defendant contended that by refusing to order the State's key witness to submit to a psychological examination, the trial court denied him his Sixth Amendment right to confront a witness testifying against him.[434] The Kansas Supreme Court used an abuse of discretion standard, similar to the standard used by other jurisdictions faced with this same issue, to evaluate the trial court's decision to forego psychological examination of a noncomplaining witness.[435]

The trial court cited a previous Kansas Supreme Court decision, *State v. Gregg*,[436] as precedent for not requiring Rudell, the noncomplaining witness, to undergo a psychological examination.[437] In *Gregg*, the court denied the defendant's motion for a court-ordered psychological examination of an eight-year-old child victim.[438] Although agreeing that a trial court could "order a psychiatric examination of the complaining witness . . . if the defendant presents a compelling reason for such an examination,"[439] the court refused to require the child to undergo psychological examination because Gregg failed to provide a specific reason why the child should be examined (such as a history of mental instability or previously filing false charges).[440] Thus, the court concluded that requiring her to undergo a psychological examination would have amounted to "a fishing expedition embarked upon in the hope something damaging and admissible in the trial would be unearthed."[441]

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432. State v. Cook, 135 P.3d 1147, 1161 (Kan. 2006).
433. *Id.* (citing State v. Price, 61 P.3d 676 (Kan. 2003)).
434. *Id.*
435. *Id.* (citing State v. Calliham, 57 P.3d 220, 225 (Utah 2002)).
436. 602 P.2d 85 (Kan. 1979).
437. *Cook*, 135 P.3d at 1161 (citing *Gregg*).
438. *Gregg*, 602 P.2d at 92.
439. *Id.* at 91.
440. *Id.* at 92.
441. *Id.*

The defendant, Cook, also cited *Gregg*, arguing that his request was not a "fishing expedition" because of Rudell's history: drug abuse, depression, and the report from a psychologist who had "diagnosed him with a schizoaffective disorder . . . [stating he] experienced disorganized thinking, auditory hallucinations, agitation, and suicidal ideations."[442] In reaching its decision, the Kansas Supreme Court emphasized both that Rudell's history of mental instability was over ten years old and was the subject of cross-examination, and that Cook failed to provide any authority that these issues created "compelling reasons why the witness should have been required to submit to psychological testing prior to testifying."[443] Thus, the court held that the trial court did not abuse its discretion when it denied Cook's motion to subject Rudell to a psychological examination.[444]

The Kansas Supreme Court correctly refused to overturn the trial court's decision to forego a psychological examination of Rudell for several reasons. First, given the nature of the crime involved—second-degree murder[445]—and Rudell's intimate involvement in its commission—he was at the scene when the victim was shot and helped hide evidence of the crime[446]—it seems unlikely that a psychological examination would be necessary to establish Rudell's mental instability at the time of the murder. Second, it is unlikely that a psychological examination would have resulted in additional admissible evidence. Furthermore, the court allowed the defendant's counsel to engage in extensive cross-examination of Rudell and his psychiatrist at the time he was hospitalized on matters that included his history of mental instability and the effect it had on his ability to recall the sequence of events on the day of the murder.[447] Given that the jury was fully informed of Rudell's history of drug abuse and mental instability, it is difficult to imagine what could have been gained by requiring Rudell to undergo a formal psychological examination.

442. *Cook*, 135 P.2d at 1161.
443. *Id.* at 1163.
444. *Id.*
445. *Id.* at 1149.
446. *Id.* at 1151.
447. *Id.* at 1163.

J. Right to Counsel

1. Right to Counsel of Choice

Within the Sixth Amendment guarantee of assistance of counsel dwells the right to choose one's own counsel when counsel is not court appointed.[448] In *United States v. Gonzalez-Lopez*, the United States Supreme Court considered first, whether a defendant must show actual prejudice when his right to counsel of choice is violated,[449] and second, whether he must show that the violation resulted in more than "harmless error."[450] Distinguishing the violation of a defendant's right to counsel of choice from ineffective assistance of counsel,[451] the Supreme Court held that a criminal defendant does not have to show actual prejudice to his case to establish that his or her right to counsel of choice has been violated because a violation occurs "*whenever* the defendant's choice [of counsel] is wrongfully denied."[452]

The Court then continued its analysis by differentiating between trial error (error occurring in the courtroom before the jury) and structural error.[453] Reasoning that different attorneys would "pursue different strategies [in] investigation and discovery, [developing a] defense, [selecting a] jury, . . . and style of witness examination and jury argument,"[454] the Court considered a denial of the right to counsel of choice a structural error.[455] Because it involves more than just "'error in the trial process,'" the Court held that structural error "'def[ies] analysis by harmless-error standards.'"[456] Thus, the Court held that when a defendant is denied access to unappointed counsel of his choice, the defendant is not required to show prejudice or to engage in "harmless-error analysis" to have his or her conviction overturned.[457]

Although the majority's decision seems plausible, it goes too far in allowing absolute reversal any time a court denies the accused access to counsel of his choice. Not only does it appear incredibly extreme,

448. United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 2561 (2006) (citing Wheat v. United States, 486 U.S. 153, 159 (1988)).

449. *Id.* at 2561–66.

450. *Id.*

451. *Id.* at 2562–64.

452. *Id.* at 2565.

453. *Id.* at 2563–64.

454. *Id.* at 2564.

455. *Id.*

456. *Id.* (quoting Arizona v. Fulminante, 499 U.S. 279, 309–10 (1991)).

457. *Id.* at 2566.

especially in situations involving an error of judgment on the part of the court, but it also allows those fortunate enough to be able to afford counsel an "out" unavailable to those who require appointed counsel. Obviously, the United States Supreme Court cannot create a "right to counsel of choice" for indigent defendants who require appointed counsel. However, given that an absolute right to counsel of one's choice does not exist for all defendants, insisting upon absolute reversal as a remedy for a constitutional violation against a "special class" of defendant seems (at the very least) overreaching.

2. Right to Appointment of New Counsel

When reviewing the trial court's decision not to grant the defendant's pro se motion for appointment of new counsel in *State v. McGee*,[458] the Kansas Supreme Court applied an abuse of discretion standard based upon whether a reasonable person would consider the decision "arbitrary, fanciful or unreasonable."[459] Agreeing that a defendant has the right to appointment of new counsel when he can show "a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication[] between" attorney and client,[460] the court nevertheless determined that it was within the discretion of the trial court to decide whether such a conflict existed based on the evidence before it.[461] Finding that the parties' disagreement about the amount of time and effort that should be put into preparing for the defendant's trial did not qualify as a conflict of interest, the court affirmed the defendant's conviction.[462]

However, when presented with more convincing evidence that a conflict of interest existed between the defendant charged with a felony and his court-appointed counsel, the Kansas Supreme Court held that the trial court had a duty to investigate.[463] In *State v. Vann*, the defendant not only filed a pro se motion to dismiss his court-appointed attorney, but also wrote a letter to the court inquiring about his pro se motion, filed another motion to proceed pro se, and continued to insist that he and his

458. 126 P.3d 1110 (Kan. 2006).

459. *Id.* at 1113 (citing State v. Jasper, 8 P.3d 708, 711 (Kan. 2000)).

460. *Id.* (citing *Jasper*, 8 P.3d at 711).

461. *Id.* at 1114.

462. *Id.* at 1114–15.

463. State v. Vann, 127 P.3d 307, 313 (Kan. 2006) (citing State v. Taylor, 975 P.2d 1196, 1201 (Kan. 1999)).

attorney had conflicting interests.[464] The Kansas Supreme Court held that there was a clear duty to investigate the alleged conflict of interest and, therefore, remanded the case to the trial court for further investigation into the alleged conflict of interest.[465]

Appointing counsel for indigent criminal defendants has become an essential component of the criminal justice system. Even though courts seek to provide indigent defendants with competent counsel to afford all criminal defendants with a fair trial, appointment of suitable counsel can present quite a challenge. Still, if courts were to provide newly appointed counsel to every criminal defendant that felt he or she was not receiving the level of legal representation to which he or she was entitled, the criminal justice system would grind to a halt. Such a system would encourage crafty defendants to engage in delay tactics by requesting new counsel at every turn. Even so, the court has a duty to protect criminal defendants from bad counsel or counsel with conflicting interests. The court's approach correctly attempts to consider the possibility that appointed counsel will not provide the level of representation that the defendant deserves while at the same time protecting the criminal justice system from abuse by criminal defendants.

3. Right to Proceed Pro Se

A criminal defendant has the right to represent himself if, prior to trial, he or she makes "'a knowing and intelligent waiver of [his or her] right to counsel [after being] informed on the record of the dangers and disadvantages of self-representation [so that] the choice is . . . made with eyes open.'"[466] Failure to assert the right to proceed pro se constitutes waiver,[467] and courts are to make "'every reasonable presumption against waiver' of the right to counsel."[468] Also, courts can require "standby counsel" to aid in the defendant's self-representation regardless of protest by the defendant.[469] However, if the court chooses to deny the accused his right to pro se representation, the defendant will automatically be entitled to a new trial.[470]

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464. *Id.* at 315.
465. *Id.*
466. *Id.* at 315–16 (quoting State v. Graham, 46 P.3d 1177, 1182 (Kan. 2002)).
467. *Id.* at 316.
468. *Id.* (quoting State v. Lowe, 847 P.2d 1334, 1338 (Kan. Ct. App. 1993)).
469. *Id.* at 315 (citing Faretta v. California, 422 U.S. 806, 834 n.46 (1975)).
470. *Id.* at 316–17.

In *State v. Vann*, the court was faced with determining whether Vann's actions constituted waiver of his right to counsel.[471] Finding that the standard adopted by the Kansas Court of Appeals would erroneously require a defendant to "continually reassert" his desire to proceed pro se or risk waiving his right to self-representation,[472] the Kansas Supreme Court considered Vann's motion to proceed pro se with his appointed counsel as an advisor to be "a clear and unequivocal assertion of the right to proceed pro se."[473] Even though Vann's motion to proceed pro se was joined by motions for new counsel, the court still held that his actions evidenced his desire to proceed pro se and thus the trial court had the duty to at least "conduct . . . further inquiry into the defendant's position."[474] Thus, the Kansas Supreme Court reversed Vann's conviction and ordered a new trial.[475]

Given Vann's persistence in attempting to proceed pro se, one can hardly disagree that the trial court had an obligation to determine whether Vann was attempting to waive his right to counsel. By ignoring the defendant's motions, the trial court caused Vann to believe that he no longer had the right to represent himself. Because criminal defendants are often unfamiliar with the details of courtroom procedure, courts should have an obligation to inform defendants of their constitutional rights, especially when the court has been made aware that the defendant wishes to assert his or her rights. No court should be allowed to use the unfamiliar details of courtroom procedure to confuse a defendant into believing he or she has waived his or her constitutional rights, especially when the defendant makes an obvious attempt to assert those rights.

4. Right to Counsel in Probation Revocation Hearing

The United States Constitution, as interpreted by the United States Supreme Court, does not require states to provide counsel for defendants involved in probation hearings.[476] However, under Kansas law criminal defendants involved in probation hearings have a statutory right to counsel.[477] Because a defendant could potentially use his or her right to

471. *Id.* at 316.

472. *Id.*

473. *Id.*

474. *Id.*

475. *Id.* at 317.

476. State v. Young, 128 P.3d 1004, 1007 (Kan. Ct. App. 2006) (citing Gagnon v. Scarpelli, 411 U.S. 778, 790 (1973)).

477. *Id.* (citing KAN. STAT. ANN. § 22-3726(b) (1995); State v. Gordon, 66 P.3d 903, 915 (Kan. 2003)).

counsel to permanently halt the probationary hearing process by refusing to appoint counsel or by continually changing counsel,[478] the defendant must either accept the representation of a court-appointed attorney or appear at the scheduled hearing with counsel of his or her choice.[479] If a defendant appears at his or her probationary hearing without counsel, the court must then appoint counsel and reschedule the hearing to allow the defendant's newly appointed counsel time to prepare.[480]

In *State v. Young*, the defendant sought to overturn the trial court's decision to revoke his probation.[481] Young argued that his statutory right to counsel during a probation hearing was violated when the trial court denied a continuance of his probationary hearing even though Young was without counsel.[482] The trial court attempted to justify its decision to proceed with the hearing by accusing Young of engaging in stalling tactics because he continually failed to acquire counsel.[483] The Kansas Court of Appeals, while agreeing that the trial court had the right and the obligation to "protect itself" from abusive stalling tactics,[484] found it necessary to overturn the trial court's decision. Relying on Kansas Supreme Court precedent, it maintained that the proper remedy for the situation was appointment of counsel and a continuation of the hearing to allow the defendant's newly appointed counsel sufficient time to prepare.[485]

K. Effective Assistance of Counsel

A criminal defendant bringing an ineffective assistance of counsel claim must show both: (1) that his or her "counsel's performance was deficient, meaning counsel made errors so serious that his or her performance was less than that guaranteed by the Sixth Amendment"; and (2) that his or her counsel's poor performance "prejudiced the defense, which requires a showing that counsel's errors deprived the

478. *See, e.g.*, *id.* at 1005–07 (exemplifying stalling tactics used to prolong the process of revoking defendant's probation).

479. *Id.* at 1008.

480. *Id.* at 1009.

481. *See id.* at 1006 (outlining the defendant's motions on appeal).

482. *Id.* at 1007.

483. *See id.* at 1105–07 (detailing the course of events that transpired between the time Young was ordered to appear for a probationary hearing until the court's decision to require Young to proceed with the hearing absent counsel).

484. *Id.* at 1008.

485. *Id.* at 1007–08.

defendant of a fair trial."[486] A presumption that counsel was effective exists, which puts the burden of proving that counsel was ineffective on the defendant.[487] Although a presumption of effectiveness exists, failure to obtain facts or to interview witnesses regarding potential exculpatory information may provide sufficient support for finding that a defendant's counsel was ineffective.[488] In *Swenson v. State*, the defendant located a witness willing to testify that the victim had confessed to him that Swenson was not the individual responsible for shooting him.[489] In his motion for reversal due to ineffective counsel, the defendant contended that his attorney's argument that he chose not to call Swenson's witness as a matter of trial strategy was not persuasive because he had a duty to at least interview the witness.[490] The Kansas Court of Appeals ordered an evidentiary hearing on whether Swenson's attorney should have further investigated the witness.[491]

Swenson also alleged that the prosecutor's amended complaint was "defective because it failed to include the element of premeditation."[492] He contended that his attorney should have challenged the complaint and his failure to do so provides further evidence that his counsel was ineffective.[493] When faced with an ineffective assistance of counsel motion, the court must evaluate a decision by counsel not to "file a motion to dismiss or to vacate the judgment that alleged a defective information or complaint [under] the common-sense rule."[494] Although the complaint clearly omitted any mention of premeditation, the court reasoned, based on Swenson's attorney's closing arguments, that the defense was aware of the requirement that the prosecutor show premeditation.[495] Thus, the court determined that although the State failed to include premeditation as a necessary element in its complaint, the defense was not prejudiced by the State's omission.[496]

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486. Swenson v. State, 135 P.3d 157, 164 (Kan. Ct. App. 2006) (citing State v. Davis, 85 P.3d 1164, 1169 (Kan. 2004)), *review granted*, No. 05-94207-AS, 2006 Kan. LEXIS 484 (Kan. Sept. 19, 2006).

487. *Id.* at 165 (citing State v. Betts, 33 P.3d 575, 590–91 (Kan. 2001)).

488. *Id.* at 166.

489. *Id.* at 165–66.

490. *Id.* at 165 (citing Mullins v. State, 46 P.3d 1222, 1225–26 (Kan. Ct. App. 2002)).

491. *Id.* at 166.

492. *Id.* at 167.

493. *Id.*

494. *Id.* (citing State v. Hall, 793 P.2d 737 (Kan. 1990)).

495. *Id.*

496. *Id.*

III. PRETRIAL ISSUES

A. Complaint/Initial Appearance

The State may amend its complaint against a defendant any time after filing the complaint so long as no verdict has been rendered if the "'rights of the defendant are not prejudiced.'"[497] Also, a defendant "'may be charged with one offense and bound over for another'" if on "'preliminary examination,'" it appears "'he is guilty of [both] offense[s].'"[498] A prosecutor choosing to file a pretrial amendment to a complaint against a defendant has traditionally been given "considerable latitude" by Kansas courts.[499] Once the court allows an amended complaint, its decision cannot be overturned unless the defendant can show that the trial court abused its discretion by adopting a view that "no reasonable person would take."[500]

In *State v. Bischoff*, the State began by bringing charges against Bischoff for criminal threat.[501] Less than two weeks after the preliminary hearing the State sought to amend the complaint by adding a felony charge of aggravated assault;[502] the State's motion was later granted by the trial court.[503] Nearly two months later, Bischoff sought to dismiss the amended complaint, or at the very least, request a bill of particulars;[504] the trial court denied Bischoff's motions.[505] On appeal, the Kansas Court of Appeals reversed the trial court's decision.[506] The State subsequently appealed to the Kansas Supreme Court.

In its decision, the Kansas Supreme Court considered whether Bischoff's rights were actually prejudiced by the trial court's decision to allow the amendment. The court noted that Bischoff never presented any evidence of prejudice at his hearing before the trial court or in his arguments before the court of appeals,[507] and that he had a ten-month

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497. State v. Bischoff, 131 P.3d 531, 538 (Kan. 2006) (quoting KAN. STAT. ANN. § 22-3201(e) (Supp. 2004)).

498. *Id.* at 539 (quoting State v. Pioletti, 785 P.2d 963, 972 (Kan. 2003)).

499. *Id.* at 538.

500. *Id.*

501. *Id.* at 534.

502. *Id.*

503. *Id.* at 535.

504. *Id.*

505. *Id.*

506. *Id.*

507. *Id.* at 539.

period of time between the amendment and the trial.[508] The court reasoned that Bischoff, given the amount of time between the amendment and the trial, was not prejudiced by the amended complaint and reversed the court of appeals's decision.[509]

The court also reasoned that Bischoff was not prejudiced by the State's amended complaint because he had plenty of opportunity at the preliminary hearing, held prior to the State's filing of a motion to amend the complaint, to cross-examine witnesses about the added charge of aggravated assault. However, without knowing, or having reason to expect, that the prosecutor intended to charge him with that offense, Bischoff had no reason to pursue that line of questioning in cross-examination of the State's witnesses. Therefore, to argue that he was not prejudiced because he had ample opportunity to cross-examine the same witnesses at the preliminary hearing as later testified at trial is a gross oversimplification that ignores the fact that to take full advantage of an opportunity to interview witnesses, the accused must first know all the charges against him.

B. Bail

Bail bonds are treated as contracts between bondsmen and the state and require bondsmen to guarantee that a criminal defendant will meet the conditions of his or her bond as ordered by the court.[510] However, if by altering the terms of a defendant's bond, the court materially changes the bondsman's liability, the bondsman is released from his obligation to the state.[511] Kansas courts have defined "material change . . . as 'a change that a careful and prudent person would regard as substantially increasing the risk of loss.'"[512]

In *State v. Sedam*, the Kansas Court of Appeals held that by significantly increasing the conditions of the defendant's bond (i.e., requiring the defendant charged with possession of a controlled substance to submit to a urinalysis and appear before the court on a weekly basis), the court materially changed the defendant's bond.[513] The

508. *Id.*

509. *Id.* at 540.

510. State v. Sedam, 122 P.3d 829, 831 (Kan. Ct. App. 2005) (citing State v. Indemnity Ins. Co., 672 P.2d 251, 253–54 (Kan. Ct. App. 1983)), *review denied*, No. 04-92737-A, 2006 Kan. LEXIS 76 (Kan. Feb. 15, 2006).

511. *Id.* (citing First Nat'l Bank of Anthony v. Dunning, 855 P.2d 493, 495–96 (Kan. Ct. App. 1993)).

512. *Id.* (quoting *First Nat'l Bank of Anthony*, 855 P.2d at 496).

513. *Id.* at 831.

State contended that the bondsman was still liable for the bond, regardless of the fact that the court materially changed the bond without his approval, because Sedam's violation related to the conditions of the original bond.[514] The Kansas Court of Appeals disagreed, reasoning that by failing to notify the bondsman of material changes in the conditions of the defendant's bond, the court effectively nullified the bondsman's contract with the state.[515]

Courts should not have the authority to make significant changes binding a bondsman without first allowing him to determine whether he finds the increased risk acceptable. Clearly, the Kansas Court of Appeals agrees as it appears to have absolved the bondsman of his obligation to the state not only because doing so seems "fair," but also as a means of doling out a kind of punishment for failing to communicate with the defendant's bondsman. Hopefully, the court's decision will lead to an increase in communication between courts and bondsmen.

C. Preliminary Hearing

The procedures following the arrest of a criminal defendant are initially governed by chapter 22, sections 2901 and 2902 of the Kansas Statutes.[516] Section 2901(1) states that if arrested on probable cause, a criminal defendant "shall be taken without unnecessary delay before the nearest available magistrate and a complaint shall be filed forthwith."[517] Unreasonable delay in holding the initial appearance may result in dismissal of the complaint with prejudice.[518] However, the Kansas Supreme Court has continually noted that this form of sanction "should be imposed only under extremely compelling circumstances . . . where no other remedy would protect against abuse."[519]

Amendments to section 2902(1) allow the State to request a preliminary examination before a magistrate.[520] Prior to the amendments, the right to request a preliminary examination was given

514. *See id.* at 830 ("The State argues that reinstatement of Sedam's bond did not prejudice Warfield in any way and Sedam's bond was revoked for failing to appear, which was the fundamental obligation of the bond.").

515. *Id.* at 831.

516. KAN. STAT. ANN. §§ 22-2901 to -2902 (Supp. 2006).

517. *Id.* § 22-2901(1).

518. *See* State v. Crouch, 641 P.2d 394, 396 (Kan. 1982) (addressing the issue of "whether the incarceration of the defendants for eleven days . . . warranted the dismissal with prejudice").

519. *Id.* at 398; *see also* State v. Rivera, 83 P.3d 169, 177 (Kan. 2004) (citing *Crouch* for the contention that dismissal "must be exercised with great caution and only in cases where no other remedy would protect against the State's abuse").

520. 2006 Kan. Sess. Laws 247.

only to the criminal defendant.[521] As a result, a defendant could waive their right to the hearing without objection from the State.[522] The amendments also remove references to felony "warrants," replacing them with the term, "charge."[523] The amended version of section 2902 states that "[t]he state and every person charged with a felony shall have a right to a preliminary examination before a magistrate, unless such charge has been issued as a result of an indictment by a grand jury."[524] Therefore, the State may now request a preliminary examination even when such a hearing has been waived by the criminal defendant.

It does not appear that this ability to request a preliminary hearing against the wishes of the criminal defendant will have a very significant impact on criminal procedure. When a defendant has waived the preliminary hearing, he or she is to be bound over for trial in the court having jurisdiction.[525] It is likely that the State will rarely have the desire to request a preliminary hearing in such an instance. Exceptions will occur, however, such as to provide witnesses an opportunity to gain experience testifying prior to trial.

D. The Formal Charge: Information and Indictment

Section 3201(b) requires that "[t]he complaint, information or indictment . . . be a plain and concise written statement of the essential facts constituting the crime charged."[526] Amendments to the information or complaint are allowed pursuant to section 3201(e), which states that "[t]he court may permit a complaint or information to be amended at any time before verdict or finding if no additional or different crime is charged and if substantial rights of the defendant are not prejudiced."[527] In *State v. Bischoff*, the Kansas Supreme Court recognized that it has previously interpreted this statute as allowing the charging of a different crime by amendment to the complaint before trial "provided [that] the substantial rights of the defendant are not prejudiced."[528] "Whether to allow the amendment is subject to the district court's discretion."[529]

521. *See id.* (adding the State's right to that of the person charged).

522. *See id.* (allowing a defendant the right to waive preliminary examination).

523. *Id.*

524. KAN. STAT. ANN. § 22-2902(1) (Supp. 2006).

525. *Id.* § 22-2902(4).

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

527. *Id.* § 22-3201(e).

528. State v. Bischoff, 131 P.3d 531, 538 (Kan. 2006) (citing State v. Woods, 825 P.2d 514 (Kan. 1992)).

529. *Id.*

Furthermore, the court stated that it has "consistently . . . given the State considerable latitude in amending a complaint prior to trial."[530] An abuse of discretion will be found "only when no reasonable person would take the view adopted by the district court."[531] Lastly, the criminal "defendant bears the burden of establishing such an abuse of discretion."[532]

In the event of a complaint, information, or indictment that fails to sufficiently inform the defendant of the particulars of the crime thereby preventing the preparation of a defense, "the court may, on written motion of the defendant," require the prosecutor to provide a bill of particulars.[533] "A bill of particulars serves to inform the defendant of the nature of the charges and the evidence against him or her, enabling the defendant to prepare a defense, and to prevent further prosecution for the same offense."[534] The decision requiring a bill of particulars is discretionary with the court "except in such cases where the charging instrument itself is insufficient to inform the accused of the charges against which he or she must defend."[535] The defendant bears the burden of establishing an abuse of the court's discretion in denying a bill of particulars.[536] However, "[t]here is no abuse of discretion in denying the bill of particulars where the record is clear the defendant was not misled."[537]

E. Jurisdiction and Venue

In *State v. Johnson*, the defendant challenged the court's jurisdiction to convict and sentence him under a lesser offense than that charged.[538] Johnson was originally charged with aggravated indecent liberties with a child.[539] "At trial the State proposed a lesser included instruction on aggravated indecent solicitation of a child . . . but never filed an amended complaint . . . ."[540] "If a crime is not specifically stated in the information or is not a lesser included offense of the crime charged, the

530. *Id.*
531. *Id.*
532. *Id.*
533. KAN. STAT. ANN. § 22-3201(f) (Supp. 2006).
534. *Bischoff*, 131 P.3d at 539 (citing State v. Myatt, 697 P.2d 836, 845 (Kan. 1985)).
535. *Id.* at 540 (citing State v. Webber, 918 P.2d 609, 625 (Kan. 1996)).
536. *Id.*
537. *Id.* (citing State v. Kee, 711 P.2d 746, 756 (Kan. 1985)).
538. State v. Johnson, 122 P.3d 397, 400 (Kan. Ct. App. 2005), *review granted*, No. 04-91867-AS, 2006 Kan. LEXIS 165 (Kan. Mar. 28, 2006).
539. *Id.*
540. *Id.*

district court lacks jurisdiction to convict the defendant of the crime, regardless of the evidence presented."[541] Due to lack of evidence, the charge listed in Johnson's complaint was one for which he could not be convicted, thus creating a situation of legal impossibility.[542] The Kansas Court of Appeals determined that the lesser offense, aggravated indecent solicitation of a child, satisfied the "elements test" because each element of the lesser charge applicable to the defendant was also included in the principal charge.[543] Furthermore, the court concluded that "[t]he mere fact that the evidence was arguably insufficient to support a conviction under [the principal offense] does not affect the jurisdiction of the court to impose a sentence for a conviction under a proper lesser included offense."[544] Notably, this holding is not likely affected by the Kansas Supreme Court's decision in *State v. Schoonover*.[545] In *Schoonover*, the court discussed double jeopardy in the context of multiple charges for the same offense rather than a single, lesser charge.[546]

In *State v. Elliott*, the defendant challenged his criminal history classification for purposes of felony sentence enhancement.[547] "In June 2003, Elliott was charged in the district court with [felony] driving under the influence of alcohol with two or more prior DUI convictions in violation of [section] 8-1567."[548] "The presentence investigation report revealed that Elliott had five prior DUI convictions, all committed within a 5-year period. The first three prior DUI convictions occurred in October 1994 in municipal court and were listed as misdemeanors."[549] The fourth prior DUI conviction, also listed as a misdemeanor, occurred in February 1996 in municipal court.[550] The fifth prior DUI conviction occurred in September 1998 in district court and was listed as a felony.[551]

Chapter 8, section 1567 of the Kansas Statutes states that the first DUI conviction constitutes a class B misdemeanor and the second a class A misdemeanor.[552] Upon a third DUI conviction, however, the

541. *Id.* (citing State v. Horn, 892 P.2d 513 (Kan. Ct. App. 1995)).
542. *Id.* at 402.
543. *Id.*
544. *Id.* at 401.
545. 133 P.3d 48 (Kan. 2006).
546. *See id.* at 60 (categorizing double jeopardy into three instances, all of which involve the same offense).
547. State v. Elliott, 133 P.3d 1253, 1254 (Kan. 2006).
548. *Id.*
549. *Id.*
550. *Id.*
551. *Id.*
552. KAN. STAT. ANN. § 8-1567(d)–(e) (Supp. 2006).

defendant "shall be guilty of a nonperson felony."[553] Because it constitutes a felony, the district court has exclusive jurisdiction over any DUI conviction where the defendant has two or more prior DUI convictions.[554] In filing a written objection to criminal history, Elliott argued that the municipal court lacked jurisdiction over those convictions that should have been charged as felonies.[555] It is clear that the trial court should have charged Elliott's fourth DUI conviction as a felony. Similarly, Elliott argued that, because the first three convictions occurred on the same day making it impossible to determine an order, all three should also be stricken from his criminal history.[556] Therefore, Elliott requested that the trial court sentence him as a second-time DUI offender, rather than a sixth-time offender.[557] The Kansas Supreme Court upheld the trial court's decision to strike two of Elliott's prior DUI convictions from his criminal history score.[558] As a result, Elliott was convicted as only a fourth-time offender under section 1567(g).[559]

The jurisdiction of municipal and district courts is fixed by statute.[560] Chapter 12, section 4104 of the Kansas Statutes states that municipal courts "shall have jurisdiction to hear and determine cases involving violations of the ordinances of the city."[561] On the other hand, chapter 22, section 2601 of the Kansas Statutes grants district courts the "exclusive jurisdiction to try all cases of felony and other criminal cases under the laws of the state of Kansas."[562] Taken together, the statutes direct all felony crimes to be charged and tried solely in district courts and not in municipal courts.[563]

The Kansas Supreme Court has previously recognized that "[a]n objection based on lack of subject matter jurisdiction may be raised at any time, whether it be for the first time on appeal or even upon the appellate court's own motion."[564] Because of this, a jurisdictional

553. *Id.* § 8-1567(f).

554. *See* KAN. STAT. ANN. § 22-2601 (1995) ("The district court shall have exclusive jurisdiction to try all cases of felony . . . .").

555. *Elliott*, 133 P.3d at 1254.

556. *Id.*

557. *Id.*

558. *Id.* at 1254, 1259.

559. *Id.* at 1254.

560. *Id.* at 1255.

561. KAN. STAT. ANN. § 12-4104 (1995).

562. KAN. STAT. ANN. § 22-2601 (1995).

563. City of Junction City v. Cadoret, 946 P.2d 1356, 1360 (Kan. 1997).

564. Rivera v. Cimarron Dairy, 988 P.2d 235, 238 (Kan. 1999) (citing State v. Nelson, 946 P.2d 1355, 1356 (Kan. 1997)).

challenge such as that made in *Elliott* is not subject to the usual bar on collateral attacks of prior convictions.

While seemingly unfair from a criminal justice standpoint, the *Elliot* decision was likely correct. Previous convictions that have been proven invalid should not be used to enhance a defendant's criminal history classification during sentencing. The *Elliot* decision will likely have implications in other situations where an increased charge due to prior convictions is called for by statute.

F. Joinder and Severance

The charging of multiple crimes as separate counts in one complaint is authorized by chapter 22, section 3202(1) of the Kansas Statutes. This section states that

> [t]wo or more crimes may be charged against a defendant in the same complaint, information or indictment in a separate count for each crime if the crimes charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.[565]

In *State v. Bunyard*, the Kansas Supreme Court addressed the denial of a criminal defendant's motion to sever three rape charges into three separate trials.[566] The decision that charges be joined or severed for trial is within the discretion of the trial court and will not be disturbed on appeal absent a clear showing of abuse of such discretion.[567] In *Bunyard*, the defendant relied on chapter 60, section 455 of the Kansas Statutes to support his motion for separate trials.[568] Section 455, which regulates the admissibility of evidence of prior bad acts or crimes, states that such evidence is admissible only to prove a material fact such as motive, opportunity, intent, or identity.[569] Citing its previous decision in *State v. Barksdale*, the *Bunyard* court rejected this argument, stating that "'Kansas case law and the provisions of [section] 22-3203(1) make it clear that joinder is not dependent upon the other crimes being joined meeting the admissibility test set forth in [section] 60-455.'"[570] Had the

565. KAN. STAT. ANN. § 22-3202(1) (1995).
566. State v. Bunyard, 133 P.3d 14, 18 (Kan. 2006).
567. *Id.* at 20 (quoting State v. Hill, 895 P.2d 1238, Syl. ¶ 3 (Kan. 1995)).
568. *Id.* at 19.
569. KAN. STAT. ANN. § 60-455 (1995).
570. *Bunyard*, 133 P.3d at 21–22 (quoting State v. Barksdale, 973 P.2d 165, 173 (Kan. 1999)).

court severed the three rape charges into separate trials, evidence of each charge would not be admissible in the separate trials because it would not likely satisfy section 455. However, in a single trial, section 455 would not prevent the presentation of evidence concerning all three charges simultaneously.

In general, joinder of similar crimes is the rule, while severance is the exception.[571] The burden is on the criminal defendant to show special circumstances that illustrate why severance is necessary.[572] The charges to be joined may be "'of the same general character, requiring the same mode of trial, the same kind of evidence, and the same kind of punishment.'"[573] "The 'same or similar character' language of [section] 22-3202(1) does not limit joinder to only those crimes that are clones of each other," nor is there any case law suggesting that cases must be of equal strength or weakness to be joined.[574]

Joinder of two or more defendants is authorized by chapter 22, section 3202(3) of the Kansas Statutes and subject to requirements similar to those concerning the joinder of charges. Section 3202(3) provides for the charging of codefendants in the same complaint.[575] Additionally, case law allows for consolidation when codefendants are charged with the same crime in separate complaints.[576] In *State v. Boyd*, three defendants were charged with the same crime under separate complaints.[577] The cases were then consolidated for trial.[578] The court recognized that, even though the requirements of joinder are technically satisfied, trials should not be consolidated if any defendant will be prejudiced by the joinder.[579] "Separate trials should be conducted upon a showing of actual prejudice stemming from a joint trial and, in such a circumstance, the trial court should not join the complaints or, if the complaints have been joined, should sever the cases for trial."[580]

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571. *Id.* at 23.
572. *Id.*
573. *Id.* at 20 (quoting *Barksdale*, 973 P.2d at 171–72).
574. *Id.* at 23.
575. KAN. STAT. ANN. § 22-3202(3) (1995).
576. State v. Boyd, 127 P.3d 998, 1007 (Kan. 2006).
577. *Id.* at 1004.
578. *Id.*
579. *Id.* at 1008.
580. *Id.* (citing State v. Aikins, 932 P.2d 408, 422 (Kan. 1997)).

When determining whether a joint trial is sufficiently prejudicial as to mandate severance or nonjoinder, a court should consider whether

> "(1) the defendants have antagonistic defenses; (2) important evidence in favor of one of the defendants which would be admissible on a separate trial would not be allowed on a joint trial; (3) evidence incompetent as to one defendant and introducible against another would work prejudicially to the former with the jury; (4) the confession by one defendant, if introduced and proved, would be calculated to prejudice the jury against the others; (5) one of the defendants who could give evidence for the whole or some of the other defendants would become a competent and compellable witness on the separate trials of such other defendants."[581]

G. *The Arraignment*

The arraignment is "the formal act of calling the defendant before a court having jurisdiction to impose sentence for the offense charged, informing the defendant of the offense with which the defendant is charged, and asking the defendant whether the defendant is guilty or not guilty."[582]

H. *Guilty Pleas*

A criminal defendant's plea of guilty or nolo contendere is governed by chapter 22, section 3210 of the Kansas Statutes. By entering a plea of guilty, a defendant "waives certain fundamental constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers."[583] Additionally, for such a waiver to be valid under the Due Process Clause, "it must be 'an intentional relinquishment or abandonment of a known right or privilege.'"[584] Accordingly, subsections 3210(a)(2) and (3) require the court to inform the defendant that entering the guilty plea effectively waives these constitutional rights.[585] The court must also confirm that

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581. *Id.* (quoting State v. White, 67 P.3d 138, Syl. ¶ 2 (Kan. 2003)).

582. KAN. STAT. ANN. § 22-2202(3) (1995).

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

584. *Id.* (quoting *Boykin*, 395 U.S. at 243 n.5).

585. *Id.*

the defendant has "voluntarily entered the plea with an understanding of the consequences."[586]

In *State v. Moses*, the Kansas Supreme Court addressed the denial of a defendant's postsentence motion to withdraw a guilty plea.[587] Motions to withdraw pleas are controlled by section 3210(d), which states that "[a] plea of guilty or *nolo contendere*, for good cause shown and within the discretion of the court, may be withdrawn at any time before sentence is adjudged."[588] The statute additionally provides that a court may, after sentencing, permit the defendant to withdraw a plea to correct "manifest injustice."[589] "The decision to deny a motion to withdraw a plea . . . lies within the discretion of the trial court, and that decision will not be disturbed . . . absent a showing of abuse of [such] discretion."[590] In *Moses*, the defendant had signed a written plea petition that set forth the constitutional rights waived by the plea.[591] The court determined, however, that this document alone cannot serve as a substitute for having the court personally inform the defendant of the consequences of entering a plea and the court's determination that the defendant understands those consequences.[592]

The failure of a court to strictly follow the procedures of section 3210 will not automatically result in a successful withdrawal of a plea.[593] The court must consider the totality of the circumstances, through a review of the complete record, to determine whether such failure constitutes reversible error.[594] The *Moses* court affirmed the district court's decision refusing to allow Moses to withdraw his guilty pleas and reviewed several factors supporting that decision, including the fact that Moses's counsel at the time of his plea had explained the guilty plea petition in detail.[595]

While being personally informed by the court is the most reliable method of ensuring a criminal defendant understands his or her waiver of rights, other methods should be sufficient. As in *Moses*, a reviewing court should consider discussions between the criminal defendant and the

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586. *Id.*

587. *Id.* at 331.

588. KAN. STAT. ANN. § 22-3210(d) (Supp. 2006).

589. *Id.*

590. *Moses*, 127 P.3d at 334 (citing State v. Muriithi, 46 P.3d 1145, 1148 (Kan. 2002); State v. Stough, 41 P.3d 281, 285 (Kan. 2002)).

591. *Id.* at 336.

592. *Id.* at 336–37.

593. *Id.* at 335–36.

594. *Id.* at 337.

595. *Id.* at 338.

defense attorney as providing a satisfactory explanation of the consequences associated with entering a guilty plea. There should be no finding of manifest injustice when a criminal defendant is asked by the trial judge whether he or she had been fully informed of the nature of his or her guilty plea and the rights he or she will be surrendering as a result of the agreement.

A direct appeal of a defendant's guilty plea is controlled by section 3602(a). This section states that "[n]o appeal shall be taken by the defendant from a judgment of conviction before a district judge upon a plea of guilty or *nolo contendere*, except that jurisdictional or other grounds going to the legality of the proceedings may be raised by the defendant as provided in K.S.A. 60-1507 and amendments thereto."[596] Additionally, "[a] defendant may not file a direct appeal from a guilty plea unless the defendant first files a motion to withdraw the plea and the trial court denies the motion."[597]

I. Discovery

Prosecutors have an obligation, pursuant to the Due Process Clause, to disclose exculpatory evidence to a criminal defendant, "even when no request for the disclosure has been made."[598] Kansas courts are bound by the United States Supreme Court decision in *Brady v. Maryland*[599] in determining prosecutorial misconduct for failure to disclose evidence.[600] *Brady* held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[601]

Failure by the prosecution to disclose evidence as required by *Brady* warrants a reversal only if the withheld evidence is material, and "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[602] The Kansas Supreme Court, in *State v. Adams*, recounted three scenarios in which the *Brady* standard applies:

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596. KAN. STAT. ANN. § 22-3602(a) (Supp. 2006).

597. State v. Thorpe, 141 P.3d 521, 523 (Kan. Ct. App. 2006), *review denied*, No. 04-93563-A, 2006 Kan. LEXIS 778 (Kan. Dec. 19, 2006).

598. State v. Adams, 124 P.3d 19, 26 (Kan. 2005) (citing State v. Kelly, 531 P.2d 60, 63 (Kan. 1975)).

599. 373 U.S. 83 (1963).

600. *Adams*, 124 P.3d at 26 (citing *Brady*).

601. *Brady*, 373 U.S. at 87.

602. Haddock v. State, 146 P.3d 187, 211 (Kan. 2006).

> "(1) where there is a deliberate bad faith suppression for the purpose of obstructing the defense or intentional failure to disclose evidence which has high probative value and which could have not escaped the prosecutor's attention; (2) where there is a deliberate refusal to honor a request for evidence where the evidence is material to guilt or punishment, irrespective of the prosecutor's good or bad faith in refusing the request; and (3) where suppression was not deliberate and no request for evidence was made, but where hindsight discloses that it was so material that the defense could have put the evidence to significant use."[603]

The scenarios presented in *Adams* fall into a sliding scale whereby the "required degree of the evidence's materiality to the defendant's case increases as the classification of the level of intent supporting the State's conduct decreases."[604] The first category, involving deliberate bad faith on the part of the State, "requires a fairly low showing of materiality."[605] The third category, involving inadvertent suppression and no request by the defendant, requires a high degree of materiality in order for the court to find a due process violation.[606]

J. Pretrial Motions and Pretrial Conference

Motions to suppress illegally seized evidence "shall be made before trial" unless the opportunity did not exist or the defendant was not aware of the grounds for the motion.[607] Such a motion "may be made before or during a preliminary examination."[608] The court must "receive evidence on any issue of fact necessary to determine the motion" and the prosecution has the burden of showing that any search and seizure were lawful.[609]

In *State v. Bieker*,[610] the Kansas Court of Appeals analyzed the district court's failure to hold a separate hearing in ruling upon the defendant's second motion to suppress evidence.[611] Defendant Bieker was charged with possession of drugs and drug paraphernalia.[612] "Prior

603. *Adams*, 124 P.3d at 26 (quoting *Kelly*, 531 P.2d at 63).
604. *Id.*
605. *Id.*
606. *Id.* (citing *Kelly*, 531 P.2d at 64).
607. KAN. STAT. ANN. § 22-3216(3) (1995).
608. *Id.* § 22-3216(4).
609. *Id.* § 22-3216(2).
610. 132 P.3d 478 (Kan. Ct. App. 2006), *review denied*, No. 04-93487-A, 2006 Kan. LEXIS 534 (Kan. Sept. 19, 2006).
611. *Id.* at 482–83.
612. *Id.* at 481.

to the preliminary hearing, [Bieker] filed a motion to suppress any incriminating statements [made] in violation of his *Miranda* rights. Following the presentation of the State's evidence at the preliminary hearing, the district court denied the motion to suppress."[613] Bieker subsequently "filed another motion to suppress, this time challenging the lawfulness of the search and seizure."[614] A second hearing was then scheduled.[615] However, at the outset of testimony, the court continued the hearing, stating that the issue had sufficiently been addressed during the preliminary hearing.[616] Before the date on which the hearing was to resume, "the district court filed a journal entry, indicating that the second motion to suppress was denied because the issue . . . had previously been resolved by the preliminary hearing."[617]

"A rehearing on a motion to suppress is generally left to the sound discretion of the district court."[618] "'Normally, . . . the motion, when made before trial, will be heard once and disposed of; however, if at trial new or additional evidence is produced bearing on the issue of substantially affecting the credibility of the evidence adduced at the pretrial hearing of the motion, . . . [section 22-3216] authorizes reentertainment of the motion in the court's discretion.'"[619] The court of appeals adopted the abuse of discretion standard of review in the event of a district court's refusal to hold an evidentiary hearing on a second motion to suppress filed after the preliminary hearing.[620] Because Bieker did not present additional evidence in the second motion to suppress, but rather relied on testimony offered at the preliminary hearing, there was no abuse of discretion.[621]

IV. TRIAL RIGHTS

A. Speedy Trial

There are two sources of speedy trial rights in Kansas: statutory and constitutional. The general statutory provisions are found in chapter 22, sections 3401 and 3402 of the Kansas Statutes. Constitutional

613. *Id.*
614. *Id.*
615. *Id.*
616. *Id.*
617. *Id.*
618. *Id.* at 482 (citing State v. Holmes, 102 P.3d 406, 420 (Kan. 2004)).
619. *Id.* (quoting *Holmes*, 102 P.3d at 420) (alteration in original).
620. *Id.* at 483.
621. *Id.*

protections arise from the Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial."[622] The Due Process Clause of the Fifth Amendment provides protection before a defendant has been arrested or charged.[623]

1. Statutory Rights

Kansas defines by statute the number of days the State has to bring the defendant to trial. The time depends upon whether the defendant is in jail awaiting trial,[624] out on bail,[625] or in jail serving time for another conviction.[626] Absent a continuance granted by the court, if the defendant is not brought to trial within the allotted time, he shall be discharged from liability from the charges with prejudice.[627] The court may extend the statutory time (1) upon request of the defendant,[628] (2) if the defendant is the cause of the delay,[629] (3) if the defendant is incompetent to stand trial, (4) if evidence is unavailable in time for trial, or (5) if it would be a burden on the court to proceed within the specified time.[630]

In *State v. Garcia*,[631] the defendant challenged a series of continuances, claiming his speedy trial rights under the Kansas statute had been violated.[632] The defendant was arraigned for multiple counts of first-degree murder on October 14, 2003.[633] Upon motions by the defendant, the trial was continued until February 2, 2004.[634] The court then continued the trial until May 17 upon the State's motions.[635] One hundred and five days elapsed between February 2 and May 17.[636] The

622. U.S. CONST. amend. VI.

623. *See* U.S. CONST. amend. V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . .").

624. *See* KAN. STAT. ANN. § 22-3402(1) (Supp. 2006) (within ninety days of arraignment).

625. *See id.* § 22-3402(2) (within 180 days of arraignment).

626. *See* KAN. STAT. ANN. § 22-4303 (1995) (within 180 days of request by defendant).

627. § 22-3402(1)–(2).

628. *Id.*

629. *Id.*

630. *Id.* § 22-3402(5).

631. 144 P.3d 684 (Kan. 2006).

632. *Id.* at 690.

633. *Id.* at 691.

634. *Id.*

635. *Id.*

636. *Id.*

district court had granted continuances to allow the State to have DNA testing done at a FBI laboratory, instead of a faster, more expensive private lab.[637] The issue before the court was whether it was reasonable under section 3402(5)(c)[638] to continue the trial beyond the statutorily defined speedy-trial period when the cost of obtaining the State's evidence on time would have been prohibitive. This specific issue had not been confronted before in Kansas. Because the cost of testing at the private lab would have been "prohibitive," the Kansas Supreme Court held that the decision to continue the trial was reasonable.[639]

2. Constitutional Protections

The constitutional protections are provided through the United States Constitution[640] and Article X of the Kansas Constitution.[641] Kansas courts have relied on United States Supreme Court precedent when deciding speedy-trial cases. Delay in arresting defendant and filing charges does not violate the speedy-trial rights, although this may violate the defendant's due process rights under the Fifth Amendment.

Barker v. Wingo[642] states the test used in Kansas for analyzing speedy-trial challenges. Four factors are considered: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his or her right; and (4) the prejudice to the defendant.[643] *State v. Brown* held that the *Barker* test would apply in Kansas speedy-trial cases.[644] Kansas has declined to adopt bright-line rules fixing how long of a delay is too long. For example, in *State v. Mathenia*, a twenty-three-month delay was not prejudicial where the State's case was exceedingly complex.[645] The Supreme Court of the United States has held that an eight-year delay is presumptively prejudicial.[646]

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637. *Id.*

638. A trial may be continued beyond the speedy trial period when "[t]here is material evidence which is unavailable; . . . reasonable efforts have been made to procure such evidence; and . . . there are reasonable grounds to believe that such evidence can be obtained and trial commenced within the next succeeding 90 days." KAN. STAT. ANN. § 22-3402(5)(c) (Supp. 2006).

639. *Garcia*, 144 P.3d at 693.

640. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . .").

641. *See* KAN. CONST. art. X ("In all prosecutions, the accused shall be allowed to . . . have . . . a speedy public trial . . . .").

642. 407 U.S. 514 (1972).

643. *Id.* at 530–32.

644. State v. Brown, 823 P.2d 190, 196 (Kan. 1991).

645. State v. Mathenia, 942 P.2d 624, 627 (Kan. 1997).

646. Doggett v. United States, 505 U.S. 647, 657–58 (1992).

In *State v. Weaver*, the defendant objected to the State's continuance after a ten-month delay; the trial started four months after his objection.[647] The Kansas Supreme Court applied the *Barker* factors and was strongly persuaded by the fact that the defendant was on bail prior to trial, and had not objected to the delay until ten months after his arrest leading to a finding of minimal prejudice to the defendant and upholding of his sentence.[648]

The speedy-trial clock starts when a defendant is arrested or charged in the federal system.[649] In Kansas, section 3402(1) instructs that a defendant's speedy-trial clock begins at arraignment. Without a showing of necessity, the State may not avoid its speedy-trial obligations under section 3402 when it dismisses charges against the defendant, and later refiles the same charges.[650]

If a speedy-trial violation occurs, the remedy is dismissal of the charges or vacating the sentence.[651]

3. Prearrest Delay

The Due Process Clause of the Fifth Amendment—not the speedy-trial clause of the Sixth—protects defendants from unreasonable prearrest delays. The Supreme Court of the United States and Kansas Supreme Court have held that the defendant must show prejudice and an improper motive to prevail on this charge. In *State v. Royal*,[652] the Kansas Supreme Court held that "due process rights may be said to have been denied by reason of pre-accusation delay, where it is shown that actual prejudice resulted to the defendant in his ability to conduct his defense and that the government intentionally delayed prosecution to gain a tactical advantage over him."[653]

B. Trial by Jury

There are two sources of trial-by-jury rights in Kansas: statutory and constitutional. Kansas statutes provide that all felony cases shall be tried

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647. State v. Weaver, 78 P.3d 397, 398–99 (Kan. 2003).

648. *Id.* at 402–03.

649. United States v. MacDonald, 435 U.S. 850, 862 (1978).

650. State v. Clemence, 145 P.3d 931, 937 (Kan. Ct. App. 2006), *review denied*, No. 04-92114-A, 2007 Kan. LEXIS 121 (Kan. Feb. 14, 2007).

651. *See, e.g.*, State v. George, 65 P.3d 1060, 1063 (Kan. Ct. App. 2003) (case remanded with orders to dismiss charges).

652. 535 P.2d 413 (Kan. 1975).

653. *Id.* at 416.

by a jury of twelve members, unless the defendant, the State, and the court consent either to a bench trial or that the jury shall be fewer than twelve persons.[654] Misdemeanor and traffic offenses are tried to the court, unless the defendant requests a jury trial within seven days of notice of trial assignment.[655] Traffic infractions and trials in municipal court are also tried to the court.[656]

1. General Requirements

The right to jury trial in the Sixth Amendment to the United States Constitution is incorporated and therefore enforceable against the states.[657] The Sixth Amendment requires a jury in all cases where the possible punishment is greater than six months in prison.[658] The Supreme Court of the United States has upheld juries of six persons.[659] In juries of twelve, the Court has upheld less-than-unanimous verdicts.[660]

In *State v. Sykes*,[661] the defendant was charged with misdemeanor theft and faced twelve months in jail.[662] The defendant failed to submit a timely request for a jury trial per chapter 22, section 3404(1) of the Kansas Statutes.[663] The district court proceeded with a bench trial over the defendant's objection. On appeal, the conviction was overturned.[664] The appellate court held that the defendant's failure to submit a timely request for a jury trial did not amount to a valid waiver of the right to a jury trial. When the possible sentence is greater than six months in jail, the defendant is entitled to a jury trial under the United States Constitution, absent a knowing waiver.[665] Consequently, when the possible punishment is greater than six months, the requirement in section 3404(1) that the defendant's jury request be timely is moot.

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654. KAN. STAT. ANN. § 22-3403(1)–(2) (1995).

655. KAN. STAT. ANN. § 22-3404 (Supp. 2006). This requirement is effectively mooted in cases where the possible punishment is greater than six months in jail. *See infra* notes 658–60 and accompanying text.

656. § 22-3404(3), (5).

657. Baldwin v. New York, 399 U.S. 66, 67 (1970).

658. *Id.* at 73–74.

659. Williams v. Florida, 399 U.S. 78, 86 (1970).

660. *See* Apodaca v. Oregon, 406 U.S. 404, 406 (1972) (upholding verdicts of 11-1 and 10-2).

661. 132 P.3d 485 (Kan. Ct. App. 2006), *review denied*, No. 05-94075-A, 2006 Kan. LEXIS 504 (Kan. Sept. 19, 2006).

662. *Id.* at 489.

663. *Id.* at 492. Section 3404(1) requires that a written request for a jury trial be submitted no later than seven days after the trial is assigned. KAN. STAT. ANN. § 22-3404(1) (Supp. 2006).

664. *Sykes*, 132 P.3d at 491.

665. Baldwin v. New York, 399 U.S. 66, 73 (1970).

2. Impartial Jury

The Sixth Amendment requires that the jury be a fair cross-section of the community. "Large distinctive groups" such as minorities and women may not be categorically excluded nor substantially underrepresented. In *Duren v. Missouri*,[666] the United States Supreme Court invalidated a rule where women could opt out of juries upon request.[667] As a result of this rule, although women composed fifty-four percent of the general population, only fifteen percent of venirepersons were women.[668] *Duren* stated the test for determining a violation of the fair cross-section requirement:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.[669]

Missouri's rule, which resulted in the clear statistical underrepresentation of women on jury panels, violated the Sixth Amendment's fair cross-section requirement.[670]

State v. Baker[671] exemplifies the application of *Duren* in Kansas. The defendant argued that persons age sixty and over were overrepresented in jury panels, and moved to have his jury dismissed.[672] Thirty-five percent of the venirepersons in the defendant's case were age sixty or above.[673] The defendant challenged the process by which persons called for jury duty could be excused.[674] The court acknowledged that younger people were more likely to have valid exemptions.[675] "People charged with care of small children are generally in the under 60 category as are persons whose presence at their employment is required for public welfare, health, or safety (policemen,

666. 439 U.S. 357 (1979).
667. *Id.* at 360.
668. *Id.* at 362.
669. *Id.* at 364.
670. *Id.* at 360.
671. 819 P.2d 1173 (Kan. 1991).
672. *Id.* at 1180.
673. *Id.*
674. *Id.*
675. *Id.*

firemen, etc.)."[676] Fatal to the defendant's request was the absence of evidence of systematic exclusion in the jury-selection process.[677] It was not enough that one distinctive group is over- or underrepresented; there must be systematic exclusion of a distinctive group.

3. Peremptory Challenges

Batson v. Kentucky[678] involved a prosecutor who struck venirepersons of the same race as the defendant.[679] This procedure was found to be impermissible under the Equal Protection Clause of the Fourteenth Amendment.[680] The Court held that the defendant must first establish a prima facie case by showing that members of his racial group were excluded.[681] The burden then shifts to the prosecutor to offer a race-neutral explanation.[682] The court then must decide whether the prosecutor's explanation is worthy of credence.[683] *Batson* has been expanded to the purposeful exclusion of venirepersons based on race *by* the defendant[684] and exclusion based on gender.[685]

A *Batson* challenge on appeal is difficult to prove. Any nonracial explanation may be offered by the prosecutor, and significant deference is given to the trial judge's determination. The prosecutor in *State v. Pham* struck two Hispanic venirepersons.[686] The defendant challenged the strikes under *Batson*. The prosecutor claimed that he struck the first juror because he did not answer questions posed to the panel.[687] For example, he did not say that being a juror would be burdensome despite the fact that he was the only clerk who operated a liquor store during the day.[688] The second venireperson was struck because she was concerned about her English comprehension.[689] The appellate court reviewed the challenges for abuse of discretion and gave latitude to the trial judge in determining the prosecutor's credibility. In *Pham*, the appellate court

676. *Id.* at 1180–81.
677. *Id.* at 1181.
678. 476 U.S. 79 (1986).
679. *Id.* at 82–83.
680. *Id.* at 107.
681. *Id.* at 95.
682. *Id.* at 97.
683. *Id.* at 98.
684. Georgia v. McCollum, 505 U.S. 42, 59 (1992).
685. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 146 (1994).
686. State v. Pham, 136 P.3d 919, 928 (Kan. 2006).
687. *Id.* at 929.
688. *Id.*
689. *Id.*

found that these explanations were legitimate, and that the trial court did not abuse its discretion.[690]

When the court erroneously fails to strike potential jurors for cause, the defendant's use of a peremptory strike on the challenged juror cures the court's error and deprives the defendant of a further remedy. In *State v. Ackward*, the defendant challenged two potential jurors for cause.[691] One had been a victim of armed robbery—the charge in the instant case—and the other was a police officer who knew several of the witnesses.[692] The district court denied defendant's motions to strike for cause.[693] The defendant then used two peremptory challenges to remove the two prospective jurors.[694] The issue before the appellate court was whether the jury that actually heard the case was impartial.[695] Thus, it was irrelevant that the defendant was required to use peremptory challenges to correct the district court's error.[696] The defendant admitted that he could not "definitively say" that the jury that tried his case was not impartial; thus, his conviction was upheld.[697]

C. *Other Trial Rights*

1. Public Trial

The Sixth Amendment provides that criminal defendants have the right to a public trial.[698] This Amendment has been incorporated and is applicable to states. In *State v. Dixon*, the Kansas Supreme Court held that the defendant had been denied this right when his verdict was read in a closed courtroom.[699] In *Dixon*, one prosecution team consecutively prosecuted two defendants for the same charges.[700] In order to prevent the second defendant's jury from being contaminated by the verdict from the first defendant's trial, the judge closed the courtroom to the public for the verdict.[701] On appeal, the defendant conceded that the right to public

690. *Id.*
691. State v. Ackward, 128 P.3d 382, 399 (Kan. 2006).
692. *Id.*
693. *Id.*
694. *Id.*
695. *Id.*
696. *Id.*
697. *Id.*
698. U.S. CONST. amend. VI.
699. State v. Dixon, 112 P.3d 883, 909 (Kan. 2005).
700. *Id.* at 906.
701. *Id.*

proceedings was not absolute.[702] At times, "'the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information'" may outweigh the need for public proceedings.[703] A decision to close proceedings, however, is subject to strict scrutiny.[704] After discussing the interests at stake and the available alternatives, the court concluded that the defendant's right to a public trial had been violated.[705] The court reversed and remanded after finding that deprivation of this right was not harmless error.[706]

2. Confrontation

The Confrontation Clause of the Sixth Amendment states that defendants shall have the right to be confronted with the witnesses against them.[707] In *State v. Boyd*, the defendant argued that she was denied her right to confront the child-victim witness when the witness testified via closed-circuit television.[708] The United States Supreme Court held this type of testimony does not violate the Confrontation Clause of the Sixth Amendment in *Maryland v. Craig*, which specifically upheld the constitutionality of Maryland's closed-circuit testimony statute.[709] Interpreting Kansas's closed-circuit testimony statute, the Kansas Supreme Court determined that the district court abused its discretion by allowing the closed-circuit testimony against Boyd.[710] First, the State's expert testified that the children would be traumatized by testifying against Boyd's two codefendants—the witnesses' parents—but not against Boyd herself.[711] Second, in denying Boyd's motion to sever the trial, the district court impermissibly considered the general trauma caused by requiring the child witnesses to testify more than once.[712] The legally relevant consideration is whether the presence of the

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702. *Id.*

703. *Id.* at 907 (quoting Waller v. Georgia, 467 U.S. 39, 45 (1984)).

704. *See id.* at 908 ("'[I]t must be shown that the denial is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest.'" (quoting Press-Enterprise Co. v. Superior Court of Cal., 464 U.S. 501, 510 (1984))).

705. *Id.* at 910.

706. *Id.*

707. U.S. CONST. amend. VI.

708. State v. Boyd, 127 P.3d 998, 1009 (Kan. 2006).

709. Maryland v. Craig, 497 U.S. 836, 860 (1990).

710. *Boyd*, 127 P.3d at 1011.

711. *Id.* at 1010.

712. *Id.*

defendant is the source of the trauma to the witness, not whether the testimony itself would be traumatic.[713]

In *State v. Torres*,[714] the Kansas Supreme Court settled a question left open after the United States Supreme Court case *Crawford v. Washington*.[715] In *Crawford*, the Court announced that the Confrontation Clause forbids all testimonial statements of an unavailable witness unless the defendant had an opportunity to cross-examine that witness.[716] The defendant in *Torres* argued that his statements to police were inadmissible because the defendant—invoking his Fifth Amendment right to silence—was unavailable and had not been cross-examined.[717] The Kansas Supreme Court held that the *Crawford* rule was "clearly discussing interrogations of people other than the defendant."[718]

In a second Kansas case interpreting *Crawford*, the issue was whether a nontestifying witness's statement to officers that the defendant "usually carried weapons" was testimonial.[719] The defendant in *State v. Araujo* argued that the statement was testimonial, and as such, it was inadmissible under *Crawford*.[720] The Kansas Court of Appeals agreed with the district court that the statement was not testimonial: it was offered at trial not to prove the truth of the matter asserted, but rather to demonstrate the officer's state of mind when arresting the defendant.[721]

3. The Defendant's Right to Testify

The Due Process Clause of the Fourteenth Amendment gives a defendant the absolute right to testify on his own behalf. The right to testify may not be denied by defendant's counsel. A defendant's right to present evidence is subject to reasonable restrictions, however.

In *State v. McFadden*,[722] the defendant claimed that his right to testify had been abridged by the court's decision to forbid him from testifying about his own medical condition.[723] The defendant was

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713. *Id.* at 1009–10 (applying the test stated in *State v. Chisholm*, 825 P.2d 147 (Kan. 1992)).

714. 121 P.3d 429 (Kan. 2005).

715. 541 U.S. 36 (2004).

716. *Id.* at 58.

717. *Torres*, 121 P.3d at 438.

718. *Id.*

719. State v. Araujo, 144 P.3d 66, 68, 71 (Kan. Ct. App. 2006), *review granted*, No. 05-94831-AS, 2007 Kan. LEXIS 29 (Kan. Feb. 13, 2007).

720. *Id.* at 71–72.

721. *Id.* at 73.

722. 122 P.3d 384 (Kan. Ct. App. 2005).

723. *Id.* at 387.

prosecuted for driving under the influence.[724] He attempted to testify that his medical condition would make him appear intoxicated although he was not.[725] The district court held that the testimony would be impermissible expert testimony by a lay witness.[726] The court of appeals characterized the ruling as an evidentiary one, and thus subject to an abuse of discretion review.[727] The court found no abuse of discretion and affirmed.[728]

D. Right to Remain Silent: Self-Incrimination

1. Generally

The Fifth Amendment states that no person shall be compelled to be a witness against himself.[729] The right against self-incrimination applies only to testimony which is compelled, testimonial, and incriminating.[730] This protection includes the right of the defendant not to take the stand as a witness.[731] The right is personal; it does not protect corporations.[732]

The self-incrimination clause prohibits only communications that are testimonial.[733] Testimonial communications either "explicitly or implicitly, relate a factual assertion or disclose information."[734] Thus, compelled blood samples or handwriting samples are not testimonial. Only when the witness is required "to disclose the contents of his own mind"[735] is the self-incrimination clause at issue. In *State v. Wahweotten*,[736] the defendant objected to evidence that he refused to take a breathalyzer test.[737] The results of a breathalyzer test would not be testimonial, but the defendant argued that his refusal to take the test was testimonial.[738] In accordance with Kansas and United States Supreme

724. *Id.* at 386.
725. *Id.*
726. *Id.* at 387.
727. *Id.*
728. *Id.* at 388.
729. U.S. CONST. amend. V.
730. Doe v. United States, 487 U.S. 201, 207 (1988).
731. KAN. STAT. ANN. § 60-423 (1995).
732. Braswell v. United States, 487 U.S. 99, 104–05 (1988).
733. *Doe*, 487 U.S. at 207.
734. *Id.* at 210.
735. Curcio v. United States, 354 U.S. 118, 128 (1957).
736. 143 P.3d 58 (Kan. Ct. App. 2006), *review denied*, No. 05-94523-A, 2007 Kan. LEXIS 59 (Kan. Feb. 13, 2007).
737. *Id.* at 63–64.
738. *Id.* at 64–65.

Court precedent, the court held that "the refusal to submit to a breath test was not a communicative statement and thus was not protected by the Fifth Amendment."[739]

Compelled communications are prohibited. Thus, a criminal defendant may not be required to testify against himself at trial. Further, a witness who is protected by the Fifth Amendment privilege may refuse to answer questions, unless and until the witness is protected "at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution."[740]

Finally, the testimony must incriminate the witness.[741] Testimony incriminating the witness's best friend or child does not necessarily compel the witness to incriminate herself. Testimony regarding acts that are embarrassing also do not implicate Fifth Amendment protection.[742]

2. Immunity

Immunity is a tool that the government may use to compel testimony that would otherwise be protected by the Fifth Amendment's protection against self-incrimination. Chapter 22, section 3415 of the Kansas Statutes provides for two kinds of immunity: transactional and use. Under transactional immunity, the statute provides: "Any person granted transactional immunity shall not be prosecuted for any crime which has been committed for which such immunity is granted *or for any other transactions arising out of the same incident.*"[743] Under use immunity: "Any person granted use and derivative use immunity may be prosecuted for *any crime*, but the state shall not use any testimony against such person provided under a grant of such immunity or any evidence derived from such testimony."[744]

A witness granted use immunity may be prosecuted for any crime, but the immunized testimony and fruits thereof may not be used at his trial.[745] A witness is given transactional immunity with respect to a

739. *Id.* at 68.

740. Lefkowitz v. Turley, 414 U.S. 70, 78 (1973) (citation omitted).

741. *See* Curcio v. United States, 354 U.S. 118, 124 (1957) (stating that one cannot be lawfully compelled "to condemn himself by his own oral testimony").

742. United States v. Calandra, 414 U.S. 338, 353 (1974).

743. KAN. STAT. ANN. § 22-3415(b)(1) (Supp. 2006) (emphasis added).

744. *Id.* § 22-3415(b)(2) (emphasis added).

745. Kastigar v. United States, 406 U.S. 441, 448–49 (1972).

particular crime or incident; in exchange for his testimony, the witness may not be prosecuted for the specified crime.[746] Once granted immunity—either use or transactional—the witness may not refuse to answer questions based on Fifth Amendment grounds.[747]

3. Comments on the Defendant's Silence

The prosecution may not comment on the defendant's invocation of his right to silence.[748] Comments that the defendant, who has invoked his right to silence, does not appear remorseful are also prohibited by the self-incrimination clause, if "the prosecutor [attempts] to use evidence of the defendant's courtroom behavior where the defendant has exercised his right not to testify."[749]

E. Proof Beyond a Reasonable Doubt

The Constitution requires proof beyond a reasonable doubt to support a criminal conviction. Every fact required to support the conviction must be proved beyond a reasonable doubt. The requirement arises from the defendant's right to due process.[750] Unless legislative intent indicates otherwise, the burden rests upon the defendant to prove an affirmative defense, such as duress.[751]

F. Other Kansas Trial Issues

1. Motion for Acquittal

The defendant may move for a judgment of acquittal at the close of the prosecution's case. If the judge finds from the evidence that "a reasonable mind might fairly decide a defendant is guilty beyond a reasonable doubt" then the judge must deny the motion.[752] A motion to set aside the verdict may be made after the jury's verdict.

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746. *Id.* at 453.

747. *Id.* at 462.

748. Griffin v. California, 380 U.S. 609, 613 (1965). In 2005, the Kansas Supreme Court, guided by *Griffin*, held that the prosecutor may not highlight the defendant's communications with his attorney to infer consciousness of his guilt. State v. Dixon, 112 P.3d 883, 904 (Kan. 2005).

749. State v. Kleypas, 40 P.3d 139, 280 (Kan. 2001).

750. *In re* Winship, 397 U.S. 358, 361 (1970).

751. Dixon v. United States, 126 S. Ct. 2437, 2442 (2006).

752. State v. Wiggett, 44 P.3d 381, 385–86 (Kan. 2002).

2. Submission of the Case to the Jury

When an outside party has tampered with a jury, a mistrial may be the proper remedy. Rules of evidence bar a juror from testifying about "the effect of any statement, conduct, event or condition upon the mind of a juror as influencing him or her to assent to or dissent from the verdict . . . or concerning the mental processes by which it was determined."[753]

If a jury becomes deadlocked a court may give the jury an *Allen*[754] instruction. An *Allen* instruction can provoke a stalled jury into making a decision. The charge generally instructs the jury about the burden of having to retry the case, and it may state that there is no reason to believe that another jury will make a better decision than the current one. When given before deliberations have begun, coercive effect is not a concern. However, when the instruction is given after deliberations have begun, the Kansas Supreme Court has held that the instruction could exert undue influence on the jury.[755] The content and timing of the instruction might rise to reversible error. For example, in *State v. Troy*[756] after less than two hours of deliberations, the judge gave an *Allen* instruction to a deadlocked jury.[757] The Kansas Supreme Court suggested that the instruction was improper because it coerced or restrained the jury's deliberations, but it declined to reverse the conviction because the defendant failed to object when the charge was given.[758]

3. Mistrial

The court may declare a mistrial when (1) it is physically impossible to proceed; (2) there is a legal defect which would make the verdict reversible as a matter of law; (3) prejudicial conduct, in or out of the courtroom, would cause injustice to either the defense or the prosecution; (4) the jury cannot agree on a verdict; (5) false statements of a juror on voir dire prevent a fair trial; or (6) the defendant's competency is to be

753. KAN. STAT. ANN. § 60-441 (1995).

754. Allen v. United States, 164 U.S. 492 (1896).

755. State v. Makthepharak, 78 P.3d 412, 417 (Kan. 2003) (citing State v. Struzik, 5 P.3d 502, 514 (Kan. 2000)).

756. 524 P.2d 1121 (Kan. 1974).

757. *Id.* at 1124.

758. *Id.* at 1124–25.

determined.[759] If a mistrial is granted, the trial is retained on the court's docket.[760]

G. Double Jeopardy

1. Generally

The Fifth Amendment provides that no person shall "be subject for the same offence to be twice put in jeopardy."[761] The protection of double jeopardy encompasses three distinct rights: the defendant may not be retried for the same offense after a conviction, retried for the same offense after an acquittal, nor shall the defendant receive multiple punishments for the same offense.[762]

Jeopardy does not attach until the jury is sworn or empanelled, or, in a bench trial, when the prosecution's first witness is sworn.[763] If an appellate court finds that the evidence supporting a conviction is insufficient, the State may reprosecute the defendant.[764]

In case of a mistrial, a second prosecution without the defendant's consent does not violate the Double Jeopardy Clause when there is "manifest necessity" to abort the trial, such as a deadlocked jury.[765] Bad faith conduct by the prosecutor intended to provoke a mistrial cannot provide manifest necessity.[766]

2. Multiplicity

Multiplicity involves the third category of double jeopardy protections: multiple punishments for the same offense. When the same conduct gives rise to criminal liability, the major difficulty for purposes of the Double Jeopardy Clause is determining what constitutes the "same offense." In *Blockburger v. United States*, the Supreme Court of the United States established a rule for determining whether there are multiple offenses for the same conduct: "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the

759. KAN. STAT. ANN. § 22-3423(1) (1995).
760. *Id.* § 22-3423(2).
761. U.S. CONST. amend. V.
762. State v. Yeoman, 951 P.2d 964, 965 (Kan. Ct. App. 1997).
763. State v. Griffin, 787 P.2d 701, 703 (Kan. 1990).
764. Tibbs v. Florida, 457 U.S. 31, 42 (1982).
765. State v. Graham, 83 P.3d 143, 151 (Kan. 2004).
766. *Id.*

test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact the other does not."[767] This rule—known as the *Blockburger* test—focuses on the statutes under which the defendant is charged at issue; the evidence at trial is immaterial to this analysis. If each offense considered in the abstract requires proof of a fact that the other does not, then there is no multiplicity. This rule is sometimes described as a constitutional rule, but it is also called a canon of statutory construction.

In *State v. Schoonover*, the Kansas Supreme Court confronted multiplicity in Kansas, and in particular, the court held that the single act of violence/merger doctrine would no longer be applied in Kansas.[768]

3. State v. Schoonover

Scott Schoonover was discovered passed out in his vehicle on a country road.[769] The officer that was called to the scene observed several items in the vehicle which were consistent with the manufacture of methamphetamine, and a search warrant for the car was issued.[770] Schoonover was later charged with and convicted of, among other things, possession and manufacture of methamphetamine.[771]

On appeal, Schoonover argued that his convictions were multiplicitous.[772] Interpreting and applying the recent case *State v. Patten*,[773] the Kansas Court of Appeals upheld his conviction.[774] The Kansas Supreme Court took the opportunity to conduct an in-depth analysis of the protections provided by the Double Jeopardy Clause, and specifically the "single act of violence doctrine."[775]

When the same conduct or act creates criminal liability under two or more statutes, many jurisdictions (including Kansas and the United States) have at times held that the defendant may only be prosecuted for one offense under the "single act of violence doctrine."[776] For example, in the 2004 case *State v. Groves*, the defendant threw a woman to the

767. Blockburger v. United States, 284 U.S. 299, 304 (1932).
768. State v. Schoonover, 133 P.3d 48, 77 (Kan. 2006).
769. *Id.* at 57.
770. *Id.* at 58.
771. *Id.* at 59.
772. *Id.*
773. 122 P.3d 350 (Kan. 2005).
774. *Schoonover*, 133 P.3d at 48.
775. *Id.* at 59–80.
776. *Id.* at 62.

ground and snatched her purse in the same motion.[777] The Kansas Supreme Court held that convictions for aggravated battery and aggravated robbery were multiplicitous because they arose from the same act of violence.[778] This doctrine directly conflicts with the *Blockburger* test: the single act of violence doctrine examines the evidence that is presented at trial and determines whether it is the same evidence that supports convictions for multiple offenses, while *Blockburger* looks only at the statutory elements of the crimes charged. Schoonover argued that the evidence which supported the charges of possession of methamphetamine and manufacture of methamphetamine arose from the same act, and thus were multiplicitous under the single act of violence doctrine.[779]

The Kansas Supreme Court provided a detailed history of the evolution of the Double Jeopardy Clause at the state and federal level. The court was bothered by the confusion and inconsistency surrounding the Double Jeopardy Clause. For example, the court discussed the single act of violence doctrine's application in felony-murder cases.[780] When prosecuting felony murder, the State ordinarily would also charge the defendant with the underlying felony. The court highlighted a 1981 Kansas Supreme Court rule which held that the underlying felony and the felony-murder rule would "merge" under the single act of violence doctrine, i.e., the defendant could only be prosecuted for the underlying felony or the felony murder, but not both.[781] The court was not comfortable with the trend that "in most instances, the felony-murder cases represent a departure" from the doctrine.[782] The court found that the doctrine should not apply in felony-murder cases because the legislature did not intend for the offenses to merge, and examination of intent is the underlying principle in the *Blockburger* test.[783]

Schoonover is a natural extension of the court's 2005 case *State v. Patten*.[784] *Patten* held that the *Blockburger* elements test would be applied in Kansas in questions of multiplicity.[785] *Patten* rejected the so-called common law test stating that the "test for whether the offenses merge and are, therefore, multiplicitous is whether each offense charged

777. State v. Groves, 95 P.3d 95, 96 (Kan. 2004), *overruled by Schoonover*, 133 P.3d 48.
778. *Id.* at 99.
779. *Schoonover*, 133 P.3d at 80–81.
780. *Id.* at 75–77.
781. State v. Garnes, 624 P.2d 448, 453 (Kan. 1981), *overruled by Schoonover*, 133 P.3d 48.
782. *Schoonover*, 133 P.3d at 75.
783. *Id.* at 62–63, 76.
784. 122 P.3d 350 (Kan. 2005).
785. *Id.* at 355–56.

requires proof of a fact not required in proving the other."[786] The focus of the common law test is on the evidence necessarily proved at trial to support multiple convictions, while the *Blockburger* test looks only at the statutory elements of the crimes charged. The *Patten* court hoped to eliminate some confusion in the lower courts which had been applying "a mix of approaches, including examination only of the elements where the test is stated in terms of 'proof of a fact' and examination of the proof of a fact where the test is stated in terms of 'proof of an element.'"[787]

Following the logic of *Patten*, the *Schoonover* court held that the single act of violence doctrine would no longer be applied in Kansas.[788] The court listed six reasons for abolishing the rule. First, the doctrine expands the protections of the Fifth Amendment without a reasoned justification. Second, the Kansas Supreme Court frequently has held that the Fifth Amendment provides the *same* protection as the Kansas Constitution. Third, abolition of the doctrine reconciles felony-murder prosecutions with the rest of the single-act-of-violence cases. Fourth, rejection of the doctrine reconciles multiplicity cases with established Kansas precedent regarding successive prosecution cases. Fifth, rejection of the doctrine is consistent with chapter 21, section 3107 of the Kansas Statutes, which deals with multiplicity prosecutions. Sixth, it reconciles contradictory and divergent Kansas case law.[789]

Rejection of the merger doctrine brings Kansas law closer to the principles underlying the Double Jeopardy Clause. The purpose of the clause is to limit judicial power; there is nothing problematic about the legislature authorizing multiple punishments for the same conduct. The violation occurs when the court abuses the guidelines of the legislature by imposing multiple unauthorized sentences.[790] The merger doctrine unnecessarily diverts attention away from legislative intent. The best way to determine legislative intent is not to examine the defendant's conduct with respect to the statutes, as the merger doctrine would require. A better method is to look at the statutes themselves to see if they authorize multiple punishments.

Undoubtedly, *Schoonover* has purged Kansas case law of the confusion and inconsistencies surrounding the merger doctrine. The

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786. *Id.* at 353.

787. *Id.*

788. *Schoonover*, 133 P.3d at 77.

789. *Id.* at 77–78.

790. *See* Missouri v. Hunter, 459 U.S. 359, 366 (1983) ("With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.").

holding provides a simple analytical framework for multiplicity challenges. In the post-*Schoonover* case *State v. Sanchez*,[791] the Kansas Supreme Court faced a challenge to an arguably multiplicative conviction of felony murder and child abuse. The court simply applied "'the same-elements test: whether each offense requires proof of an element not necessary to prove the other offense. If so, the charges stemming from a single act are not multiplicitous and do not constitute a double jeopardy violation.'"[792] Because the child abuse charge required proof that the victim was under the age of eighteen and the felony murder required the death of the victim, the convictions were not multiplicitous.[793] The court disposed of another case involving convictions of aggravated criminal sodomy and rape, finding no double jeopardy violation under *Schoonover*.[794] These cases are noteworthy because of the straightforward and short analysis used by the court in considering the challenges to multiplicity.

However, *Schoonover* may be a simple fix to a more complex problem. *Blockburger* itself seemed like a simple and straightforward solution to multiplicity issues, but its application eventually proved problematic. The strict elements test in *Blockburger* cannot fairly deal with the facts of some cases—for example, *Prince v. United States*.[795] In *Prince*, the defendant was convicted under the Federal Bank Robbery Act of both bank robbery and entering a bank with the intent to commit a robbery.[796] Under the *Blockburger* test, each crime had a mutually independent element, and thus conviction under both would not violate *Blockburger*, nor would these offenses have been multiplicitous under *Schoonover*. But the Court did not end its analysis there. It considered evidence of Congress's intent and established a default rule of lenity in the absence of evidence of congressional intent. In so doing, it held that the two offenses "merged," and the convictions were thus multiplicitous.[797] The contrary result would clearly undermine Congress's intent.[798]

To account for the shortcomings of the *Blockburger* test, the Supreme Court of the United States was forced to recognize that the test

791. 144 P.3d 718 (Kan. 2006).
792. *Id.* at 728 (quoting *Schoonover*, 133 P.3d at Syl. ¶ 12).
793. *Id.*
794. State v. Potts, 135 P.3d 1054, 1060–61 (Kan. 2006).
795. 352 U.S. 322 (1957).
796. *Id.* at 324.
797. *Id.* at 328.
798. *Id.*

"is simply a 'rule of statutory construction,' a guide to determining whether the legislature intended multiple punishments."[799] Kansas—under *Schoonover* and *Patten*—does not require nor permit an inquiry into congressional intent. The purpose of the Double Jeopardy Clause is to prevent the sentencing court from giving a greater punishment than the legislature intended. *Blockburger* announced a rule of statutory construction; a tool whose ultimate purpose is to discern the intent of the legislature. Kansas, therefore, ignores the ultimate purpose of the Double Jeopardy Clause in favor of a simple rule; a mere proxy for the crucial question. It may be the case in the vast majority of convictions that Congress did not intend two offenses to "merge" when they contain independent elements. However, the Double Jeopardy Clause forbids a greater punishment than Congress intended. When the *Schoonover* rule fails to discern legislative intent, the court abdicates its duty by failing to conduct an inquiry into congressional intent.

H. Appeals

The defendant may appeal any judgment against the defendant made by the district court.[800] The defendant may not appeal convictions after nolo contendere or guilty pleas, except to challenge the legality of the proceedings.[801] The prosecution may appeal four rulings: (1) an order of dismissal; (2) an order arresting judgment; (3) a question reserved by the prosecution; and (4) an order granting certain new trials.[802] Furthermore, the prosecution may appeal an order to quash a warrant or suppress evidence before trial and within ten days of the order.[803]

I. Resentencing After Conviction

In *North Carolina v. Pearce*, the Supreme Court of the United States held that it is impermissible to resentence a defendant to a harsher punishment because the defendant appealed the conviction.[804] A presumption of vindictiveness exists when the sentencer does not give

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799. Grady v. Corbin, 495 U.S. 508, 517 (1990), *overruled on other grounds by* United States v. Dixon, 509 U.S. 688 (1993).

800. KAN. STAT. ANN. § 22-3602(a) (Supp. 2006).

801. *Id.*

802. *Id.* § 22-3602(b)(1)–(4).

803. KAN. STAT. ANN. § 22-3603 (1995).

804. North Carolina v. Pearce, 395 U.S. 711, 723–24 (1969), *overruled on other grounds by* Alabama v. Smith, 490 U.S. 794 (1989).

affirmative reasons for the increased sentence.[805] The Kansas case *State v. Rinck*[806] affirmed *Pearce*'s central holding. The defendant in *Rinck* appealed his conviction, and his second conviction was harsher than his first conviction.[807] Because the sentencing judge in *Rinck* failed to offer any explanation why the second sentence was greater than the first, the second sentence was found to be vindictive and thus unconstitutional as a matter of law.[808]

Where the presumption of vindictiveness does not apply, the defendant may prevail by showing actual vindictiveness.[809] The presumption of vindictiveness does not depend upon whether the resentencing was imposed by the same judge or by a different one.[810]

J. Postconviction Remedies

A prisoner in custody may move the sentence-imposing court to vacate, set aside, or correct the sentence.[811] The motion must be made within one year of the final order from the prisoner's direct appeal.[812] The court is not required to entertain more than one motion from the petitioner.[813] The prisoner may petition on the grounds that "the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or is otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack."[814] The sentencing court's decision may be appealed.[815]

The prisoner may also apply for federal habeas corpus relief under 28 U.S.C. § 2254. A federal court will entertain the motion only if the state remedies have been exhausted and the prisoner alleges a violation of federal law.[816]

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805. *Id.* at 725–26.
806. 923 P.2d 67 (Kan. 1996).
807. *Id.* at 69.
808. *Id.* at 70.
809. Wasman v. United States, 468 U.S. 559, 569 (1984); State v. Cooper, 69 P.3d 559, 563 (Kan. 2003).
810. *Rinck*, 923 P.2d at 73.
811. KAN. STAT. ANN. § 60-1507(a) (1995).
812. *Id.* § 60-1507(f)(1).
813. *Id.* § 60-1507(c)
814. *Id.* § 60-1507(b).
815. *Id.* § 60-1507(d).
816. 28 U.S.C. § 2254(a)–(b)(1) (2000).