2022-23 Kansas Criminal Law Update for the Douglas County Bar Association

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I. Pretrial Issues

i. Constitutional Speedy Trial

1. In ***State v. Ford*, __Kan.__, 519 P.3d 456 (2022),** Mr. Ford pled guilty to first-degree murder and related charges in 1993. His convictions were vacated in 2016 because it was unclear whether he received a requested competency hearing before he pled. On remand, a jury found Mr. Ford guilty of the charges. Mr. Ford attempted to argue that the delay between the original charges in 1992 and the trial that began in 2019 violated his constitutional right to a speedy trial, but the Court disagreed.

   Mr. Ford argued that the speedy trial clock ran continuously from the day he was charged in 1992 until his 2019 trial. But the Court found that the time Mr. Ford stood convicted did not count toward a constitutional speedy trial analysis. Noting that other courts had held that the appropriate consideration for speedy trial was the time between the charge and trial, the Court found that counting the period of incarceration after conviction in this case would also defeat the purpose of speedy trial, which is to minimize the possibility of lengthy pre-trial incarceration.

ii. Self-defense Immunity

1. In ***State v. Betts*, 316 Kan. 191, 514 P.3d 341 (2022)**, Mr. Betts, a Wichita police officer, was inside a home during a domestic violence call when he fired two gunshots at a dog he believed was attacking him. He missed the dog, but bullet fragments hit a young girl who was, at the time, right next to the advancing dog.

   The State charged Mr. Betts with aggravated battery. Betts filed a pretrial motion to dismiss seeking self-defense immunity. The district court granted him self-defense immunity and dismissed the case. The State appealed, arguing that self-defense immunity does not apply where an innocent bystander is harmed by a defendant's reckless conduct, even if the defendant is acting in self-defense.

As a matter of first impression, the Kansas Supreme Court agreed. Looking to the statutory language of K.S.A. 2021 Supp. 21-5231(a) and K.S.A. 2021 Supp. 21-5222, the Court determined that the grant of immunity is "confined to the use of force against a person or thing reasonably believed to be an aggressor[,]" and therefore does not extend to a defendant's reckless acts while engaged in self-defense that results in unintended injury to an innocent bystander.

iii. Self-Representation

1. In ***State v. Couch*, No. 122,156, __ Kan. __, __ P.3d __ (August 11, 2023)**, the Court analyzed whether the district court committed structural error when it denied Mr. Couch's request to proceed *pro se* at his trial on rape, kidnapping, and other related charges. Mr. Couch had requested to represent himself, explaining he was tired of his attorneys who he said had accused him of the crimes. But he also threatened his present attorney and cussed at the judge. The district court found him incompetent to represent himself because it concluded he could not control his own actions and frequently spoke out of turn disrupting the proceedings. Couch moved twice more to represent himself, but the court denied his motions. He threatened to strangle someone if his restraints were removed and was ultimately removed from the court room. Noting that accuseds have unqualified rights to self-representation, the Court explained that unqualified does not mean absolute. Rather, the right to self-representation "rests on an implied presumption that the court will be able to achieve reasonable cooperation" from the *pro se* accused. In order to properly invoke the right to represent one's self, the accused must be able and willing to abide by the rules of procedure and protocol. Still, the behavior must be more than merely trying, but must constitute seriously disruptive conduct that is likely to continue. Although the court based its decision to deny Mr. Couch's motion on his lack of technical legal knowledge *and* his disruptive behavior, when only the latter should have been considered, the record supports the district court's conclusion that he was unduly disruptive, and therefore, its denial of his motion for self-representation.

iv. Discovery

1. **Duty of State to Disclose Evidence to Defense**

a. In ***State v. Frantz***, ___ Kan. ___, 521 P.3d 1113 (2022), the Kansas Supreme Court evaluated whether the State's handling of evidence regarding evidence a victim's dying declaration violated due process.

First, the accused argued the prosecution violated his due-process rights when it failed to inform the jury that an officer misheard the dying declaration. The Court held that no violation occurred because the body camera footage was turned over in discovery and played for the jury, allowing the parties to argue their respective inferences about what was said. A prosecutor's duty to turn over evidence does not require them to draw inferences favorable to the defense from that evidence.

Second, the Kansas Supreme Court determined no due process violation could be established from an allegation that officers lied to conceal body camera footage absent evidence the footage existed or demonstrated evidence of efforts the State attempted to conceal the footage. This rule was held to be particularly true in this case because the defendant was aware of the conversation allegedly sought to be concealed and its substance.

v. Challenges to Searches

1. In ***State v. Campbell*, 532 P.3d 425 (2023)**, Mr. Campbell moved to suppress all evidence seized during a road-side stop, arguing that law enforcement lacked probable cause to search the vehicle. The district court granted the request, finding that the search-warrant extension for the vehicle listed an erroneous date in November when law enforcement intended to put December. After the State moved for reconsideration, the district court reversed its suppression ruling. On appeal, Mr. Campbell argued that the district court's reconsideration ruling was erroneous because the date on the search warrant was not a technical irregularity as contemplated by K.S.A. 22-2511 but rather a substantive error, and also because law enforcement placed the GPS tracking device on his car outside the statutory timeframe. The Kansas Supreme Court disagreed finding that the discrepancy in dates and placing of the tracking device were technical irregularities that did not affect the validity of the search warrant. As such, the Court found that the district court did not abuse its discretion in granting the State's motion to reconsider its erroneous suppression ruling.

vi. Challenges to Seizures

1. Investigatory Detentions

a. In ***State v. Bates*, 316 Kan. 174, 513 P.3d 483 (2022)**, the Kansas Supreme Court determined that the totality of the circumstances as found the by district court provided reasonable suspicion to effectuate an

investigatory detention, rendering the accused's seizure reasonable under the Fourth Amendment of the United States Constitution and Section 15 of the Kansas Constitution Bill of Rights. Even though there were potentially innocent explanations for some of the factors the district court relied upon for determining that reasonable suspicion existed, the Court emphasized that the question is whether the circumstances when viewed as a whole justified the seizure.

2. Objectively unreasonable seizures

a. In ***State v. Cline*, 526 P.3d 686 (Kan. App. 2023)**, a Kansas trooper attempted to pull Mr. Cline over for driving with a broken windshield but when Mr. Cline did not stop, the trooper pursued him through residential streets and performed a tactical intervention maneuver to immobilize Mr. Cline's vehicle, which caused Mr. Cline's car to spin, run off the road into a utility pole, causing the death of Mr. Cline's passenger. The State charged Mr. Cline with felony murder among other crimes, but the district court granted Mr. Cline's motion and suppressed all evidence obtained after the trooper's maneuver, finding the trooper's actions were an objectively unreasonable use of force to carry out a seizure.

The Kansas Court of Appeals agreed. On appeal, the parties did not dispute and the Court agreed that, by terminating the car chase by striking the vehicle, the trooper carried out a seizure under the Fourth Amendment and Section 15 of the Kansas Constitution—the trooper intentionally applied physical force. *Citing Torres v. Madrid*, 592 U.S. ---, 141 S. Ct. 989, 998 (2021) ("A seizure requires the use of force *with intent to restrain*.") (emphasis in original). The Court reiterated that the proper test for assessing the reasonableness of a seizure is under the objective reasonableness standard, which requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake. In applying this standard, the Court determined that the risk of danger to the public (including Mr. Cline's passenger) by use of the trooper's dangerous maneuver was objectively unreasonable, i.e., that the trooper used excessive force to seize Mr. Cline under the circumstances constituting an objectively unreasonable seizure.

The Court of Appeals also upheld the district court's decision to apply the exclusionary rule to suppress all evidence following the seizure. The rule, while not an individual right, was created as a deterrent by barring the introduction of evidence obtained in violation of the Fourth Amendment. Recognizing that the Trooper's actions were part of a pattern of intentional conduct, the importance that law enforcement

officers from all agencies know the lawful parameters of carrying out dangerous vehicle maneuvers, and the direct causal connection between the trooper's use of excessive force and the evidence Mr. Cline sought to suppress, the Court of Appeals determined that the facts and circumstances of this case fell within the purpose of the exclusionary rule such that the suppression of all evidence derived from the trooper's unreasonable seizure would serve its remedial purpose.

3. Arrests

a. Probable Cause to Support Arrest Warrant

i. Impact of Omissions

1. In ***State v. Frantz***, ___ Kan. ___, 521 P.3d 1113 (2022), the Kansas Supreme Court held that regardless of whether the omissions from a probable cause affidavit alleged by the defendant were deliberate, the alleged omissions did not negate probable cause to arrest Mr. Frantz for the crime of first- degree murder, and thus did not entitle Mr. Frantz to relief.

vii. Challenges to Statements

1. (In)Voluntariness of Confession

a. In ***State v. Spencer***, No. 124,804, Ms. Spencer argued that the district court erred by failing to suppress statements she made involuntarily during interrogation because her statements resulted from her tiredness, stomach issues, and coercive confinement in an interview room. But the Kansas Supreme Court disagreed: although she was confined, interrogation repeatedly ceased for her to take breaks, her stomach pain did not impair her understanding or free will, and tiredness alone is insufficient evidence of involuntariness.

viii. First Amendment Challenges

1. Standing & Overbreadth

a. In ***City of Wichita v. Trotter*, 316 Kan. 310, 514 P.3d 1050 (2022)**, the Kansas Supreme Court reiterated that to have standing to assert a First Amendment overbreadth challenge to a law, a litigant need not establish personal injury arising from that law. The same third party standing is unavailable in Fourth Amendment challenges, as those rights are personal to a defendant and may not be vicariously asserted.

The Kansas Supreme Court determined that the Wichita City Ordinance regulating after hours establishments was unconstitutionally overbroad because it failed to regulate only commercial activity, instead reaching private gatherings, which impermissibly violates the right of assembly guaranteed by the First Amendment.

II. Trial Issues

i. Specific Offenses

1. Aggravated Kidnapping

a. Sufficiency of Evidence

i. Flight from Crime vs. Facilitate Commission of Crime

1. In ***State v. Couch*, No. 122,156, __ Kan. __, __ P.3d __ (August 11, 2023)**, the State initially charged Mr. Couch with restraining the complaining witness with the intent to facilitate flight or the commission of any crime. But, the jury instructions only contained the "commission of any crime" language. The Court found insufficient evidence existed to convict Mr. Couch for kidnapping to facilitate a crime because moving the witness from room to room was merely incidental to and inherent in the other offenses of rape; *i.e.*, moving her from room to room did not make the crimes substantially easier to commit. This was true even though Mr. Couch had better access to bindings in the bedroom where he moved the witness, and even though he prevented her from touching her phone as he moved her. Though the evidence showed that the witness was bound to facilitate Mr. Couch's flight, because that was not an element of the offense given to the jury, the Court reversed Mr. Couch's kidnapping conviction.

ii. Kidnapping to Terrorize or Inflict Harm on Victim

1. In ***State v. Butler*, No. 123,742, __ Kan. __, __ P.3d __ (August 11, 2023),** the Kansas Supreme Court held that the *Buggs* kidnapping test—which examines whether a kidnapping was incidental to the another crime, made the commission of another crime substantially easier, or substantially lessened the risk of detection on another crime—only applied when the accused was alleged to have kidnapped the witness in order to facilitate an additional crime. Therefore, when the State alleged the kidnapping occurred to inflict bodily harm or terrorize the witness, it did not

also have to prove that the kidnapping substantially facilitated the commission of another offense, even if the accused was alleged to have committed another offense while the witness was confined.

2. Burglary

a. In ***State v. Gutierrez-Fuentes***, **315 Kan. 341, 508 P.3d 378 (2022),** the accused argued that the State had failed to present sufficient evidence that he lacked authority to enter the apartment he'd lived at with his former girlfriend so as to make him criminally liable for burglary. He noted that he'd resided there with her and that the State hadn't put on any evidence about their respective interests in the property so as to prove he was legally excludable from it. But the Kansas Supreme Court held sufficient circumstantial evidence supported the finding he lacked the authority to be in the apartment: his girlfriend had kicked him out and he'd left; she'd asked for the key back and he'd told her he'd lost it, not that he didn't have to return it; and he asked her to admit him on the day in question, he didn't just enter. The Court found this evidence indicated that Mr. Gutierrez-Fuentes recognized his girlfriend's right to exclude him from the property; and was circumstantial proof he was not legally allowed admittance. The Court therefore affirmed his burglary conviction.

3. Attempted Aggravated Burglary

a. In ***State v. Larsen*, No. 122,660, __ Kan. __, __ P.3d __ (August 4, 2023)**, Mr. Larsen argued his conviction for attempted aggravated burglary should be vacated along with the Court's decision in *State v. Watson*, 256 Kan. 396, 401, 885 P.2d 1226 (1994), because both resulted from the application of a rule permitting convictions of attempted aggravated burglary absent proof the accused knew the dwelling he was attempting to enter was occupied. Applying *State v. Mora*, 315 Kan. 537, 541-42, 509 P.3d 1201 (2022), the Kansas Supreme Court overruled *Watson*. Under *Mora*, when an accused is charged with attempting to commit an offense, the State must prove the accused acted with specific intent as to all elements. Indeed, the State must prove the accused intended to commit the intended crime, even if the completed crime does not require proof of specific intent. As applied here, this meant Mr. Larsen's conviction could only be upheld if the State proved beyond a reasonable doubt that he intended to enter an *occupied* dwelling. On the facts of this case, where evidence showed Mr. Larsen potentially hoped to gain access to items individuals often took when away—*i.e.*, car keys and wallets—the Court found the State had met its burden. Thus, even

under the *Mora* standard, the Court found the evidence sufficient to uphold Mr. Larsen's attempted aggravated robbery conviction.

4. Driving Under the Influence

a. In ***State v. Zeiner*, 316 Kan. 346, 515 P.3d 736 (2022)**, the Kansas Supreme Court found that while no direct evidence supported the conclusion the defendant drove while intoxicated, circumstantial evidence did support the finding. The accused admitted to drinking earlier, last left an establishment that served alcohol, smelled like alcohol, and was found three miles from home asleep in the driver's seat with evidence of alcohol consumption in the vehicle. This evidence supported the jury's finding the accused drove while intoxicated.

5. Attempted First-Degree Murder

a. Sufficiency of the evidence

i. In ***State v. Buchanan*, 317 Kan. 443, 531 P.3d 1198 (2023)**, the Court denied Mr. Buchanan's claim that insufficient evidence supported a finding that he had specific intent to commit attempted first-degree murder after finding that ample evidence allowed a rational juror to conclude beyond a reasonable doubt that Mr. Buchanan intended to commit murder where evidence showed, *inter alia*, that Mr. Buchanan planned to destroy the apartment where his teenage daughter lived with her brother and mother by setting fire to it at 4 a.m. (when people are most likely to be sleeping) and in a location that blocked the individuals from exiting the apartment.

6. First-Degree Premeditated Murder

a. In ***State v. Hilyard*, 316 Kan. 326, 515 P. 3d 267 (2022)**, the Kansas Supreme Court affirmed that sufficient evidence supported Hilyard's conviction for premeditated first-degree murder. Hilyard argued for the first time on appeal that there was insufficient evidence of premeditation because there was no direct evidence that he knew or should have known the victim was alive when Hilyard began the process of decapitation.

The Court indicated direct evidence is not necessary to prove premeditation and that circumstantial evidence can suffice. The Court listed five factors to analyze when circumstantial evidence is being used

to determine premeditation: "'(1) the nature of the weapon used; (2) lack of provocation; (3) the defendant's conduct before and after the killing; (4) threats and declarations of the defendant before and during the occurrence; and (5) the dealing of lethal blows after the deceased was felled and rendered helpless.' " *State v. Kettler*, 299 Kan. 448, 467, 325 P.3d 1075 (2014) (quoting *State v. Scaife,* 286 Kan. 614, 617-18, 186 P.3d 755 [2008]). Inferences reasonably drawn are not driven by the number of factors present in a particular case, because in some cases one factor alone may be compelling evidence of premeditation. See *State v. Cook*, 286 Kan. 1098, 1102, 191 P.3d 294 (2008)."

Here, the court centered it's analysis on the testimony of two witnesses. The coroner testified that there was blood in the victim's airway which would imply the victim was still breathing when the act of decapitation began. A crime scene investigator testified that they found arterial spray from a cut to the neck which implies blood pressure from a beating heart. Because reasonable inferences can be drawn from that circumstantial evidence, there was sufficient evidence before the jury for it to find premeditation.

b. In ***State v. Frantz*, ___ Kan. ___, 521 P.3d 1113 (2022),** the Kansas Supreme Court determined that the prosecution presented sufficient evidence to sustain a conviction for first-degree premeditated murder. The Court reiterated that, when reviewing evidence sufficiency, appellate courts do not consider whether the evidence is capable of supporting multiple inferences or whether one inference is more compelling than another, but instead view the evidence in a light most favorable to the prosecution and determine whether a rational fact finder could reasonably have drawn conclusions supporting guilt. Under this standard, the evidence presented was sufficient for a rational fact finder to conclude Frantz was the killer. There was also sufficient evidence of proximate cause and premeditation: the victim was shot multiple times with a handgun, there was evidence of a delay between shots, the shooter purportedly chased the victim while firing, and the shooter fled immediately following the shooting.

c. In ***State v. Spencer*, No. 124,804**, Spencer argued the State failed to present sufficient evidence that she committed murder with premeditation because she only planned to get drugs in exchange for sex, she never planned to kill the victim. But the Court found the case's evidence provided direct evidence of premeditation: she stabbed the

victim for at least 6 minutes with no break, she brought he knife to the crime scene, and she and her friend texted about the killing before it happened and spoke to each other throughout the killing while they did it—and it was recorded. Thus, the Court found the evidence sufficient.

7. Possession of Paraphernalia

a. **Unit of Prosecution**

i. In ***State v. Eckert*, ___ Kan. ___, 522 P.3d 796 (2023)**, the Kansas Supreme Court held that the mass noun "drug paraphernalia" as used in K.S.A. 2016 Supp. 21-5709(b) is ambiguous regarding the unit of prosecution. As such, the canons of statutory construction requiring the avoidance of absurd results and the rule of lenity required a single unit of prosecution for any number of items possessed contrary to any subsection of K.S.A. 2016 Supp. 21-5709(b), abrogating *State v. Booton*, No. 113,612, 2016 WL 4161344 (Kan. App. 2016) (unpublished opinion). Accordingly, all but one felony and one misdemeanor conviction of the original 25 convictions were vacated as multiplicitous and in violation of the prohibition against double jeopardy.

b. **Sufficiency of Evidence**

i. In ***State v. Sieg*, 315 Kan. 526, 506 P. 3d 535 (2022)**, the Kansas Supreme Court upheld convictions for possession of methamphetamine and possession of drug paraphernalia. Sieg was the passenger in a legally stopped vehicle and found with an eyeglass case near him. Inside the case was a spoon, a pipe, and two baggies. The pipe was tested for DNA and one of three DNA profiles on the pipe matched Sieg. The baggies each tested positive for methamphetamine. Sieg argued that insufficient evidence existed to convict him of possessing paraphernalia because the instruction given stated that the jury must find the spoon was used for injecting drugs. No evidence was given that directly addressed how a spoon would be used to inject methamphetamine. On appeal, the Kansas Supreme Court held that while the Due Process Clause of the Fourteenth Amendment requires proof beyond a reasonable doubt of each element of an offense, a review of the evidence is conducted in the light most favorable to the prosecution to determine if any rational factfinder could have found the required elements proved

beyond a reasonable doubt. Here, because spoons were always mentioned with syringes during the trial, there was enough circumstantial evidence for the jury to make a properly supported finding of guilt.

8. Aggravated Arson

a. Multiple Counts from Single Fire

i. In ***State v. Buchanan*, 317 Kan. 443, 531 P.3d 1198 (2023)**, the state charged Mr. Buchanan with several crimes after an intentionally set fire damaged several apartments. A jury convicted him of numerous offenses, including six counts of aggravated arson. On appeal, the Court determined as a matter of first impression that, under the unit-of-prosecution test, there is no double jeopardy violation when a defendant is convicted on multiple counts of aggravated arson committed under K.S.A. 21-5812(b)(1)—that is, arson committed upon a property in which there is a person—arising from damage by fire to separate apartments, each with a person inside. The Court looked to legislative intent to discern that property under K.S.A. 21-5812(b)(1) includes an apartment, in which there is a person, and that the singular form of property conveys that damage to each property, including each apartment in an apartment building, constitutes a unit of prosecution. The Court thus upheld Mr. Buchanan's six counts of aggravated arson as it reflected the damage caused by fire to six apartments in which there was a person.

9. Registration Violations

a. Element of Residence

i. In ***State v. Huey*, 315 Kan. 807, 511 P.3d 927 (2022)**, Mr. Huey argued his conviction for failing to register as a violent offender should be vacated because the State failed to present evidence that he resided in Shawnee County at the time of the alleged failure, and residence in that jurisdiction was an element of the offense. Huey had registered in Shawnee County, where he resided in June 2017, and again in September 2017, but he did not register in November 2017. Huey argued that the fact that he registered in September 2017 as a Shawnee resident was insufficient to support the inference that he still resided there in November; indeed, frequent registration updates are required

because residences may frequently change. But the Court disagreed. Despite the fact that it recognized that the State presented "no direct evidence of where Huey lived, worked, or attended school in November 2017," the Court concluded that Huey's residence in September created a reasonable inference of his residence in November, and circumstantial evidence and inferences may support a jury's finding of an element of an offense. *Rosen*, *J.*, dissented, stating that the lack of evidence of Mr. Huey's residence in the weeks leading up to, during, and following the failure to register made the inference of continued residency insufficient to prove the residence element beyond a reasonable doubt.

b. **Vehicle Information Required**

i. In ***State v. Moler*, __ Kan. _, 519 P.3d 794 (2022)**, the Kansas Supreme Court overturned Moler's conviction for a violation of the Kansas Offender Registration Act (KORA) due to ambiguous language within the portion of the statute related to vehicle registration. K.S.A. 2021 Supp. 22-4903(a) makes it a crime for a registrant to not register "any vehicle owned or operated by the offender, or any vehicle the offender regularly drives" either personally or as part of their employment.

Here, Moler was arrested for driving on a suspended license after being seen driving a car and a truck that were not registered to him under KORA's provisions and then subsequently prosecuted for violating his registration obligations. The arresting officer testified that he saw Moler drive the car and truck a single time. Moler testified that the registration office had only asked if he owned or regularly operated a vehicle and he said "no." The jury convicted Moler of a KORA violation for not reporting the driving of the car and truck. Moler moved for judgement of acquittal due to insufficient evidence. Specifically, he argued that evidence he drove a vehicle a single time was insufficient to show he'd failed to register a car he regularly operated under KORA's registration requirement. The trial court denied the motion.

A divided Court of Appeals affirmed but Judge Malone dissented and agreed with Moler's interpretation of the KORA provision. Judge Malone stated "the statute should be read *in para materia* and harmonized with KORA as much as possible." A harmonious reading would require more than one use of a vehicle before a registrant needed to register it because even lodging requires registration only after multiple days. Additionally, a single use

interpretation did nothing to protect the public from the accused by giving information about a vehicle the accused would never drive again. Judge Malone did not consider the statute ambiguous but found the rule of lenity would apply if it were and that application of the rule would benefit Moler.

The Kansas Supreme Court granted review and decided statutory interpretation was needed. When interpreting a statute, the court first tries "to give effect to the intent of the legislature" by reading the plain language of the statue. If the language is unambiguous, that language controls and further statutory interpretation is inappropriate. Moler argued that the language in K.S.A. 2021 Supp. 22-4907(a) (12) was ambiguous due to undefined terms. Registration includes "all vehicle information, including the license plate number, registration number and any other identifier and description of *any vehicle owned or operated by the offender, or any vehicle the offender regularly drives*, either for personal use or in the course of employment, and information concerning the location or locations such vehicle or vehicles are habitually parked or otherwise kept." (Emphasis added.)

Because the terms are not defined, the court presumes that the terms have their ordinary meanings. However, the ordinary meaning of operate includes both single-use and multiple-use scenarios. Breaking the statutory language down further into construction of the sentence leads to superfluous language. Because definitions and sentence structure cannot solve the problem, the Court then looked to the legislative history. Although the direct legislative history was of limited help, the federal guidelines for the Adam Walsh Act clarified that SORNA required registration for vehicles "that the sex offender regularly drives, either for personal use or in the course of employment." 73 Fed. Reg. at 38057.

Because the 2011 amendments to KORA were intended to follow the federal law, failing to register a vehicle an individual drove one time as a regularly operated vehicle does not violate KORA. Even if the legislative history had not supported this conclusion, the rule of lenity would still require reversing Moler's conviction.

10. Computer Crimes

a. In ***State v. Smith*, __ Kan. __, 526 P.3d 1047 (2023)**, Smith argued that his crime of conviction—a computer crime that prohibits using a computer "for the purpose of devising or executing a scheme or artifice with the intent to defraud or to obtain money, property, services, or any other thing of value by means of false or fraudulent pretenses or representation"—contained alternative means and that the State had failed to present sufficient evidence of each of those means. Specifically, he argued that executing a scheme "with the intent to defraud" was an alternative crime from obtaining money "by means of false or fraudulent pretense or representation" because only the later required the individual to engage in fraudulent behavior to facilitate theft. But the Court disagreed and concluded both stated crimes were merely options within a means, as both contemplate an individual engaging in false or fraudulent behavior to commit a crime. The Court likewise emphasized that a "person" under the statute includes a financial institution, so the fact that Smith's victim was a bank was sufficient.

ii. Evidence

1. Witnesses

a. Confrontation Clause

i. Limiting Cross Examination

1. In ***State v. Frantz*, ___ Kan. ___, 521 P.3d 1113 (2022)**, the Kansas Supreme Court found that the defendant's Sixth Amendment Confrontation rights were not violated by the district court's limitation of two lines of cross examination. One line of questioning regarded a witness' history of hospitalization for depression and suicidal thoughts, which the defense argued was relevant to Frantz's defense that the witness was the actual perpetrator of the crime because the witness' depression and suicidal tendencies showed consciousness of guilt, and because the history of hospitalization impeached the witness's prior testimony about the basis for his depression. But the Court held it was proper to limit this line of inquiry because it related to inadmissible character evidence designed to show character traits other than honesty, veracity, or their opposites and was thus inadmissible under K.S.A. 60-422(c). Moreover, the Court found the information in the line of questioning was not inconsistent with prior testimony and therefore not admissible as impeachment evidence.

Regarding the other line of questioning, the district court prohibited the defendant from eliciting the witness' prior statement that "I could kill you and get away with it" because it was merely hypothetical, not a confession of past events, and therefore was not a statement against interest. Also, because it related to a specific instance of conduct that was not a conviction, K.S.A. 60-447(a) and K.S.A. 60-422(d) prohibited its use to establish the witness' violent character, and K.S.A. 60-422 (c) rendered the information inadmissible because it would have established a character trait other than dishonesty.

Limiting cross-examination in these two ways did not violate the Confrontation Clause of the Sixth Amendment to the United States Constitution because while a defendant has the right to present evidence, such evidence must comport to the rules of evidence and procedure. Here, the limitation was the result of the district court's reasonable application of the rules of evidence and cross-examination was otherwise constitutionally sufficient in that the defendant was able to present sufficient information for the jury to make a discriminating appraisal of the witness' motives, bias, and credibility.

b. Hearsay

i. Interpreter Statements

1. In ***State v. Gutierrez-Fuentes*, 315 Kan. 341, 508 P.3d 378 (2022)**, the Kansas Supreme Court concluded that the district court erred when admitting out-of-court statements made by interpreters on behalf of the alleged victim to the police and the forensic nurse. Mr. Gutierrez-Fuentes had argued that these statements were inadmissible hearsay because while the alleged victim was present in court to be cross-examined about what she said to the interpreter, and the nurse and officers were present to be cross-examined about what the interpreter said to them, the interpreters were not present for cross-examination. Noting that two people make statements when an interpreter is utilized—the witness, who made out-of-court foreign language statements; and the language interpreter, who made out-of-court foreign and English-language statements- the Court held the accused is not required to trust "the hospital interpreter's understanding of the source and target languages, the interpreter's motives, or the interpreter's reliability." Thus, it concluded that Mr. Gutierrez-Fuentes' hearsay objection should have been sustained. However, it found the admission of the hearsay harmless. *Luckert, J.*,

joined by *Biles*, *J.*, concurred. Under their view, the district court erred in admitting the interpreter's statements to the police officer and nurse because the State failed to establish a hearsay exception allowing their admission. Moreover, they would hold that the Court of Appeals abused its discretion in addressing the language conduit theory when the State had not laid the foundation for its application and had failed to adequately brief the issue.

ii. Cell Phone Maps

1. In ***State v. Brown*, 316 Kan. 154, 513 P.3d 1207 (2022)**, the Court assumed error in the district court's admission of improper hearsay evidence, specifically maps of cell phone data transmissions. However, the Court determined that the error in allowing the evidence did not require reversal because it did not prejudice the client's substantial rights and the State demonstrated there was no reasonable probability that the error impacted the outcome of the trial in light of the entire record. In specific, other evidence that was cumulative of the objected-to evidence was admitted without objection.

2. Prior Bad Acts

a. In ***State v. Campbell*, 532 P.3d 425 (2023)**, the Kansas Supreme Court reversed the defendant's convictions for possessing methamphetamine and drug paraphernalia with intent to use to distribute where it found the erroneous admission of evidence of Mr. Campbell's prior convictions for similar crimes was not harmless.

The issue before the Supreme Court was narrow; the parties agreed that the panel of the court of appeals correctly determined that the district court erred in allowing the State to introduce evidence of Mr. Campbell's prior crimes under K.S.A. 60-455 but failed to conduct a harmless error analysis. The Court then undertook a nonconstitutional harmless error analysis, assessing (1) the prejudicial impact resulting from the impermissible evidence that came in, and (2) the prejudicial impact resulting from the district court's instructions to the jury that it could consider that evidence. Looking to the types of prejudice that may result from the admission of prior bad acts evidence as articulated in *State v. Gunby*, 282 Kan. 39 (2006), as useful guidance, the Court determined that the erroneous admission of the prior-crimes evidence created prejudice to Mr. Campbell based on the emphasis the State placed on Mr. Campbell's prior convictions for similar crimes in its opening statement, case-in-chief, and closing argument. The Court

further determined that the district court's erroneous instructions to the jury that it could consider the prior crimes evidence as non-propensity and propensity evidence substantially increased the likelihood that the jury relied on the inadmissible evidence to convict Mr. Campbell of similar crimes, and concluded that a reasonable probability that the erroneous admission of the prior drug crime evidence affected the outcome of the trial, requiring reversal of Mr. Campbell's convictions.

b. In ***State v. Sieg,* 315 Kan. 526, 506 P. 3d 535 (2022)**, the Kansas Supreme Court upheld Mr. Seig's convictions for possession of methamphetamine and possession of drug paraphernalia. Sieg was the passenger in a legally stopped vehicle and found with an eyeglass case near him. Inside the case was a spoon, a pipe and two baggies. The pipe was tested for DNA and one of three profiles matched Sieg. The baggies each tested positive for methamphetamine.

At trial, the arresting officer testified that he believed the drugs belonged to Sieg based on his observations that evening and "prior word of mouth of his behaviors and…his associations." Pursuant to K.S.A. 60-455(a) evidence of prior bad acts is not admissible to demonstrate that a defendant committed a present bad act. But, the district court held that the officer's vague references did not constitute prior-bad-acts evidence because specific no act was mentioned and because he did not object to the use of reputation evidence.

The defense also challenged use of the DNA found on the pipe as K.S.A. 60-455(a) evidence. But the Court found this was not an admission that Sieg used drugs in the past, but evidence that he possessed the pipe where his DNA appeared.

3. Inflammatory Photographs

a. In ***State v. Lowry*, __ Kan. __, __ P. 3d __ (2023)**, the Kansas Supreme Court affirmed the district court's denial of Lowry's motion in limine which sought to exclude "gruesome" photographs from trial. For the photographs to be admitted, they must be material, relevant and not more prejudicial than probative. Here the Court found there was no abuse of discretion in admitting the photographs because of their relevance generally and their use by witnesses to illustrate their testimony. They were not admitted solely to inflame the jury's passions and prejudices.

4. Polygraph Evidence

a. In ***State v. White*, 316 Kan. 208, 514 P.3d 368 (2022)**, Mr. White argued that the district court erred in disallowing evidence of his failed

polygraph examination. He argued that the polygraph was an inherently unreliable test, but the officer's statements to him that he had failed it were what ultimately induced him to confess to aggravated indecent liberties with a child.

Mr. White argued that the Sixth Amendment protected his right to explain that the interrogators coerced his confession by telling him he'd failed the polygraph examination. He noted that in ***Crane v. Kentucky*, 476 U.S. 683 (1986),** the United States Supreme Court had held that the constitutional right to present a complete defense "would be an empty one if the State were permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." The Kansas Supreme Court agreed that an accused must be able to answer "the one question every rational juror needs answered: If the defendant is innocent, why did he previously admit his guilt?" It likewise affirmed that excluding circumstances that prompted a confession unconstitutionally prohibits an accused from casting doubt on a confession—seemingly even if that circumstance that prompted the confession was the detective's use of a polygraph examination.

Nonetheless, it found Mr. White wasn't entitled to relief because he proffered below that he changed his statement because he suffered from blackouts and couldn't remember if he'd committed the offense, not the officer's comments regarding his failure of the polygraph. Based on that proffer, the Kansas Supreme Court could not find that Mr. White's right to present a defense had been violated by the exclusion of the polygraph evidence.

5. Video of Confession to Prior Crime

a. In ***State v. White*, 316 Kan. 208, 514 P.3d 368 (2022)**, Mr. White argued that his graphic video confession to prior sex crimes was improperly admitted, but the Court found it was harmless because Mr. White stipulated to committing the crimes. Here, the Court of Appeals assumed error in admitting the video, noting one factor to consider in whether 60-455 evidence is admissible is whether "the government can obtain any less prejudicial evidence." The stipulation was arguably less prejudicial than the video-taped confession. Nonetheless, it found the admission of the video harmless in light of the accused's confession to the present crime, and also the victim's testimony. The Kansas Supreme Court affirmed.

iii. Affirmative Defenses

1. **Compulsion**

   a. In ***State v. Lowry*, __ Kan. __, __ P. 3d __ (2023)**, the Kansas Supreme Court evaluated the district court's refusal to instruct the jury on compulsion. K.S.A. 2022 Supp. 21-5206(a) allows for a compulsion defense to crimes other than murder or voluntary manslaughter. For a coercion or duress defense to be valid, the threat "must be present, imminent and impending" and cannot be used if there is a reasonable opportunity to avoid or escape the illegal act. Here, three people were killed after being restrained in a Topeka home. As part of the event, Lowry left the location where the victims were restrained prior to their deaths. Because Lowry left the scene and could have disengaged from the illegal conduct and/or reported it to police, the Court found the compulsion defense was unavailable and affirmed the district court's refusal to instruct the jury on the defense.

iv. Amending Complaints During Trial

1. In ***State v. White*, 316 Kan. 208, 514 P.3d 368 (2022)**, Mr. White argued that the State was impermissibly allowed to amend, during trial, the complaint charging him with aggravated indecent liberties to include a broader time period than originally charged. Mr. White argued that this prejudiced his ability to put forth an alibi defense, but the Court disagreed. It found that the State is given wide latitude in charging the time periods for child sexual abuse, and that Mr. White's alibi defense was only minimally developed.

iv. Jury Instructions

1. **Aiding and Abetting**

   a. In ***State v. Mora*, 315 Kan. 537, 509 P.3d 1201 (2022),** the accused, Tanner Mora, went with his friend while she worked a shift at Burger King. The friend's boyfriend, Bledsoe, showed up, too. Tanner & Bledsoe left the Burger King together. Texts show Tanner contacted a third person, Wade, to buy weed. Wade got into the car that Tanner & Bledsoe were in and Bledsoe held a gun on Wade and demanded Wade give him the marijuana. Wade laughed and said, no, and Bledsoe shot him. Wade fell out of the car, and when police found Wade's body, there was marijuana next to it. Tanner Mora was then convicted of felony murder for allegedly aiding and abetting Bledsoe in the attempted robbery of Wade or/alternatively for the killing

occuring during the distribution of marijuana. Tanner's defense was that he thought they were just buying marijuna. Problematically, the jury was told that Tanner could be liable for Bledsoe's killing of Wade if it was foreseeable that Wade would be killed during Bledsoe's armed robbery of Wade.

Mr. Mora argued that the district court erred when instructing the jury that "The person who is responsible for a crime committed by another is also responsible for any other crime committed in carrying out or attempting to carry out the intended crime, if the person could reasonably foresee the other crime as a probable consequence of committing or attempting to commit the intended crime."

He argued that he didn't know Bledsoe was going to rob Tanner, but thought he was accompanying Bledsoe to buy marijuana. Because of this, he contended he didn't have the specific intent to rob the decedent, so he shouldn't have been convicted of aiding and abetting in the robbery felony-murder.

The Court noted that the objectionable instruction "should not be used for a specific-intent crime for which defendant is charged on an aiding and abetting theory" under the PIK. Instead, "for a defendant to be convicted of a specific-intent crime on an aiding and abetting theory, that defendant must have the same specific intent to commit the [underlying] crime as the principal." Because Mora was charged with attempted aggravated robbery under an aiding and abetting theory, which requires specific intent, the State was required to prove Mora had the specific intent to commit robbery, rendering the instruction at issue clearly erroneous. Moreover, the Court held the error impacted the outcome because the record did not contain sufficient evidence that Mr. Mora went to the drug deal with the specific intent to rob the dealer.

2. Presumptions & Inferences

a. Possession with Intent to Distribute

i. In ***State v. Valdez*, 316 Kan. 1, 512 P.3d 1125 (2022), and *State v. Holder*, 314 Kan. 799, 502 P.3d 1039 (2022)**, the Kansas Supreme Court held that the permissive-inference instruction given at the appellants' trials was legally inappropriate, and therefore in error. The Court noted that "PIK Crim. 4th 57.022 [2013 Supp.] provides a jury instruction with a permissive inference the jury may accept or reject

about a defendant's possession with intent to distribute when that defendant is found to possess specific quantities of a controlled substance. This permissive instruction does not fairly and accurately reflect the statutory rebuttable presumption specified in K.S.A. 2020 Supp. 21-5705[e]."

ii. In ***State v. Martinez*****, No. 121,204**, police recovered 111 grams of methamphetamine from a jacket Martinez had been wearing and charged him with possession with the intent to distribute it. A jury convicted Martinez after being told it could infer he intended to distribute the methamphetamine if it found he possessed more than 3.5 grams of it and that it could consider the inference along with the case's other evidence "in determining whether the State met the burden of proving the intent of the defendant." The jury was also told that the "burden never shifts to the defendant."

On appeal, Martinez noted the jury instruction presented the jury with a permissible-inference presumption, but that the statute on which it was based imposed a mandatory—and therefore unconstitutional—presumption. Based on the discrepancy between the instruction and the statute, Martinez argued that: (1) the statute was unconstitutional because it there was no rational connection between the 3.5 grams and the inference of distribution; (2) the instruction was unconstitutional for the same reason; and (3) the instruction was legally inappropriate because it didn't accurately state the law.

The Kansas Supreme Court held that Martinez lacked standing to challenge the constitutionality of the statute because it hadn't been applied in his case. Rather, the court had instructed the jury using the permissive-inference instruction, so it could not consider his facial challenge to the statute.

It likewise declined to consider whether the instruction violated his due process rights because of a lack of rational relationship between the 3.5 gram number and the presumption of distribution because it found that even if Martinez was correct and there was no rational relationship—it would nonetheless apply a clear-error standard of review—which it would apply anyways because the instruction didn't accurately reflect the law.

Moreover, under clear-error review, it declined to reverse, finding that the evidence firmly established Martinez' intent to

distribute, even if the absence of the instruction. Specifically, evidence showed the value of the methamphetamine to be about $2,400, and an officer testified that the quantity was more than a dozen times greater than the amount a personal user would generally possess. Moreover, his trial defense wasn't that he possessed the drugs for personal use, but that he didn't knowingly possess them at all.

iii. In ***State v. Slusser*, 121460**, Slusser was convicted of possessing methamphetamine with the intent to distribute it after the jury was instructed it could infer he had the intent to distribute the drugs he possessed if it found he possessed more than 3.5 grams of methamphetamine, and that it could consider this or reject it, along with other evidence to determine if the State met its burden to prove intent. The jury was also told the burden never shifted to the accused.

On appeal, Slusser argued this instruction was legally inappropriate because the statute it was based on—K.S.A. 21-5705(e)—creates a mandatory rebuttable presumption, not the permissive inference on which the jury was instructed. Additionally, he argued that the mandatory rebuttable presumption statute was unconstitutional.

The Kansas Supreme Court declined to reach the instructional issue because it found Slusser had proposed the presumption instruction he now argued was improper. It likewise refused to reach the merits of his constitutional challenge because it concluded he lacked standing to challenge the mandatory presumption statute because it wasn't applied in his case.

Nonetheless, the Court reversed Slusser's convictions for intent to distribute and aggravated child endangerment based on his alleged drug distribution because the prosecutor erred during closing argument by characterizing the inference as a presumption that relieved the State of its burden to prove beyond a reasonable doubt that Slusser intended to distribute methamphetamine. The court found the error reversible where the evidence indicated Slusser possessed only 11.2 grams of methamphetamine and an officer testified an individual user could possess more than the 3.5 grams trigger the inference of presumption.

iv. In ***State v. Strong*, 121,865**, police executed a search warrant on Strong's home and discovered a digital scale, and inside a sunglasses' case, two baggies: one with 10.24 grams of methamphetamine inside it, and the other with 1.4 grams inside of it. Strong's house was within 1000

feet of a school, and a jury convicted him of possession with intent to distribute methamphetamine within 1000 feet of a school.

On appeal, like Slusser, Strong argued that the district court erred by instructing the jury that it could infer he had the intent to distribute the drugs he possessed if it found he possessed more than 3.5 grams of methamphetamine, and that it could consider this or reject it, along with other evidence to determine if the State met its burden to prove intent. The jury was also told the burden never shifted to the accused. Strong argued this instruction was legally inappropriate because the statute it was based on—K.S.A. 21-5705(e)—creates a mandatory rebuttable presumption, not the permissive inference on which the jury was instructed. Additionally, he argued that the mandatory rebuttable presumption statute was unconstitutional.

The court agreed the instruction was legally inappropriate because it didn't accurately state the law, which created a mandatory rebuttable presumption, but found the error didn't require reversal in this case under clear-error review where other evidence of distribution—a scale, and baggies—existed. Moreover, the Court held Strong lacked standing to challenge the statute's constitutionality because the mandatory rebuttable presumption in the statute wasn't applied in his case.

v. In ***State v. Bentley*****, No. 123185**, Bentley likewise challenged the presumptive inference instruction given at his trial on possession with intent to distribute, where evidence showed he possessed nearly 28 grams of methamphetamine, which he told the interviewing detective he planned to "break the house off," which the detective thought meant give in exchange for a place to stay. Like in *Martinez*, he argued the presumptive-inference instruction given at his trial was unconstitutional because there wasn't a rational relationship between the 3.5 grams and the inference of distribution—*i.e.*, the amount was arbitrary—and because it described a permissive inference when the law created a mandatory presumption. Because the Court agreed the instruction was legally inappropriate, it declined to determine if the triggering amount was arbitrary. Moreover, it found other evidence—beyond the presumption—indicated intent, so the error didn't require reversing his conviction.

3. Lesser Included Offense Instructions

a. Standard for Reviewing Failure to Give *Sua Sponte*

i. In ***State v. Berkstresser*, ___ Kan. ___, 520 P.3d 718 (2022)**, the Kansas Supreme Court clarified that for examining a court's failure to sua sponte instruct on a lesser-included offense, appellate courts first determines whether there was "some evidence" of the lesser crime, i.e., evidence sufficient for the jury to find each element of the lesser crime. Where there is "some evidence" for the lesser crime, the lesser offense instruction is factually appropriate. The Court then explained that it reviews failure to give unrequested jury instructions for clear error, i.e., to determine whether the jury *would have* reached a different verdict if the instruction were given. In doing so, the Supreme Court rejected the Court of Appeals' lesser standard determining whether the jury *could have* reached a different result.

b. Lesser Included Offenses for Specific Offenses

i. Voluntary Manslaughter

1. In ***State v. Lowry*, __ Kan. __, __ P. 3d __ (2023)**, the Kansas Supreme Court affirmed the district court's denial of jury instructions for the lesser-included offense of voluntary manslaughter finding it was not factually appropriate. "An inquiry about factual appropriateness of a lesser included offense instruction begins with consideration of what the jury must find to convict the defendant of the lesser included offense—here, voluntary manslaughter. As relevant to the parties' arguments, K.S.A. 2022 Supp. 21-5404 defines the elements of voluntary manslaughter as "'knowingly killing a human being ... upon sudden quarrel or in the heat of passion'." In this case, Lowry stabbed a victim who attempted to escape. Because the "sudden quarrel" referenced by Lowry was a result of the victim's escape attempt, and therefore foreseeable, the Court determined the jury instruction was not factually appropriate.

4. Specific Offense Instructions

a. Driving Under the Influence

i. In ***State v. Zeiner*, 316 Kan. 346, 515 P.3d 736 (2022),** the Kansas Supreme Court held that the district court reversibly erred when it failed to give requested jury instructions defining the word "operate" as used in K.S.A. 2021 Supp. 8-1567(a) synonymously with "drive."

b. Felony Murder

i. In ***State v. Carter*, ___ Kan. ___, 516 P.3d 608 (2022)**, the Kansas Supreme Court found that PIK's use of "or another" in the first element of felony murder adequately informed the jury that the death must occur during the commission of the felony charged and that the killing be carried out by the defendant or another during the commission of the charged felony. This fulfills both the res gestae and causation requirements of felony murder, in which the death must (1) lie within the res gestae, i.e. acts committed before, during, or after the occurrence of the underlying crime, but are so closely connected to form a part of that occurrence and; (2) the felony and death must have direct causal connection, turning on the time, distance and causal relationship between the acts and the underlying crime. Likewise, the "or another" language is also legally appropriate because all participants to a felony murder are guilty as principles, precluding the necessity of informing the jury the defendant must be legally responsible for the party causing the death.

c. Premeditated First-Degree Murder

i. In ***State v. Hilyard*, 316 Kan. 326, 515 P. 3d 267 (2022),** the Kansas Supreme Court affirmed the validity of the jury instructions used at trail. Hilyard claimed for the first time on appeal that the PIK 4th instruction regarding premeditation used in her case was improper. When jury instructions are challenged for the first time on appeal, a three step review is performed. First, the Court decides if failure to preserve the issue or a lack of jurisdiction precludes review. An instruction can be reviewed for the first time on appeal if clear error is alleged. Second, the merits of the claim are examined to determine the factual and legal appropriateness of the instruction. This includes looking at them in the context of all instructions given to determine if the set of instructions was likely to mislead the jury. Third, the Court analyzes the clear error standard which requires convincing the court the error was outcome determinative.

Here, Hilyard submitted PIK Crim 4th 54.150 without modification. That instruction reads "Premeditation means to have thought the matter over beforehand, in other words, to have formed the design or intent to kill before the act." Hilyard argued that it should have been modified to include language from *State v. Stanley*, 312 Kan. 557, 569, 574, 478 P.3d 324 (2020), and instead state: "Premeditation requires more than mere impulse, aim, purpose, or objective. It requires a period, however brief, of thoughtful, conscious reflection and pondering—done before the final act of killing—that is sufficient to allow the actor to change his or her mind and abandon his or her previous impulsive intentions." *Hilyard,* 316 Kan. at 334, 515 P. 3d at 275. However, this modification does not represent the full statement from *Stanley* and omits language that would harm Hilyard's position.

Ultimately, the Court found that the unmodified PIK was an appropriate statement of the law regarding premeditation. The Court did not agree that every "brawl" before a homicide requires additional modification to distinguish between intent and premeditation. Because the temporal element present in *Stanley* was absent here, modification was not needed.

5. Unanimity Instructions

a. In ***State v. Smith*, __ Kan. __, 526 P.3d 1047 (2023),** the State alleged Smith had participated in a string of four thefts, and then charged him with theft under a statute prohibiting stealing "property of the value of less than $1,500 . . . in two or more acts or transactions . . . constituting parts of a common scheme or course of conduct." On appeal, Smith argued that the district court erred by failing to give a unanimity instruction *sua sponte* that informed the jury it had to unanimously agree that Smith committed, at minimum, the same two thefts in order to convict him. Assuming error in failing to give the instruction, the Court declined to reverse Smith's conviction, concluding that the error was harmless because the parties explained that the jury had to unanimously agree on the underlying acts in order to convict when the court reopened closing arguments in response to a jury instruction. Because an instruction would not have done anything beyond the parties' discussions of the unanimity requirement, no reasonable possibility existed that the error impacted the verdict.

v. Closing Arguments

1. **Prosecutorial Error**

   a. In ***State v. Brown*, 316 Kan. 154, 513 P.3d 1207 (2022),** the prosecutor repeatedly used "we know" statements in its closing argument, a phrase which has long been prohibited and constitutes erroneous argument. The prosecutor also argued that Mr. Brown "is responsible" for the alleged offense, which is impermissible statement of the prosecutor's opinion because it was not tied to evidence in the record. Despite finding these statements constituted error, the Kansas Supreme Court explained that the jury instructions, the context of the various statements surrounded by discussions of the evidence, the reasonable inferences the prosecutor asked the jury to draw, and the overall strength of the evidence demonstrated that the erroneous statements did not contribute to the jury's verdict.

   b. In ***State v. Hilyard*, 316 Kan. 326, 515 P. 3d 267 (2022),** the Kansas Supreme Court found no prosecutorial error occurred. Prosecutors have wide latitude afforded in closing arguments but overstep if they implicate the defendant's rights. Specifically, the prosecutor cannot misstate the law or shift the burden of proof. The burden of proof does not shift by pointing out a lack of evidence to support a defense or by rebutting an argument regarding deficiencies in the State's case. A prosecutor's general question about the lack of evidence offered to rebut the State's evidence also does not shift the burden.

   c. In ***State v. Frantz*, ___ Kan. ___, 521 P.3d 1113 (2022)**, the Kansas Supreme Court held that while no evidence directly showed what time the defendant arrived at a parking lot, the argument that the defendant waited for the victim was within the latitude afforded prosecutors in drawing reasonable inferences given the defendant drove at least 20 minutes to the apartment, was not on good terms with the victim and was unlikely to know his whereabouts. Thus, the prosecutor did not err by stating facts not in evidence.

vi. Responding to Jury Questions

1. **Pressuring a Divided Jury**

   a. In ***State v. Martinez*, 121204**, Martinez argued that the district court erred when responding to a jury question. The jury wrote, after a few hours of deliberation, "we're 10 and 2, any suggestions?" In response, the Court responded that all it could do was to encourage continued

deliberations. Though it found Martinez had not invited the error by acquiescing to the district court's response to the question, it concluded the issue failed on its merits because it didn't include *Allen*-error language or objectionable language, like that "like all cases this case must be decided sometime" or "another trial would be a burden on both sides."

vii. Cumulative Error

1. In ***State v. Brown*, 316 Kan. 154, 513 P.3d 1207 (2022),** the Court found that the erroneous admission of an exhibit and numerous prosecutorial errors in closing argument warranted review for cumulative error. The Court ultimately concluded that the errors were not cumulatively prejudicial because they occurred on separate days of trial so the jury was unlikely to associate them, and, although the errors were interrelated, they did not accumulate to cause substantial prejudice or lead to an unfair trial.

viii. Motion for Judgment of Acquittal

1. Standard for Assessing Motion

a. In ***State v. Frantz*, ___ Kan. ___, 521 P.3d 1113 (2022),** the Kansas Supreme Court determined that the district court did not err in denying the defendant's motion for acquittal, finding that while identification testimony was suspect, it was not so incredible no reasonable fact-finder could have relied upon it to find guilt, rendering the question one of credibility for the jury. Furthermore, in assessing sufficiency of a prima facie case, the appellate courts consider all the evidence presented by the prosecution, and not only that challenged by the parties.

2. Waiver

a. In ***State v. Frantz*, ___ Kan. ___, 521 P.3d 1113 (2022),** the Kansas Supreme Court noted that in presenting evidence in her defense to refute the elements of the crimes alleged by the prosecution, the defendant may have waived her challenge to the denial of her motion for judgment of acquittal made at the close of the prosecution's case, as held in *State v. Blue*, 225 Kan. 576, 578, 592 P.2d 897 (1979). The Court did not resolve the issue on these grounds as the prosecution failed to raise the issue below or brief it on appeal.

However, Justice Stegall, joined by Chief Justice Luckert and Justice Rosen, advocated for discarding the waiver rule from *Blue*, asserting that it violated the Double Jeopardy Clauses of the Kansas

Constitution Bill of Rights and United States Constitution. This is because if a district court errs in denying a motion for a judgment of acquittal, and the defense puts on evidence, the prosecution is given another chance to attempt to convict the defendant, and if so, the original error is unreviewable. As such, in order to place defendants who should have gotten a judgment of acquittal but erroneously did not on equal footing with those who did, the appellate courts should review the whether the denial of the motion at the end of the prosecution's case was error.

III. Sentencing Issues

i. Departure Sentences

1. Upward Departure Sentences

a. In ***State v. Newman-Caddell*, __Kan.__, -- P.3d --, No. 121, 956 (April 21, 2023)**, the Kansas Supreme Court upheld the district court's application of the extreme sexual violence and risk of future dangerousness departure factors under K.S.A. 21-6815, which doubled the presumptive sentence for Mr. Newman-Caddell's aggravated kidnapping conviction.

Mr. Newman-Caddell argued that the crime of aggravated kidnapping is not a crime of extreme sexual violence as defined by K.S.A. 21-6815(c)(2)(F)(i) because it does not include a statutory element of sexual violence. The statute defines a crime of extreme sexual violence as a felony "crime involving a nonconsensual act of sexual intercourse or sodomy with any person." Applying well-established principles of statutory interpretation, the Kansas Supreme Court disagreed finding that the departure factor applies to "any crime *involving* a nonconsensual act of sexual intercourse or sodomy" and unambiguously allows consideration of the facts underlying the crime to determine whether the State has proven the extreme sexual crime aggravating factor. The Court concluded that because the kidnapping statute contemplates that a kidnapping will involve other crimes ("to facilitate flight or the commission of *any* crime"), a kidnapping conviction may include a crime of extreme sexual violence.

Here, where the factual basis of Mr. Newman-Cadell's guilty plea established that he had committed aggravated kidnapping to facilitate rape and sodomy (to which he also pleaded guilty), the district court did not err in finding that he committed aggravated kidnapping involving crimes of extreme sexual violence.

ii. Criminal History Challenges

1. In ***State v. Busch*, __ Kan. __, 528 P.3d 560 (2023),** Busch challenged the classification of 5 out-of-state offenses, arguing they'd been improperly classified as person felonies on his criminal history. The crimes at issue were three 1985 burglaries, one 1989 criminal trespass, and one 1995 third-degree burglary in New Jersey, and the PSI listed residential behind each offense. On appeal, Busch argued the New Jersey crimes encompassed broader conduct than comparable Kansas crimes, and thus were misclassified. The Court of Appeals held that because Busch had not objected to his criminal history at sentencing, the PSI satisfied the State's burden to prove the crimes were residential.

   Busch petitioned for review, arguing that: (1) the residential parenthetical was insufficient proof that the crimes involved a residence; and (2) the district court engaged in unconstitutional factfinding beyond the existence of the priors to classify them as person offenses. The Kansas Supreme Court agreed that New Jersey burglary did not require entry into a dwelling, and thus, encompassed broader conduct and could not be scored as a person crime. It therefore ordered the burglary offenses to be reclassified as nonperson offenses. But, it concluded the criminal trespass offense was a person felony because the PSI indicated a specific subsection that referred to residential criminal trespass and the PSI sufficiently carried the State's burden to prove Busch had violated that subsection because he didn't object.

iii. Double Jeopardy

1. Merger

a. In ***State v. Berkstresser*, ___ Kan. ___, 520 P.3d 718 (2022),** the Kansas Supreme Court followed its recent holding in *State v. Vargas*, 313 Kan. 866, 492 P.3d 412 (2021), to hold that where the jury convicted the client on alternatively charged counts, the verdicts merge into a single conviction.

2. Unit of Prosecution

a. In ***State v. Eckert*, ___ Kan. ___, 522 P.3d 796 (2023)**, the Kansas Supreme Court held that the mass noun "drug paraphernalia" as used in K.S.A. 2016 Supp. 21-5709(b) is ambiguous regarding the unit of prosecution. As such, the canons of statutory construction requiring the avoidance of absurd results and the rule of lenity required a single unit of prosecution for any number of items possessed contrary to any subsection of K.S.A. 2016 Supp. 21-5709(b), abrogating *State v. Booton*,

No. 113,612, 2016 WL 4161344 (Kan. App. 2016) (unpublished opinion). Accordingly, all but one felony and one misdemeanor conviction of the original 25 convictions were vacated as multiplicitous and in violation of the prohibition against double jeopardy.

b. In ***State v. Buchanan*, 317 Kan. 443, 531 P.3d 1198 (2023)**, the state charged Mr. Buchanan with several crimes after an intentionally set fire damaged several apartments. A jury convicted him of numerous offenses, including six counts of aggravated arson. On appeal, the Court determined as a matter of first impression that, under the unit-of-prosecution test, there is no double jeopardy violation when a defendant is convicted on multiple counts of aggravated arson committed under K.S.A. 21-5812(b)(1)—that is, arson committed upon a property in which there is a person—arising from damage by fire to separate apartments, each with a person inside. The Court looked to legislative intent to discern that property under K.S.A. 21-5812(b)(1) includes an apartment, in which there is a person, and that the singular form of property conveys that damage to each property, including each apartment in an apartment building, constitutes a unit of prosecution. The Court thus upheld Mr. Buchanan's six counts of aggravated arson as it reflected the damage caused by fire to six apartments in which there was a person.

iv. Restitution

1. Unworkability

a. Permissible Evidence of Unworkability

i. In ***State v. Taylor*, No. 123,005, __ Kan. __, __ P.3d __ (2023),** the Kansas Supreme Court considered whether an accused could meet their burden of showing restitution unworkable by relying on unsworn answers to questions from the court regarding the accused's financial and attendant circumstances, and concluded that such testimony constituted evidence on which the court could rely. Though it noted unsworn testimony may be less credible than sworn responses, such testimony may nonetheless be relied upon at sentencing.

b. Sufficiency of Evidence of Unworkability

i. In ***State v. Taylor*, No. 123,005, __ Kan. __, __ P.3d __ (2023),** the court reviewed a district court's restitution order requiring Mr. Taylor to pay $15/month towards restitution during his incarceration, which was entered over Mr. Taylor's objection that he

had no assets, no employment, and child-support obligations. Mr. Taylor argued the plan was unworkable because no evidence indicated he'd be able to make even the small monthly payments ordered; thus, no evidence of workability existed. But the Court found it wasn't the State's job to prove workability; it was Taylor's job to prove unworkability. And although Taylor showed he had no assets and child support obligations, he failed to show that he wouldn't be able to obtain employment while in prison, and make the payments required based on his prison income. The Court found he could have pointed to the Internal Management Policies and Procedures that would have indicated paying $15/month would constitute a hardship, but failed to do so. As a result, the Court affirmed the district court's restitution order.

Standridge, J., *dissented*, and *Rosen* and *Wilson*, *JJ., joined.* In their view, no reasonable person would agree with the district court's order requiring a penniless man to pay $15/month in restitution while incarcerated. The dissent concluded that the district court's reliance on the State's assertion that Taylor could earn money while in prison lacked evidence in the record. Justice Standridge noted that it would take a psychic to divine one's future ability to pay, and the district court's decision should have been based on an examination of *all* of the relevant factors germane to a restitution order: income, present and future earning capacity, future living expenses, debts and financial obligations, dependent children, amount of time it would take to pay off the order at the announced rate, and purposes of restitution. She would have held that imposing an unachievable restitution plan did not align with the purposes of restitution. As such, the dissent would have deferred restitution repayment until Mr. Taylor's release, at which time he could obtain employment.

2. Payment to Victims of Crimes Beyond Crime of Conviction

a. In ***State v. Eubanks*, 316 Kan. 355, 516 P. 3d 116 (2022)**, the Kansas Supreme Court determined that a restitution order did not create an illegal sentence and that the amount of restitution ordered was correct. Here, Eubanks was convicted of stealing items from two victims. Eubanks entered a plea to attempted theft against one victim. His attorney agreed to the prosecutor’s recitation of the plea agreement, which indicated that Eubanks would pay restitution to the “victims,” even though Eubanks would plead only to a single count of theft. Eubanks indicated he was satisfied with the agreement. On multiple other occasions, defense counsel referred to multiple victims. The

sentencing journal entry showed restitution to both victims. The Court of Appeals affirmed the sentence because Eubanks agreed to pay the restitution to both victims and the district court had the authority to make restitution a condition of postrelease supervision pursuant to K.S.A. 2020 Supp. 21-6604(e). The Kansas Supreme Court agreed: sufficient evidence showed that Eubanks agreed to pay multiple victims (plural), and making restitution a condition of postrelease supervision may occur because the sentencing judge and Prisoner Review Board have overlapping authority to make orders regarding postrelease because the Board may still reduce the amount of restitution owed if the plan is unworkable.

3. Amount of Restitution

a. In ***State v. Smith*, __ Kan. __, 526 P.3d 1047 (2023)**, the State asked for $4,100 in restitution at sentencing, although trial evidence indicated only $3,200 in loss from a theft. At sentencing, defense counsel did not object to the amount requested by the State, indicating that "we had the trial and the evidence has already been heard." The district court imposed the requested $4,100. On appeal, Smith challenged the restitution, noting that evidence only established a $3,200 loss. The Court of Appeals found he'd invited the error by not objecting. It noted that because Smith didn't object to the amount or request an evidentiary hearing, he couldn't complain of the amount on appeal. But the Kansas Supreme Court held that, "the ultimate question is whether the record reflects that the defense's actions *in fact induced* the court to make the error" and this must result from more than a failure to object. "Here, Smith only clearly consented to—but did not affirmatively request—the $4100 restitution amount. . . . As a result, appellate review of the challenge is appropriate, and *the panel incorrectly sidestepped the issue by invoking the invited error doctrine.*" However, because Smith acquiesced to the amount below, the Court used the atypical remedy of remanding for an evidentiary hearing on the contested restitution.

4. Appellate Jurisdiction over Restitution Appeals in Certain Life and Off-Grid Sentencing Cases

a. In ***State v. Bailey*, 317 Kan. 487, 531 P.3d 520 (2023)**, the Supreme Court held that under K.S.A. 60-2101(b) the Kansas Supreme Court has jurisdiction over appeals governed by K.S.A. 22-3601, which includes jurisdiction over a defendant's appeal from a district court's order

denying a motion to void restitution. K.S.A. 22-3601 states that "[a]ny appeal permitted to be taken from a district court's final judgment in a criminal case shall be taken to the supreme court" in cases of life sentences and certain off-grid convictions. The Court determined that because restitution is part of a criminal defendant's sentence, it, rather than the Court of Appeals, was the appropriate venue for the appeal. The Supreme Court then affirmed the district court's denial of the defendant's restitution motion finding that the Court's holdings from the defendant's prior appeals constituted law of the case and thus prevented the defendant from relitigating issues already decided on appeal in successive stages of the same proceeding.

v. Resentencing Following Remand

1. Scope of District Court's Authority to Resentence

a. In ***State v. Galloway*, __Kan.__, 518 P.3d 399 (2022)**, Ms. Galloway's case had been remanded for resentencing on her conviction for first-degree murder because the district court improperly refused to consider lack of criminal history as mitigation at her first sentencing hearing. On remand, in addition to re-imposing a hard-50 sentence for the murder conviction, the district court also ran sentences for arson and interference with law enforcement consecutive to each other and to the hard-50. The district court did this despite the fact that the sentences had been run concurrent at the first sentencing hearing, and the appellate court had not remanded the other counts for resentencing. The State conceded that this was in violation the Kansas Sentencing Guidelines act, and the case was remanded, again, for resentencing.

vi. Post-Imprisonment Supervision

1. In ***State v. Collier*, 316 Kan. 109, 513 P.3d 477 (2022),** the Kansas Supreme Court clarified that a person who is sentenced for both off-grid and on-grid offenses must be sentenced to the parole supervision period for the off-grid crime, even though the on-grid crime is the primary crime of conviction for sentencing. *Justice Rosen, joined by Justice Standridge dissented, and would have found that when the client committed the crime in this case in 1993, the statutory language required the postrelease supervision term to be "based on the primary crime," which was the on-grid sentence. Because the*

legislature did not amend the statute until 1994, the dissent would require sentencing Mr. Collier to the supervision period for his on-grid crime.

IV. Post-Conviction Issues

i. Motion for New Trial

1. In ***State v. Davidson*, 315 Kan. 725, 510 P.3d 701 (2022),** the Kansas Supreme Court affirmed the summary dismissal of the defendant's motion for new trial pursuant to K.S.A. 2020 Supp. 22-3501. Because the K.S.A. 2020 Supp. 22-3501 requires motions for new trial based on newly discovered evidence be filed within two years of a final judgment, without exception, the district court did not err in dismissing a motion filed more than 20 years following the final judgment.

2. In ***State v. Buchanan*, 317 Kan. 443, 531 P.3d 1198 (2023)**, the Kansas Supreme Court denied Mr. Buchanan's claim that he was denied his constitutional right to conflict-free counsel when the district court disposed of his motion for new trial, which Mr. Buchanan filed *pro se* two months after his trial. Under K.S.A. 22-3501, a motion for new trial filed other than on the ground of newly discovered evidence must be filed within 14 days of the verdict. Because Mr. Buchanan's motion was untimely, the Court determined the *pro se* motions would be considered a postconviction collateral proceeding, and thus K.S.A. 22-4506, which governs the entitlement of counsel in postconviction proceedings, applied. The Court concluded that because all posttrial issues that Mr. Buchanan pursued on appeal relating to his dissatisfaction with counsel are arguments he raised before trial, and because the district court thoroughly considered and investigated those claims at the pretrial conference, the district court did not err in summarily denying Mr. Buchanan's motion without appointing counsel.

ii. Motion to Correct Journal Entries/ Orders *Nunc Pro Tunc*

1. In ***State v. Turner*, __Kan.__, 525 P.3d 326 (2023)**, the Kansas Supreme Court reiterated that a journal entry of judgment may be corrected at any time by a nunc tunc order, which is appropriate for correcting arithmetic or clerical errors arising from oversight or omission. Here, because the Kansas Department of Corrections' calculation of Mr. Turner's aggregate sentence reflects the sentence imposed by the district court, there is no arithmetic or clerical error, and thus issuance of a nunc pro tunc order would be inappropriate.

2. In ***State v. Redick*, __Kan.__, 526 P.3d 672 (2023)**, the Kansas Supreme Court reminded that the pronouncement from the bench, not the journal entry, is the controlling pronouncement of a sentence. Thus, where the district court properly announced from the bench that Mr. Redick was subject to lifetime parole but the journal entry erroneously indicated that he was subject to "lifetime postrelease supervision," the discrepancy in the journal entry constituted a simple clerical error properly addressed by a nunc pro tunc order correcting that portion of the journal entry to require lifetime parole.

iii. Motion to Correct Illegal Sentence

1. In ***State v. Steinert*, No. 122,418 (May 26, 2023),** the Kansas Supreme Court clarified that a Motion to Correct an Illegal Sentence may be filed **at any time**, and this includes **while on direct appeal, in an appellate court.** Moreover, the amendment to K.S.A. 2022 Supp. 21-6814, permitting journal entries to be added to the record to support a criminal-history challenge argument, applied to all cases pending on direct appeal and/or not yet final because it was a rule relating to the administration of cases. Accordingly, it reversed the Court of Appeals and found that the Court of Appeals had no discretion over whether to consider the issue; illegal-sentences challenges must be addressed when raised. However, because the parties disputed whether the document Steinert was attempting to add was, in fact, a journal entry and because the parties had not briefed whether other documents could also be considered, the Court remanded the case back to the district court for a hearing.

2. In ***State v. Verge*, __ Kan. __, 518 P.3d 1240 (2022)**, in a post-conviction motion to correct an illegal sentence, Mr. Verge argued that, because he was a Missouri resident and an "Indigenous Native Moorish-American National" at the time of his crimes, Kansas courts had no jurisdiction to convict him of capital murder. The Court found that Mr. Verge was a citizen of the United States, and he had not gone through the proper legal channels to renounce that citizenship. But it also found that his citizenship was irrelevant because all residents of the United States, whether citizen or not, must obey the law. The district court's decision denying Mr. Verge's motion was affirmed.

3. In ***State v. Johnson*, __Kan.__, --P.3d--, No. 123, 825 (2023)**, Mr. Johnson filed a *pro se* motion to correct an illegal sentence arguing that, in 2011, the district court wrongly assigned him a criminal history score of C when it designated his 1992 out-of-state armed robbery conviction as a person felony. Whether a sentence is illegal under K.S.A. 22-3504 is controlled by

the law as it existed at the time of sentencing; thus, a change in the law after sentencing can never render a sentence illegal. Accordingly, the Kansas Supreme Court set out to determine what the then-existing law in Kansas concerning how pre-1993 out-of-state convictions must be scored for criminal history purposes.

4. In ***State v. Deck*, __Kan.__, 525 P.3d 329 (2023)**, Mr. Deck, who pled guilty to attempted unintentional second-degree murder as part of a broader plea agreement, appealed the district court's denial of his motion to correct an illegal sentence, arguing that his charging document failed to allege an actual Kansas crime and was thus jurisdictionally defective, rendering his sentence illegal. A sentence is illegal if it is imposed by a court without jurisdiction, which is not waivable. And a court may correct an illegal sentence at any time while the defendant is serving that sentence. However, the Kansas Supreme Court determined Mr. Deck's claim must fail because it has long held that a defective-complaint claim that is an attack on the conviction(s) alone is not properly challenged through a motion to correct an illegal sentence. The Court has recognized instances when both a conviction and sentence can be challenged through a motion to correct an illegal sentence under K.S.A. 22-3504, but the Court found those cases distinguishable from Mr. Deck's because they were not in the context of deficiencies in the complaint.

5. In ***State v. Moncla*, 317 Kan. 413, 531 P.3d 528 (2023)**, the Kansas Supreme Court held that res judicata bars a defendant from raising the same claim in a second or successive motion to correct an illegal sentence under K.S.A. 22-3504, unless subsequent developments in the law shine new light on the original question of whether the sentence was illegal when pronounced. The Court further held that the party filing the second or successive motion to correct an illegal sentence bears the threshold burden to prove that subsequent development in the law undermines the earlier merits determination. Because Mr. Moncla raised the same claim in his second motion to correct an illegal sentence, and because no later development in the law undermined the Court's earlier decision on the legality of Moncla's sentence, the Court affirmed the district court's denial of Mr. Moncla's second motion to correct

6. In ***State v. Johnson*, 317 Kan. 458, 531 P.3d 1208 (2023)**, Mr. Johnson pleaded guilty to two counts of sexual exploitation of a child after the district court found that Mr. Johnson had waived his constitutional right to a jury trial. As part of his plea, Mr. Johnson stipulated to the existence of two aggravating factors and agreed to an upward departure from the guideline sentence. The district court approved of this agreement on the record but did

not advise Mr. Johnson of his right to have the aggravating factors—which increased his sentence beyond the statutory maximum—proved to a jury beyond a reasonable doubt. Mr. Johnson appealed and argued for the first time that his sentence was illegal under K.S.A 22-3504 because he did not make a knowing, voluntary or intelligent waiver of his right to a jury trial on the upward departure factors.

The Kansas Supreme Court held that a claim challenging the constitutional validity of a waiver relinquishing the right to have a jury determine the existence of upward departure aggravating factors falls outside the definition of an illegal sentence, as defined under K.S.A. 22-3504, expressly overruling *State v. Duncan*, 291 Kan. 467 (2010). And without a valid challenge under K.S.A. 22-3504, the Court held it is without jurisdiction to review a sentence resulting from an agreement between the State and the defendant that a district court approves on the record.

7. In ***State v. Newman-Caddell*, __Kan.__, -- P.3d --, No. 121, 956 (April 21, 2023)**, Mr. Newman-Caddell challenged his upward durational departure sentence as violating due process because the district court relied on future dangerousness, a nonstatutory factor, to support its decision. While he did not raise the issue below, Mr. Newman-Caddell asked the Court to consider it as a motion to correct an illegal sentence. The Kansas Supreme Court declined to do so, reiterating that a motion to correct an illegal sentence may not be used to litigate a constitutional due process claim. The Court further declined to exercise its discretion to consider the unpreserved claim under any preservation exception, acknowledging that doing so would change nothing in this case meaning the Court would in essence be rendering an advisory opinion—something the Court does not do.

iv. Motion for Modification of Unconstitutional Sentence

1. In ***State v. Albright*, __Kan.___, 518 P.3d 415 (2022)**, Mr. Albright filed a motion to modify his life sentence under K.S.A. 2021 Supp. 21-6628(c), arguing that his sentence was unconstitutional under *Alleyne v. United States*, 570 U.S. 99, 107-08, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), because it resulted from judicial fact-finding. Citing prior case law that held the statute did not provide a procedural vehicle for the relief Mr. Albright was seeking, the Court affirmed the district court's denial of Mr. Albright's motion.

v. Petition for DNA Testing

1. In ***State v. Angelo*, ___ Kan. ___, 518 P.3d 27 (2022)**, the Kansas Supreme Court clarified the procedures and applicable burdens for the parties during

the petition phase of a postconviction request for DNA testing. The Court set forth three steps. First, the petitioner must allege that biological material meeting the standards in K.S.A. 21-2512 exists. Second, the State is required to preserve all biological material previously secured in connection to the case and file a response identifying the material it has secured. Third, the parties may either agree that the State has identified and preserved all known biological material and proceed to the court's determination as to whether testing may produce noncumulative, exculpatory evidence, or, if the parties dispute the existence of the biological material, the court must hold an evidentiary hearing, at which the petitioner has the burden to show the biological material requested for testing actually exists.

Because the district court and the parties did not have the benefit of the Supreme Court's interpretation of the statute when the initial petition was denied, the Court explained that the district court erred in determining that testing was unlikely to produce noncumulative, exculpatory evidence without first determining whether there was a factual dispute about the biological material to be tested. The Supreme Court explained that, although the evidence sought by Mr. Brown may have little evidentiary weight, the statutory bar for ordering testing is low and does not require proof that the evidence would affect the outcome of the case.

vi. Motion for Post-Conviction Discovery

1. In ***State v. Richardson*****, ___ Kan. ___, 521 P.3d 1111 (2022),** while explicitly not endorsing nor abrogating the holding of *State v. Mundo-Parra*, 58 Kan. App. 2d 17, 24, 462 P.3d 1211 (2020), the Kansas Supreme Court found that even if a postconviction discovery right exists under *Mundo-Parra*, the defendant failed to establish the district court abused its discretion in denying the motion. The defendant's brief failed to argue good cause for the request for discovery and also failed to identify how the district court abused its discretion by denying the motion.

vii. Ineffective Assistance of Counsel

1. Counsel Arguing Against Motion

a. In ***State v. Valdez*****, 316 Kan. 1, 512 P.3d 1125 (2022),** Mr. Valdez argued at sentencing and in a written presentencing motion that he'd received ineffective assistance of trial counsel because his attorney had failed to communicate with him, to visit him as she should have, to

properly respond to his letters, to review the evidence against him with him, to properly prepare before for trial, and to allow him to make strategic decisions. At the hearing, defense counsel argued that against his allegations—explaining that she had visited him, had responded to his letters where appropriate, had given him police reports, and had prepared for trial. On appeal, he argued that the defense attorney's arguments against his motion created a conflict of interest with trial counsel, and by hearing defense counsel's "evidence to rebut [his] claims" the district court deprived him of assistance of counsel. The Court held that "neither an allegation of ineffective assistance nor defense counsel's participation in the justifiable dissatisfaction inquiry alone—or in combination—requires appointment of new counsel." Specifically, it noted that "counsel may simply recount facts truthfully, but must not go "beyond factual statements and advocat[e] against the client's position." "Otherwise, counsel's responses may create a conflict of interest requiring new counsel. But the simple fact there was a back-and-forth between counsel, the defendant, and the court does not inevitably disqualify counsel and require a new attorney." Here, the Court found defense counsel "largely" stayed within the facts, and that her comments that went beyond that, while potentially in error, "did not require new counsel." The potentially erroneous comments were that: she was "prepared for trial," that client's letters weren't "constructive," and that client had "never been happy," and finally that she couldn't have changed the case's outcome.

2. Use of Guilt-Based Defense

a. In *State v. Hilyard*, 316 Kan. 326, 515 P. 3d 267 (2022), the Kansas Supreme Court affirmed Hilyard's conviction over arguments that the guilt-based defense used by defense counsel was inappropriate because no record was made of her consent to such a defense. In a guilt-based defense, a fact is admitted by the defense that would normally require proof from the prosecution.

The Court disposed of this argument quickly. First, Hilyard never objected to the use of a guilt-based defense. Second, there is evidence in the record that she participated in that defense. Specifically, Hilyard took the stand and admitted killing the victim. Third, no rule currently exists which requires the defendant's consent to a guilt-based defense be an explicit part of the record.

viii. Wrongful Conviction Civil Action

1. In ***Matter of Bell*, 317 Kan. 334, 529 P.3d 153 (2023)**, Mr. Bell brought a *pro se* wrongful conviction civil action against the State under K.S.A. 60-5004, Kansas' civil action statute for persons wrongfully convicted and imprisoned. In 2011, a panel of the Kansas Court of Appeals had reversed Mr. Bell's convictions for rape, criminal restraint, and four counts of domestic battery. After the State declined to retry Mr. Bell, the district court ordered the charges dismissed. Mr. Bell was later convicted of unrelated charges and imprisoned in June 2018 when K.S.A. 60-5004 went into effect. The statute set forth a two-year statute of limitations but also provided that "[a] claimant convicted, imprisoned and released from custody before July 1, 2018, must commence an action under this section no later than July 1, 2020." However, with the COVID-19 global pandemic and the Court's Administrative Order suspending all statutes of limitations or deadlines, Mr. Bell had until July 28, 2021, to timely file a civil action under the wrongful conviction statute. Mr. Bell filed an action in November 2021. The State moved to dismiss arguing it was untimely, and the district court granted the State's request.

   On appeal, the Kansas Supreme Court clarified that use of the phrase "convicted, imprisoned and released from custody" in K.S.A. 60-5004 refers to imprisonment for which a claimant is seeking compensation; not to another, unrelated imprisonment. The Court concluded that Mr. Bell's untimely filing could not be salvaged by equitable tolling principles based on Mr. Bell's lack of knowledge that the claim existed, or due to prison protocols put in place during the COVID-19 pandemic. Finding Mr. Bell did not assert any facts that would support the application of equitable tolling, the Court affirmed the district court's dismissal of Mr. Bell's suit for failure to state a claim.

V. Appellate Issues

i. Appellate Review

1. Waiver of Arguments

a. In ***State v. Davidson*, 315 Kan. 725, 510 P.3d 701 (2022),** the Kansas Supreme Court determined that the defendant waived his argument that the district court abused its discretion in failing to construe his *pro se* motion for new trial based on newly discovered evidence as a K.S.A. 60-1507 motion by failing to argue how the district court abused its discretion.

b. In ***Shelton-Jenkins v. State*, __Kan.__, 526 P.3d 1056 (2023),** the Kansas Supreme Court determined that Mr. Shelton-Jenkins had not preserved any issue on appeal relating to his motion to withdraw his

guilty plea under K.S.A. 22-3210 or his K.S.A. 60-1507 motion in which he alleged ineffective assistance of counsel and the involuntariness of his plea. The Kansas Supreme Court determined that Mr. Shelton-Jenkins had abandoned all arguments made below by raising them "only incidentally in his brief." The Court likewise held that the arguments Mr. Shelton-Jenkins raised for the first time on appeal were also unpreserved given that Kansas Supreme Court Rule 6.02(a)(5) requires an appellant to explain why an issue is properly before the Court and Mr. Shelton-Jenkins "failed to argue—either in his brief or at oral arguments—that any exception applies." Accordingly, because Mr. Shelton-Jenkins failed to establish ineffective assistance of counsel, the Court concluded that his argument for statutory manifest injustice must fail, as well.

c. In ***State v. Genson*, 316 Kan. 130, 513 P.3d 1192 (2022)**, the Kansas Supreme Court determined that the panel of the Court of Appeals did not abuse its discretion by refusing to consider issues that Mr. Genson raised for the first time on appeal. In his direct appeal, Mr. Genson challenged KORA under Section 1 and Section 5 of the Kansas Constitution Bill of Rights. The Kansas Supreme Court reiterated the general rule that appellate courts are obligated to address claims properly raised in district court and later appealed, but that appellate courts have discretion to refuse consideration of issues that are not effectively raised below. Finding that Mr. Genson "mainly framed his arguments around his constitutional right to present a defense without specifically referencing either the Kansas or federal Constitutions[,]" the Kansas Supreme Court held that the panel did not abuse its discretion in refusing to consider these arguments for the first time on appeal.

2. Consideration of Issues *Sua Sponte*

a. In ***City of Wichita v. Trotter*, 316 Kan. 310, 514 P.3d 1050 (2022),** the Kansas Supreme Court held that the Court of Appeals erred in reinstating the defendant's dismissed second charge *sua sponte*. The City, as the appellant, bore the burden to establish district court error. Because the City did not brief or argue that the trial court improperly dismissed the second charge, the Court of Appeals erred in *sua sponte* reinstating the charge without allowing opportunity for the parties to brief the issue.

3. Prudential Decision to Review Unpreserved Issues

a. In ***State v. Richardson*, ___ Kan. ___, 521 P.3d 1111 (2022),** the Kansas Supreme Court declined to reach, for the first time on appeal, the defendant's argument that her motion for postconviction discovery

should be considered a habeas corpus action, and that she should be afforded discovery to pursue that fundamental right. The Kansas Supreme Court reaffirmed that it possesses the discretion to decline to reach issues raised for the first time on appeal, even if they meet traditional exceptions to preservation.

ii. Appellate Transcripts

1. In ***State v. Frantz*, ___ Kan. ___, 521 P.3d 1113 (2022),** the Kansas Supreme Court reiterated that while criminal defendants have a due process right to reasonably accurate transcripts and may be entitled to a new trial if incomplete or inaccurate transcripts preclude meaningful appellate review, to make such a claim the appellant must show that a complete and accurate transcript might change the outcome of the appeal.

iii. Evenly Split Decision by Kansas Supreme Court

1. In ***State v. Buchhorn*, 316 Kan. 324, 515 P. 3d 282 (2022)**, the Kansas Supreme Court reaffirmed a 1986 rule that the judgement of the court from which review is sought stands when the appellate court is evenly divided due to the recusal of one justice and an even split among the remaining justices.

   Here, Buchhorn was convicted of second-degree murder but the conviction was overturned by the Court of Appeals due to ineffectiveness of counsel. This decision was appealed, but Justice Wall was involved in the case prior to becoming a Kansas Supreme Court Justice. Because Justice Wall was disqualified and the remaining justices' votes were evenly split, the Court upheld the Court of Appeals' decision and remanded the case accordingly.

Statutory changes made in the 2023 Legislative Session[1]
prepared for the Douglas County Bar CLE on September 21, 2023
by Jennifer Roth, co-chair of the BIDS Legislative Committee

Relating to time and jurisdiction

Statute	Description	Bill No. and effective date
K.S.A. 21-5107	Amends the statute of limitations to include childhood sexual abuse (i.e. a list of offenses as defined by the bill, when the victim is under 18) as crimes for which criminal prosecution can be commenced at any time	S. Sub for HB 2127 Eff. 7/1/23 (originated in SB 317)
K.S.A. 22-3402	Extends the suspension of statutory speedy trial rights in all criminal cases from May 1, 2023, until March 1, 2024; specifies that time between March 19, 2020, and March 1, 2024, may not be assessed against the State for any reason; provides that any person arraigned before March 1, 2024, is deemed to have been arraigned on that date for statutory speedy trial purposes	Sub. HB 2121 Eff. 4/20/23
K.S.A. 22-3717	Provides that "the service of the postrelease supervision period shall not toll except as provided by K.S.A. 75-5217"	S. Sub. for HB 2010 Eff. 7/1/23 (originated in HB 2069)
K.S.A. 50-6,109	Extends sunset date on the Scrap Metal Theft Reduction Act from July 1, 2023, to July 1, 2028 (Act impacts the crimes of theft and criminal deprivation of property)	HB 2326 Eff. 7/1/23
K.S.A. 75-702	Gives the Attorney General concurrent authority with any county or district attorney to prosecute theft or RICO violations	SB 174 Eff. 7/1/23 (originated in SB 244)

[1] For full text of bills, bill summaries, etc., please visit http://www.kslegislature.org/li/. For 2023 session laws, please visit https://sos.ks.gov/publications/session-laws.html.

New and expanded crimes

Crime	Description	Bill No. and eff. date
Battery (K.S.A. 21-5413)	Creates the crime of battery against a health care provider (class A misdemeanor)	SB 174 Eff. 7/1/23 (originated in HB 2023)
Burglary (K.S.A. 21-5807)	Expands the crime by including intent to commit domestic battery and violation of a protective order	SB 174 Eff. 7/1/23 (originated in SB 73)
Criminal discharge of a firearm (K.S.A. 21-6308)	Expands the crime to include reckless and unauthorized discharge of any firearm at a motor vehicle "in which there is a human being, regardless of whether the offender knows or has reason to know that a human being is present"	S. Sub. for HB 2010 Eff. 7/1/23 (originated in SB 183)
Human smuggling (new crime; no existing statute #)	Creates the crime of human smuggling: makes it a SL 5 PF for "intentionally transporting, harboring or concealing an individual into or within Kansas" when the person (1) knows, or should have known, that the individual is in the U.S illegally, (2) "benefits financially or receives anything of value," and (3) "knows, or should have known, that the individual being smuggled is likely to be exploited for the financial gain of another"— with a deadly weapon or threat of one, or causes bodily harm, then it is aggravated (SL 3)	HB 2350 Eff. 7/1/23
Interference with a law enforcement officer (K.S.A. 21-5904)	Expands the crime to include: "knowingly fleeing from a law enforcement officer, other than fleeing by operation of a motor vehicle, when the law enforcement officer has: (A) Reason to stop the person under K.S.A. 22-2402, and amendments thereto; and (B) given the person visual or audible signal to stop" It is a misdemeanor in the case of a misdemeanor or civil case; a SL 7 NPF in the case of a felony; or a SL 5 NPF if the person "discharged or used a firearm while fleeing"	SB 174 Eff. 7/1/23

Manufacturing a controlled substance (K.S.A. 21-5701; K.S.A. 21-5703)	Amends definition of manufacturing to include "placing into pill or capsule form"	SB 174 Eff. 7/1/23 (originated in HB 2398 and SB 238)
Possession of drug paraphernalia (K.S.A. 21-5701; K.S.A. 21-5709)	Amends definition of drug paraphernalia to *not* include "any materials used or intended for use to test a substance for the presence of fentanyl, a fentanyl analog, ketamine or gamma hydroxybutyric acid"	SB 174 Eff. 7/1/23 (originated in HB 2328)
Stalking (K.S.A. 21-5427)	Adds to the definition of "course of conduct": "utilizing any electronic tracking system or acquiring tracking information to determine the targeted person's location, movement or travel patterns"	SB 217 Eff. 7/1/23
Theft (K.S.A. 21-5801; K.S.A. 21-5804) Criminal damage to property (K.S.A. 21-5813)	Includes catalytic converters in definition of "scrap metal" in K.S.A. 50-6,109, which implicates: K.S.A. 21-5801 (value of property in a theft case); K.S.A. 21-5804 (prima facie evidence of intent to permanently deprive); K.S.A. 21-5814 (criminal damage to property); and K.S.A. 22-2902d (admission of scrap metal dealer records at preliminary hearing)	HB 2326 Eff. 7/1/23
Tobacco (K.S.A. 79-3321, et al.)	Raises the minimum age to sell, purchase, or possess cigarettes or tobacco products from 18 to 21, and amends criminal and civil penalties accordingly	HB 2269 Eff. 7/1/23
See also HB 2147 (counterfeit supplemental restraint system or nonfunctional airbag); HB 2264 (failing to provide notification to patients using mifepristone); HB 2313 (violating requirements of the born-alive infants protection act)		

New sentencing provisions, including new sentencing rules

Relating to the crime of	Description	Bill No. and eff. date
Criminal discharge of a firearm (K.S.A. 21-6308; K.S.A. 21-6804)	Creates special sentencing rule for criminal discharge of a firearm: if the trier of fact makes a finding beyond a reasonable doubt that the defendant discharged a firearm at a dwelling, building, structure, or motor vehicle and knew or reasonably should have known that someone 14 or older was present = additional 60 months; if someone under 14 was present = additional 120 months; both situations are presumptive prison and the sentence for this offense shall run consecutively to any other term imposed	S. Sub. for HB 2010 Eff. 7/1/23 (originated in SB 183)
Criminal possession of a weapon (K.S.A. 21-6304; K.S.A. 21-6804)	Creates a special sentencing rule called Reduce Armed Violence Act: if trier of fact makes a finding beyond a reasonable doubt that a person convicted of criminal possession of a weapon by a convicted felon (juvenile adjudications do not count) possessed a firearm, and used it in the commission of any "violent felony" (i.e. most of the list of inherently dangerous felonies, but not felony drug possession), then the crime is presumptive imprisonment and the sentence shall run consecutively to any other term; *no other sentence permitted*	S. Sub. for HB 2010 Eff. 7/1/23 (originated in SB 193 and HB 2031)
Distribution or manufacturing of a controlled substance (K.S.A. 21-5703; K.S.A. 21-6805)	Creates a special sentencing rule for unlawful manufacturing and distribution or cultivation of *any* substance: if the trier of fact makes a finding beyond a reasonable doubt "that the controlled substance involved, because of its appearance or packaging, was likely to be attractive to minors," the sentence is presumed imprisonment and two times the maximum duration of the presumptive term	SB 174 Eff. 7/1/23 (originated in SB 238)

Manufacturing a controlled substance (K.S.A. 21-5703; K.S.A. 21-6805)	Increases the penalty from a SL 2 to a SL 1 *if* it is a fentanyl-related substance (as defined in K.S.A. 21-5701) Creates a special sentencing rule for unlawful manufacturing a controlled substance, *if* the material contains "any quantity of a fentanyl-related controlled substance": the sentence is presumed imprisonment and two times the maximum duration of the presumptive term	SB 174 Eff. 7/1/23 (originated in HB 2398 and SB 238)
Mandatory drug treatment (K.S.A. 21-6824)	Expands SB 123 drug treatment to include nondrug, nonperson offenses for people who fall into SL 7-10/C-I grid boxes (or A-B but the priors are SL 8-10) if they meet the other requirements of SB 123	S. Sub. for HB 2010 Eff. 7/1/23 (originated in HB 2070)
Driving while suspended, revoked, canceled (K.S.A. 8-262)	For a first-time conviction, removes the mandatory term of imprisonment for driving with a driver's license that was canceled, suspended, or revoked for failure to appear in response to a traffic citation or failure to pay fines or otherwise comply with a traffic citation, and instead requires a fine of not less than $100; replaces all references to "imprisonment" with "confinement"	HB 2216 Eff. 7/1/23

Jail provisions

Description	Bill No. and eff. date
Provides that a jail is not required to take a person from an arresting agency into custody until the person has been examined by a medical care facility or health care provider if the person appears to be: unconscious or was unconscious at any time during custody or during the events leading to the person's custody; suffering from a serious illness or injury (as defined by a new section in K.S.A. 19-1930); or seriously impaired by alcohol or drugs (also as defined)—and the cost of the examination and resulting treatment is the arrestee's financial responsibility Permits a judge in a county "where there is no sufficient jail" to order that someone be transported, at the county's cost, to a jail in the "nearest county that has sufficient space and means to care for the inmate as determined by the sheriff or keeper of the jail of such nearest county" As to how the jail manages the people in it (RE: "separate rooms for each sex"), the bill defines the term "sex" to mean an individual's biological sex, either male or female, at birth Requires the Secretary of Aging and Disability Services to reimburse county jails $100/day for people in jail awaiting examination, evaluation, or treatment for competency to stand trial	SB 228 Eff. 7/1/23

Relating to children

Description	Bill No. and eff. date
Requires a referral of an alleged victim of child abuse or neglect for an examination as part of an investigation; creates a program in the department of health and environment to provide training and payment for such examinations; etc.	HB 2024 Eff. 5/4/23 (originated in HB 2034)
Requires (on or before 10/1/23) that an evidence-based risk and needs assessment be given to children in CINC cases who "have been identified as exhibiting behavior that could lead to juvenile offender charges related to physical violence, aggression, damage to property or use of life-threatening drugs"—assessments are part of "official file" but are inadmissible at a juvenile justice proceeding	HB 2021 Eff. 7/1/23

DCF works with KDOC "to allow children identified [by these assessments] to participate in evidence-based community programs" Requires that children placed in detention receive a risk and needs assessment within 72 hours, or an updated one (if one was already done); receives a case plan within 48 hours; and has access to behavioral health and mental health services as well as substance use treatment while detained Requires the court services or community correctional services officer to immediately notify the court and submit a written report showing in what manner the child has violated probation Allows a judge to commit a child on probation to detention for a probation violation "if the judge makes a finding that the juvenile is demonstrating escalating use of physical violence, aggression, weapons, damage to property, or life-threatening substances"—said detention period may not exceed 24 hours for 1st violation, 48 hours for 2nd violation, and 15 days for 3rd or more violation Allows the court to extend the overall case length limit to allow for completion of an evidence-based program if child who has been adjudicated a juvenile offender fails to complete an evidence-based program "due to a repeated, intentional effort to delay," as reported by the services provider—such extensions may only be granted incrementally Expands allowable expenditures for programs provided to children and their families Also provides for data sharing, data collection, collaboration between agencies, and grants for evidence-based programs	
Amends definition of "correctional institution" in K.S.A. 75-5202 to include "any juvenile correctional facility or institution as defined in K.S.A. 38-2302, and amendments thereto," and any other correctional institution established by the state for the confinement of juvenile offenders under the control of the secretary of corrections	HB 2214 Eff. 4/27/23

For questions, please contact Jennifer Roth at jroth@sbids.org.

Settlement Agreements Involving a Minor; SB 243

SB 243 creates law concerning requirements and procedures for a person having legal custody of a minor to enter into a settlement agreement without court approval on behalf of the minor when the settlement is less than a net amount of $25,000. The bill also amends law concerning certain dollar amounts referenced in the Kansas Uniform Transfers to Minors Act; the Act for Obtaining a Guardian or a Conservator, or Both; and a statute concerning payments to minor beneficiaries under the Kansas Public Employees Retirement System (KPERS).

Settlement Agreements on Behalf of a Minor

The bill provides that a person having legal custody of a minor may settle or compromise and enter into a settlement agreement with a person against whom the minor has a claim or from whom the minor is to receive proceeds from the sale of real estate, for the settlement of any estate or from any other source if:

- A guardian or conservator has not been appointed for the minor;
- The total amount of the settlement proceeds due to the minor, after reduction from the total settlement amount of all medical expenses, medical liens, all other liens and reasonable attorney fees and costs, is $25,000 or less if paid in cash, by draft or check, by direct deposit, or by the purchase of a premium for an annuity;
- The moneys payable under the settlement agreement will be paid as provided by the bill; and
- The person entering into the settlement agreement on behalf of the minor completes an affidavit or verified statement that attests to certain information.

Affidavit or Verified Statement

The bill requires the person entering into the agreement on behalf of the minor to attest that such person:

- Has made a reasonable inquiry and that, to the best of the person's knowledge, the minor will be fully compensated by the settlement or there is no practical way to obtain additional amounts; and
- Understands and acknowledges that such person is obligated by law to deposit the settlement directly into a restricted savings or investment account or by purchase of an annuity.

The bill requires that if an attorney represents the person entering into the agreement on behalf the minor, such attorney must maintain the affidavit or verified statement in the attorney's file for five years.

Payment of Settlements

The bill describes how proceeds resulting from a settlement agreement are to be payable, as follows.

When Minor is Represented by an Attorney

If the minor or person entering into the settlement agreement on behalf of the minor is represented by an attorney and the settlement is paid in cash, by draft or check, or by direct deposit into the attorney's trust account held for the benefit of the minor, the attorney is required to:

- Timely deposit the moneys received on behalf of the minor directly into a restricted savings or investment account that allows withdrawals from the account only under the certain specified circumstances; or

- Purchase an annuity by direct payment to the issuer of the annuity with the minor designated as the sole beneficiary of the annuity.

When Minor is Not Represented by an Attorney

If the minor or person entering into the settlement agreement on behalf of the minor is not represented by an attorney and the settlement is paid by check, draft, or direct deposit, the minor or person entering into the settlement agreement on behalf of the minor is required to provide the person or entity with whom the minor has settled the claim with sufficient information to draw a check made payable, or complete an electronic transfer of settlement funds:

- Into a restricted savings or investment account that allows withdrawals from the account only under certain specified circumstances; or

- To purchase an annuity by direct payment to the issuer of the annuity with the minor designated as the sole beneficiary of the annuity.

When Minor is in Custody of the State

If the minor is under the care, custody, and control of the State, the Secretary for Children and Families is required to establish a restricted trust account that earns interest for the benefit of the minor for the purpose of receiving moneys payable to the minor under the settlement agreement.

If the settlement is paid in cash or check, the moneys received on behalf of the minor must be timely deposited into the account described above and notice of the deposit provided to the minor and the person entering into the agreement on the minor's behalf by personal service or first-class mail.

If the settlement is paid by direct deposit, the minor, the person entering into the settlement on behalf of the minor, or the Department for Children and Families is required to provide sufficient information for the purpose of completing an electronic transfer of settlement funds into the account established under the bill. Notice of such deposit must be delivered to the minor and person entering in the agreement on the minor's behalf by personal service or first-class mail.

The bill also allows payment to be made through the purchase of an annuity with the minor designated as the sole beneficiary of the annuity.

Restrictions on Moneys

The bill places restrictions on how the money in the minor's restricted savings, investment, or trust account or subaccount established pursuant to the bill may be used. Under the bill, moneys may not be withdrawn, removed, paid out or transferred to any person, including the minor, except in the following circumstances:

- Pursuant to court order;
- Upon the minor attaining the age of majority or being otherwise emancipated; or
- Upon the minor's death.

The bill states that, upon the minor's or account holder's death, the balance of the account is to be paid to the payable on death beneficiary in accordance with the Kansas Banking Code and, in the absence of a named beneficiary, in accordance with the Kansas Probate Code.

Validity and Effect of Signed Agreement

The bill provides that a signed settlement agreement entered into on behalf of the minor under the bill is binding on the minor without the need for court approval or review, and has the same force and effect as if the minor were a competent adult entering into the agreement.

Such agreement also fully releases all claims of the minor encompassed in the settlement agreement and may be relied on by a financial institution in lieu of a court order when opening a restricted savings or investment account or purchasing an annuity on behalf of a minor.

Release of Liability

The bill specifies that any person or entity that settles with a minor in good faith pursuant to the bill's provisions is not liable to the minor for any claims arising from the settlement of the claim.

The bill also specifies that an insurer who in good faith transfers funds into an account specified by the bill, or purchases an annuity at the direction of the minor or minor's representatives, is not liable to the minor or minor's representatives for any claims arising from the use of such funds after the transfer is completed.

Finally, the bill specifies a financial institution that in good faith opens a restricted account specified by the bill at the direction of the minor or minor's representatives is not liable to the minor or minor's representatives for any claim arising from the use of such funds.

Judicial Intervention

The bill states that nothing in the bill prevents any person acting on behalf of the minor from filing for guardianship, limited guardianship, or conservatorship in district court and requesting such court to approve the settlement on behalf of the minor and oversee the settlement proceeds.

The bill also states that nothing in the bill prevents a minor or minor's representative from requesting a court approve:

- A settlement agreement;
- The affidavit or verified statement required by the bill;
- The terms and disposition of settlement proceeds; or
- Any other matter or agreement related to the settlement agreement.

The bill requires the district court to award any required docket fees associated with such action to the minor or minor's representative.

Maximum Dollar Amounts

The bill increases maximum dollar amounts specified in the Kansas Uniform Transfers to Minors Act and the Act for Obtaining a Guardian or a Conservator, or Both with respect to moneys in accounts owned by a minor to $25,000. The bill also amends law concerning lump-sum benefits payable to minor beneficiaries under KPERS to increase the maximum dollar amounts specified to $25,000, from $10,000.

Kansas General Corporation Code; House Sub. for SB 244

House Sub. for SB 244 creates a new section of law and substantially updates various articles of the Kansas General Corporation Code (Code).

The bill also amends various provisions concerning Secretary of State (SOS) business filings, reports, and fees in the Code and the Kansas Revised Limited Liability Company Act (RLLCA); Business Entity Transactions Act (BETA); the Business Entity Standard Treatment Act (BEST Act); Kansas Revised Uniform Limited Partnership Act (RULPA); and the Kansas Uniform Partnership Act (KUPA).

The bill repeals several statutes:

- On and after January 1, 2024, KSA 17-72a03, concerning public benefit corporation amendments and mergers;
- KSA 17-7511, concerning the inspection of a corporation's income tax return to verify a business entity information report to the SOS;
- KSA 17-7514, KSA 56-1a610, and KSA 56a-1204, concerning applications for extension of time for filing income tax returns submitted to the SOS; and
- KSA 56-1a608 and KSA 56a-1203 concerning annual reports and related fees. [*Note:* Continuing law requires such reports and fees be collected biennially.]

[*Note*: The bill also repeals the version of KSA 17-6712 as amended by Section 36, concerning appraisal rights in mergers and consolidations, on and after January 1, 2024. The new section will retain most of the bill's amendments, as further explained below.]

Additionally, the bill amends two sections of law concerning taxation to remove cross-references to a statute that is repealed by the bill.

Electronic Signatures and Electronic Transmissions (New Section 1)

The bill adds a section to law governing the formation of corporations in the Code. This new section provides that any act or transaction governed by the Code, articles of incorporation, or bylaws could be provided for in a "document," which is defined by the bill and deemed the equivalent of an electronic transmission.

The bill also specifies that whenever a signature is required or permitted under the Code, it could be a manual, facsimile, conformed, or "electronic signature," which is defined by the bill. The bill also outlines when an electronic transmission is deemed delivered to a person. In addition, the bill allows persons to conduct transactions in accordance with the Uniform Electronic Transactions Act as long as the requirements of this section are satisfied.

The bill specifies the various types of transactions to which the section shall not apply, and other related limitations of the section's provisions.

The bill states that the provisions of the Code control to the fullest extent permitted under the federal Electronic Signatures in Global and National Commerce Act (E-Sign Act) in the event such Code provisions are deemed to modify, limit, or supersede that Act.

Other Code Amendments (Sections 2-50)

Throughout the Code, the bill amends law to authorize certain actions of corporations in accordance with the new section concerning electronic signatures and electronic transmissions described above, unless otherwise restricted. Additionally, the bill provides express authority for corporations to use networks of electronic databases, including blockchain and distributed ledgers, for certain electronic transmissions and records.

The bill makes additional substantive changes to law governing various aspects of corporations, as follows.

Formation of Corporations (Sections 6-11)

The bill amends law governing the formation of corporations in the Code to:

- Specify an amendment, repeal, or elimination of a provision eliminating or limiting the personal liability of a director to the corporation or its stockholders shall not affect an act or omission by a director occurring before such amendment, repeal, or elimination unless the provision allows retroactive application;

- Specify any person, whether or not an incorporator or director, may provide an instruction that consent to action shall be effective at a future time, including a time determined upon a happening of an event not later than 60 days after the instruction is given, and shall be revocable prior to the time the consent becomes effective;

- Expand the types of catastrophes that trigger a corporation's emergency powers to include an epidemic, a pandemic, or a declaration of a national emergency by the U.S. government. In addition, the bill makes a corporation's emergency bylaws adoptable by a majority of directors present if a quorum cannot be readily convened, and adds language concerning actions that could be taken to address the emergency condition, including postponing stockholder meetings and changing record and payment dates of dividends declared;

- Clarify a court's jurisdiction to interpret, apply, or enforce, or determine the validity of, any instrument, document, or agreement when a corporation and one or more stockholders sells or offers to sell stock or when a corporation agrees to sell, lease, or exchange any of its property or assets upon consent of the stockholders; and

- Allow nonstock corporations to ratify defective corporate acts and stock.

Directors and Officers (Sections 12 and 13)

The bill amends law governing directors and officers to:

- Clarify that bylaws may set a board of directors' quorum at a number below or above a majority of directors, but the quorum may not be less than one-third of the total number of directors;

- Specify which officers shall be entitled to mandatory indemnification for any act or omission occurring after June 30, 2023, including the corporation's most highly compensated executive officers as identified in public filings with the U.S. Securities and Exchange Commission (SEC); and

- Authorize a corporation to permissively grant indemnification for other persons who are not officers for acts or omissions occurring after June 30, 2023.

Stocks and Dividends (Sections 14-20)

The bill amends law governing stocks and dividends to:

- Permit stock certificates to be signed by any two authorized officers of the corporation rather than by certain specified officers;

- Provide that shares of a corporation's capital stock would not be entitled to vote nor counted for quorum purposes if such shares belong to any entity that is controlled directly or indirectly by the corporation;

- Clarify the effective dates of amendments to a corporation's articles of incorporation electing not to be governed by statutory provisions limiting business combinations with interested stockholders;

- Permit the ratification of defective corporate acts or stocks when there is no valid outstanding stock for ratifications occurring on or after July 1, 2023;

- Specify the date for determining shareholders to vote to ratify a defective corporate act that involved a vote of the shareholders as the record date of the such vote, not the date of the apparent defective corporate act;

- Clarify that any act that is within a corporation's powers under the Code may be ratified or validated, even if approval had not been obtained as required by the corporation's articles of incorporation or bylaws; and

- Clarify the definition of "failure of authorization" includes the failure to authorize or effect an act or transaction in compliance with the disclosure set forth in any proxy or consent solicitation statement to the extent such failure would render the act or transaction void or voidable.

Meetings, Elections, Voting, and Notices (Sections 21-28)

The bill amends law governing meetings, elections, voting, and notices to:

- Allow certain stockholder notices, including consents, to be provided by U.S. mail, courier, or email, and not require an opt-in for email service;

- Allow the use of electronic databases, including blockchain, distributed ledgers, and stock ledgers, for certain electronic transmissions and recordkeeping;

- Allow certain stockholder records to be maintained on behalf of a corporation, and specify that printed electronic records are valid and admissible evidence in court proceedings; and

- Remove language concerning dated signatures on written consents to no longer require such signatures be dated.

Merger or Consolidation (Sections 29-37)

The bill amends law governing merger or consolidation to:

- Replace references to "Kansas corporations" with "domestic corporations" and replace references to corporations organized in other states with "foreign corporations";

- Modify provisions regarding voting rights of stockholders and proxies in conformance with provisions regarding electronic signatures and electronic transmissions in New Section 1 of the bill;

- Specify the information to be included in a merger or consolidation agreement, and remove a requirement that in a merger involving a holding company, the resulting company's organizational documents be the same as the articles of incorporation of the original corporation;

- Specify that for mergers or consolidations between two domestic corporations consummated prior to July 1, 2023, the surviving entity is required to amend its organizational documents to include certain identical information to that of the constituent corporation if it did not already contain the required information;

- Specify for mergers or consolidations between two domestic corporations consummated pursuant to an agreement or board of directors resolution adopted

on or after July 1, 2023, no vote by stockholders is required to approve such merger or consolidation unless expressly required by the corporation's articles of incorporation;

- Allow certain surviving entities to amend their organizational documents to reduce the number of classes and shares of stock or other units and remove certain language authorized by the Act;

- Revise provisions concerning required stockholder votes to approve a merger to not require such vote when the offer is conditioned on a tender of a certain amount of shares of stock of the constituent corporation;

- Allow for certain stock to become excluded or be deemed rollover stock per a written agreement for the purposes of the merger, but only with respect to merger agreements entered into on or after July 1, 2023;

- Require a merger agreement concerning a surviving domestic corporation contain a statement concerning whether amendments or changes in the articles of incorporation are desired. For consolidation involving domestic corporations, the bill shall require the articles of incorporation to be attached to the agreement;

- Require merger or consolidation agreements involving a surviving or resulting foreign corporation to include information required by the laws under which the corporation is organized;

- Require that for nonstock corporation mergers or consolidations involving converted memberships, the cash, property, rights, or securities provided in exchange for such conversion be specified in the agreement;

- Raise the fee for service of process by the SOS to $50 from $40. Continuing law and provisions under the bill require an out-of-state nonstock corporation to designate the SOS as its agent for service of process by in-state corporations;

- Amend provisions related to the merger or consolidation of a nonstock corporation with a stock corporation by specifying what information related to the articles of incorporation must be in such agreement;

- If law requires the SOS to be appointed to receive service of process for the surviving or resulting corporation, and if a certificate of merger or consolidation must be filed, the bill requires such designation to be included in the filed certificate;

- Under an agreement consummated before July 1, 2023, if a corporation's articles of incorporation are amended, appraisal rights shall be available, pursuant to continuing law [*Note*: A new statutory section that will become effective on January 1, 2024, does not contain this specific appraisal provision];

- Under an agreement consummated on or after July 1, 2023, the bill would:
    - Set a threshold for maintaining a claim of appraisal rights in certain mergers to be greater than 1 percent of the outstanding shares, or the value of the consideration exceeds $1 million; and
    - Allow corporations to tender payment of appraisal amounts when litigation begins to avoid accrual of interest; and
- Deny appraisal rights to persons who hold shares in an SEC reporting company pursuant to an intermediate merger under the bill.

Dissolution and Disposition of Corporate Assets (Sections 38 and 39)

The bill amends law governing dissolution and disposition of corporate assets to:

- Clarify the district court has jurisdiction to revoke or forfeit a corporation's articles of incorporation upon motion by the Attorney General; and
- Allow the district court to appoint trustees for winding up the affairs of those corporations whose articles of incorporation have been revoked or forfeited, and limit the court's powers to revoke or forfeit to this purpose (changed from any portion of the Code).

Extension, Renewal, or Reinstatement of Corporate Status (Sections 40-42)

The bill amends law governing extension, renewal, or reinstatement of corporate status to:

- Modify the process by which a corporation could revoke a voluntary dissolution or restore certain articles of incorporation that expired because of an existing time limitation;
- Amend provisions relating to corporate revival for nonrevoked corporations to:
    - Replace references to "renewal," "extension," and "reinstatement" with the term "revival";
    - Set requirements for certificates of revival;
    - Clarify rights and duties of a corporation upon revival; and
    - Add language defining "board of directors" and "bylaws" for purposes of reviving a corporation and establishing the requirements for authorization by the board of directors.

Public Benefit Corporations (Sections 43-45)

The bill amends law governing public benefit corporations to amend provisions regarding the management of public benefit corporations by balancing pecuniary interests of stockholders, best interests of those materially affected by the corporation's conduct, and specific public benefit (balancing requirement) to:

- Add language concerning conflicts of interest for directors of public benefit corporations and make the exculpatory provisions for directors of public benefit corporations the default;

- Add language regarding enforcement provisions of the balancing requirement to eliminate the super-majority stockholder voting requirements associated with article amendments to add or remove public benefit corporation provisions or to merge or consolidate with another entity such that the resulting entity would include or omit public benefit corporation provisions; and

- Remove the special appraisal rights of stockholders of a corporation that converts to or from a public benefit corporation.

Amendments to BETA (Sections 53-58)

The bill amends provisions in BETA governing mergers of business entities to permit certain mergers or combinations with a corporation that can be effected without the vote of the stockholders when the merging entity owns 90 percent or more of the stock of the corporation. The bill allows such mergers to occur between domestic corporations and both domestic and foreign non-corporation business entities.

The bill also states that the provisions of BETA shall control to the fullest extent permitted under the federal Electronic Signatures in Global and National Commerce (E-Sign) Act in the event such provisions modify, limit, or supersede that act.

Amendments to Code, BETA, BEST Act, RULPA and KUPA Concerning SOS Filings, Reports, and Fees (Sections 51-52, 59-72; Other Various Sections Throughout)

The bill amends law concerning business entity information filings, reports, and fees submitted to the SOS in the Code, BETA, BEST Act, RULPA, and KUPA to:

- Clarify business filing entity reports must contain the location of the principal office, including a full postal address, and clarify other references to addresses in these acts to mean postal addresses;

- Standardize the attributes of addresses of individuals and entities in periodic reports;

- Replace a per-page fee with a per-document fee for requested copies of certified and uncertified documents from the SOS;

- Expand the ability of the SOS to accept filings by various electronic means, including electronic uploads;

- Specify when filings must be made on forms prescribed by the SOS;

- Remove language requiring the number of shares of capital stock issued for domestic for-profit corporations be included on business entity filing reports;

- Remove language requiring number of memberships or number of shares of capital stock issued for non-profit corporations be included on business entity filing reports;

- Add certificates of revocation of dissolution and certificates of merger or consolidation to the SOS fee schedule for corporate filings;

- Remove language requiring the SOS to maintain copies of applications for extension tax returns of limited liability companies; and

- Clarify provisions regarding resignation of resident service agents and filing related certificates of resignation.

Uniform Trust Decanting Act; HB 2172

HB 2172 enacts the Uniform Trust Decanting Act (UTDA) and amends law in the Kansas Uniform Trust Code, Kansas Probate Code, and Kansas Income Tax Act with respect to the statutory rule against perpetuities (RAP), to make the RAP inapplicable in certain circumstances.

UTDA (Sections 2–30)

Definitions (Section 2)

The bill defines various terms used throughout the UTDA. Among the definitions in the bill:"Decanting power" is defined to mean the power of an authorized fiduciary under the UTDA to distribute property of a first trust to one or more second trusts or to modify the terms of the first trust;

- "Authorized fiduciary" means a:
  - Trustee or other fiduciary, other than a settlor, that has discretion to distribute or direct a trustee to distribute part or all of the principal of the first trust to one or more current beneficiaries;
  - Special fiduciary appointed by a court to intervene in the exercise of decanting power pursuant to Section 9 of the bill; or
  - Special-needs fiduciary as defined and described under Section 13 of the bill;
- "Beneficiary" means a person that:
  - Has a present or future, vested or contingent, beneficial interest in a trust;
  - Holds a power of appointment over trust property; or
  - Is an identified charitable organization that will or may receive distributions under the terms of the trust;
- "First trust" means a trust over which an authorized fiduciary may exercise the decanting power;
- "Second trust" means a first trust after modification under the UTDA or trust to which a distribution of property from a first trust is or may be made under UTDA;
- "Terms of the trust" means:
  - The manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or established by other evidence that would be admissible in a judicial proceeding; or

- The trust's provisions as established, determined, or amended by a trustee or other person in accordance with applicable law, court order, or nonjudicial settlement agreement;

- "Trust instrument" means a record executed by the settlor to create a trust or by any person to create a second trust that contains some or all of the terms of the trust, including any amendments; and

- "Settlor" means, except as otherwise provided in provisions regarding a second trust settlor in Section 25 of the bill, a person, including a testator, that creates or contributes property to a trust. If more than one person creates or contributes property to a trust, each person would be a "settlor" of the portion of the trust property attributable to the person's contribution except to the extent another person has power to revoke or withdraw that portion.

Applicability (Sections 3 and 5)

The bill states the UTDA applies to irrevocable express trusts, or express trusts that are only revocable with the consent of the trustee or person holding an adverse interest. The UTDA shall not be applicable to trusts held solely for a charitable purpose.

Additionally, the bill allows a trust instrument to restrict or prohibit exercise of the decanting power.

The bill specifies that the UTDA does not limit the power of a trustee, powerholder, or other person to distribute or appoint property in a further trust or to modify a trust under the instrument, other state laws, common law, a court order, or a nonjudicial settlement agreement. The bill also specifies the UTDA does not affect the ability of a settlor to make provisions in a trust instrument for the distribution of trust property, appointment in further trust of the trust property, or for modification of the trust instrument.

The UTDA applies to any trust created before, on, or after July 1, 2023, that:

- Has its principal place of administration in Kansas, including trusts whose principal place of administration has changed to Kansas; or

- Provides by its trust instrument that it is governed by Kansas law or is governed by Kansas law for the purpose of:

  - Administration, including administration of a trust whose governing law has changed to Kansas;

  - Construction of the terms of the trust; or

  - Determining the meaning or effect of the terms of the trust.

Fiduciary Duties With Respect to Decanting Power (Section 4)

The UTDA requires authorized fiduciaries to exercise decanting power in accordance with their fiduciary duties, including the duty to act in accordance with the purposes of the first trust.

The bill specifies the UTDA does not create or imply a duty to exercise the decanting power or to inform the beneficiaries about the applicability of the UTDA.

The bill further provides, for purposes of the UTDA and certain duties of trustees contained in the Kansas Uniform Trust Code, the terms of the first trust are deemed to include the decanting power, except as otherwise provided in the first-trust instrument.

Reliance on Prior Decanting (Section 6)

The UTDA specifies that a trustee or other person's reliance upon the validity of the decanting of property or a modification of a trust pursuant to the UTDA or other state law would not make such person liable for any action or failure to act as a result of this reliance.

Notice Requirements for Decanting (Section 7)

Under the bill, the notice period for decanting begins when such notice is given under the terms of the UTDA (described below), and ends 59 days after the day notice is given. The bill also states an authorized fiduciary may exercise the decanting power without consent of any person and without court approval, provided other requirements of the UTDA are met.

The UTDA requires notice be given in a record of the intended exercise of the decanting power not later than 60 days before such exercise to certain persons as specified by the bill. Such notice is required to contain certain information related to the manner and reason for the proposed decanting and to include copies of related agreements, instruments, and statements.

The bill does not require notice be provided to persons not known to the fiduciary or who cannot be located after reasonable diligence. Additionally, the bill states an exercise of the decanting power is not ineffective because of failure to give the required notice to one or more persons if the authorized fiduciary acted with reasonable care in providing notice pursuant to the bill.

Before expiration of the notice period, the bill allows exercise of the decanting power if all persons entitled to receive notice waive the period in a signed record.

The bill states receipt of notice, waiver of the notice period, or expiration of the notice period shall not affect the right of persons to seek judicial instruction or approval related to a proposed decanting.

Authority to Represent and Bind (Section 8)

The bill specifies notice provided to a person with the authority to represent and bind another person under a first-trust instrument or the Kansas Uniform Trust Code has the same effect as notice provided directly to such person.

Consent or waiver by the person with the authority described above shall be binding on the person represented unless objected to by such person before the consent or waiver could otherwise become effective.

A person with the above authority may also file an application with a court on behalf of the person represented to inquire whether the decanting power could be exercised in accordance with the UTDA.

The bill also provides that a settlor may not represent or bind a beneficiary under the UTDA.

Authority of the Court to Intervene in the Exercise of Decanting Power (Section 9)

The bill allows certain specified persons to file an application with a court seeking further instruction or approval with respect to an exercise of decanting power and provides the actions a court may take upon such application.

The bill specifies a proceeding to determine whether a proposed or attempted exercise of the decanting power is ineffective may not be commenced by a person entitled to notice under the UTDA or by a beneficiary unless such proceeding is commenced within six months from the day notice is given. Failure to receive a notice will not extend the time by which such proceeding must commence if the authorized fiduciary acted with reasonable diligence to comply with the UTDA.

The bill allows a court in a judicial proceeding involving the decanting of a trust, as justice and equity may require, to award costs and expenses, including reasonable attorney fees, to any party, to be paid by another party, or from the trust that is the subject of the controversy.

Signed Record (Section 10)

The bill requires an exercise of the decanting power to be made in a record signed by an authorized fiduciary. The bill requires the signed record to identify either directly, or by reference, the first trust and the second trust or trusts and state the property of the first trust being distributed to each second trust, and the property, if any, that remains in the first trust.

Decanting Power Of Fiduciary With Expanded Distributive Discretion (Section 11)

The bill defines several terms used in this section, including "noncontingent right," "presumptive remainder beneficiary," "successor beneficiary," and "vested interest." [*Note:* Some

other terms used in this section are defined in Section 2 of the bill, including "current beneficiary," "expanded distributive discretion," "power of appointment," and "powerholder."]

Under the provisions of the UTDA, an authorized fiduciary that has expanded distributive discretion over the principal of a first trust for the benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.

The bill specifies that in an exercise of the decanting power, a second trust could not:

- Include as a current beneficiary a person that is not a current beneficiary of the first trust, except as otherwise provided in the bill;

- Include as a presumptive remainder beneficiary or successor beneficiary a person that is not a current beneficiary, presumptive remainder beneficiary, or successor beneficiary of the first trust, except as otherwise provided in the bill; or

- Reduce or eliminate a vested interest.

The bill further specifies that in an exercise of the decanting power, a second trust may be created or administered under the law of any jurisdiction and such exercise could:

- Retain a power of appointment granted in the first trust;

- Omit a power of appointment granted in the first trust, other than a presently exercisable general power of appointment;

- Create or modify a power of appointment if the powerholder is a current beneficiary of the first trust and the authorized fiduciary has expanded distributive discretion to distribute principal to the beneficiary; and

- Create or modify a power of appointment if the powerholder is a presumptive remainder or successor beneficiary of the first trust, but the exercise of the power may take effect only after the powerholder becomes, or would have become if then living, a current beneficiary.

The bill specifies that a power of appointment may be general or nongeneral and that the class of permissible appointees may be broader than or different from the beneficiaries of the first trust. If an authorized fiduciary has expanded distributed discretion over part, but not all, of the principal of a first trust, the bill allows the fiduciary to exercise the decanting power over that part of principal over which the authorized fiduciary has expanded distributive discretion.

Decanting Power of Fiduciary With Limited Distributive Discretion (Section 12)

The bill defines "limited distributive discretion" to mean discretionary power of distribution that is limited to an ascertainable standard or a reasonably definite standard.

The bill provides that an authorized fiduciary with limited distributive discretion over the principal of the first trust for the benefit of one or more current beneficiaries may exercise the decanting power over the principal of the first trust.

The bill allows a second trust to be created or administered under the law of any jurisdiction. Under the bill, second trusts in the aggregate grant each beneficiary of the first trust beneficial interests that are substantially similar to those of the beneficiary in the first trust.

The bill specifies that the power to make a distribution under a second trust for the benefit of an individual beneficiary is substantially similar to a power under the first trust to make a distribution directly to the beneficiary. The bill classifies a distribution as being for the benefit of the beneficiary if the:

- Distribution is applied for the benefit of the beneficiary;

- The beneficiary is under a legal disability or the trustee reasonably believes the beneficiary is incapacitated, and the distribution is made as permitted under the Kansas Uniform Trust Code; or

- Distribution is made as permitted under the terms of the first-trust instrument and the second-trust instrument for the beneficiary's benefit.

If an authorized fiduciary has limited distributive discretion, the bill allows a fiduciary to exercise the decanting power over the part of the principal that the authorized fiduciary has limited distributive discretion.

Special-needs Trust (Section 13)

Definitions. The bill defines terms related to special-needs trusts, including "beneficiary with a disability" and "governmental benefits." The bill defines a "special-needs trust" to mean a trust the trustee believes would not be considered a resource for the purposes of determining whether a beneficiary with a disability is eligible for governmental benefits.

The bill also defines "special-needs fiduciary" to mean, with respect to a trust that has a beneficiary with a disability, a trustee or other fiduciary, other than a settlor, that has discretion to distribute:

- The principal of a first trust to one or more current beneficiaries; or

- The income of the first trust to one or more current beneficiaries, if no trustee or fiduciary has discretion to distribute part or all of the principal of a first trust.

The term also encompasses a trustee or other fiduciary, other than a settlor, who is required to distribute part or all of the income or principal of the first trust to one or more current beneficiaries, if no trustee or fiduciary has discretion under the above provisions.

Decanting power. The bill allows a special-needs fiduciary to exercise the decanting power over the principal of a first trust as if the fiduciary had the authority to distribute principal to a beneficiary with a disability subject to expanded distributive discretion if:

- A second trust is a special-needs trust that benefits the beneficiary with a disability; and

- The special-needs fiduciary determines that exercise of the decanting power would not be inconsistent with a material purpose of the first trust.

Under the bill, the following rules apply to an exercise of the decanting power:

- Notwithstanding the bill's provisions, the interest in the second trust of a beneficiary with a disability may:
  - Be a pooled trust as defined by federal Medicaid law for the benefit of the beneficiary with a disability; or
  - Contain payback provisions complying with the reimbursement requirements of federal Medicaid law;

- Provisions prohibiting a second trust from reducing or eliminating a vested interest shall not apply to the interests of the beneficiary with a disability; and

- Except as affected by any change to the interests of the beneficiary with a disability, the second trusts in aggregate will be required to grant each other beneficiary of the first trust beneficial interests in the second trusts that are substantially similar to the beneficiary's interests in the first trust.

Special Rules to Protect Charitable Interests (Section 14)

The bill defines the term "determinable charitable interest" to mean a charitable interest that is a right to a mandatory distribution currently, periodically, on the occurrence of a specified event, or after the passage of a specified time, and is unconditional (as defined in the section) or will be held solely for charitable purposes.

If the first trust contains a determinable charitable interest, the UTDA designates the Attorney General as having the rights of a qualified beneficiary and allows them to represent and bind the charitable interest.

If a first trust contains a charitable interest, the bill specifies the second trust or trusts could not:

- Diminish the charitable interest;

- Diminish the interest of an identified charitable organization that holds the charitable interest;

- Alter any charitable purpose stated in the first-trust instrument; or

- Alter any condition or restriction related to the charitable interest.

The bill provides that if there are two or more second trusts, the second trusts would be treated as one trust for purposes of determining whether the exercise of the decanting power diminishes the charitable interest or diminishes the interest of an identified charitable organization for purposes of the bill.

If a first trust contains a determinable charitable interest, the second trust or trusts that include a charitable interest pursuant to the bill will be administered under the laws of Kansas unless the:

- Attorney General consents in a signed record to the second trust or trusts being administered under the law of another jurisdiction; or

- A court approves the exercise of the decanting power.

The UTDA does not limit the powers and duties of the Attorney General under the laws of Kansas other than provided for in the UTDA.

Limitations on Decanting Power (Sections 15–20)

First-trust Instrument Restrictions (Section 15). The bill provides that an authorized fiduciary may not exercise the decanting power, to the extent the first-trust instrument expressly prohibits exercise of:

- The decanting power; or

- A power granted by state law to the fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

The bill also states exercise of the decanting power is subject to any restriction in the first-trust instrument that expressly applies to exercise of:

- The decanting power; or

- A power granted by state law to the fiduciary to distribute part or all of the principal of the trust to another trust or to modify the trust.

The bill provides that a general prohibition of the amendment or revocation of a first trust, a spendthrift clause, or a clause restraining the voluntary or involuntary transfer of a beneficiary's interest shall not preclude exercise of the decanting power.

The bill allows an authorized fiduciary to exercise the decanting power under the UTDA even if the first-trust instrument permits the authorized fiduciary or another person to modify the first-trust instrument or to distribute part or all of the principal of the first trust to another trust.

Additionally, the bill provides that, to the extent the creation of a second-trust instrument is permitted, if a first-trust instrument contains an express prohibition as described above, the provision must be included in the second-trust instrument.

Fiduciary Compensation (Section 16). The bill states that, if a first-trust instrument specifies an authorized fiduciary's compensation, such person may not exercise the decanting power to increase their compensation above the amount specified unless:

- All qualified beneficiaries of the second trust consent to the increase in a signed record; or

- The increase is approved by the court.

The bill clarifies that a change in the authorized fiduciary's compensation that is incidental to other changes made by the exercise of the decanting power is not an increase in the fiduciary's compensation for purposes of the bill.

Second-trust Instrument—Fiduciary Liability (Section 17). The bill provides that except as otherwise provided in the bill, a second-trust instrument shall not relieve an authorized fiduciary from liability for a breach of trust to a greater extent than the first-trust instrument.

Further, the bill states a second-trust instrument may provide for indemnification of an authorized fiduciary of the first trust or another person acting in a fiduciary capacity under the first trust for any liability or claim that would have been payable from the first trust if the decanting power had not been exercised.

The bill specifies that a second-trust instrument will not reduce fiduciary liability in the aggregate. However, a second-trust instrument may divide and reallocate fiduciary powers among fiduciaries, including one or more trustees, distribution advisors, investment advisors, trust protectors, or other persons, and relieve a fiduciary from liability for an act or failure to act of another fiduciary as permitted by Kansas law other than the UTDA.

Modification of the Power to Remove or Replace a Fiduciary (Section 18). The bill states an authorized fiduciary may not exercise the decanting power to modify a provision in a first-trust instrument granting another person power to remove or replace the fiduciary unless the:

- Person holding the power consents to such modification in a signed record and the modification only applies to such person;

- Person holding the power and the qualified beneficiaries of the second trust consent to the modification in a signed record and the modification grants a substantially similar power to another person; or

- A court approves the modification, and the modification grants a substantially similar power to another person.

Limitations on Decanting Power with Respect to Tax Liability (Section 19). The bill defines relevant terms used in this section and sets limitations for an exercise of the decanting power with respect to transfers of property affecting tax liability.

Tax deductions. Under the UTDA, if a first trust contains property that qualified, or would have qualified but for the UTDA for certain types of tax deductions as specified in the bill, a second-trust instrument may not include or omit any terms that would have a consequence of preventing the transfer from qualifying for the deduction, or reducing the amount of such deduction.

S corporation stock. The bill specifies that, if the property of the first trust includes shares of stock in an S corporation as defined in federal law and the first trust is, or but for the provisions of the UTDA would be, a permitted shareholder, an authorized fiduciary may exercise the decanting power with respect to any or all of such stock, but only if the second trust receiving the stock is a permitted shareholder under federal law. If the first trust is a qualified subchapter-S trust under federal law, the second trust may not include or omit a term that prevents the second trust from qualifying as a qualified subchapter-S trust.

Generation-skipping transfer tax. If the trust contains property that qualified or would have qualified but for the purposes of the UTDA for a zero inclusion ratio for purposes of the federal generation-skipping transfer tax, the second trust may not include or omit a term that prevents the second trust from qualifying for a zero inclusion ratio under federal law.

Qualified benefits property. If the first trust is directly or indirectly the beneficiary of qualified benefits property, the second-trust instrument may not include or omit any term that, if included in or omitted from the first-trust instrument, would have increased the minimum distributions required under federal law, including any applicable regulations or similar requirements. If an attempted exercise of the decanting power violates such, the trustee shall be deemed to have held such property and any reinvested distributions of the property as a separate share from the date of the exercise of the power applies to such share.

Grantor trust. If the first trust qualifies as a grantor trust under federal law, the second trust may not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented the first trust from qualifying under federal law.

Tax benefit. The bill defines the term "tax benefit" to mean a federal or state tax deduction, exemption, exclusion, or other benefit not discussed by the UTDA, except for a benefit arising from being a grantor trust.

The bill specifies a second-trust instrument may not include or omit a term that, if included in or omitted from the first-trust instrument, would have prevented qualification for a tax benefit if the:

- First-trust instrument expressly indicates an intent to qualify for the benefit or the first-trust instrument clearly is designed to enable the first trust to qualify for the benefit; and

- Transfer of property held by the first trust or the first trust qualified, or but for the UTDA would have qualified for the tax benefit.

The bill further specifies that, subject to the S-corporation provisions, except as otherwise provided, the second trust may be a nongrantor trust, even if the first trust is a grantor trust.

Objection by a settlor. The bill specifies that an authorized fiduciary may not exercise the decanting power if a settlor objects in a signed record delivered to the fiduciary within the notice period and:

- The first trust and a second trust are both grantor trusts, in whole or in part, the first trust grants the settlor or another person the power to cause the first trust to cease to be a grantor trust, and the second trust does not grant an equivalent power to the settlor or other person; or

- The first trust is a nongrantor trust and a second trust is a grantor trust, in whole or in part, with respect to the settlor, unless the:

    - Settlor has the power at all times to cause the second trust to cease to be a grantor trust; or

    - First-trust instrument contains a provision granting the settlor or another person a power that would cause the first trust to cease to be a grantor trust and the second-trust instrument contains such provision.

Trust Duration (Section 20). The bill specifies that a second trust may have a duration that is the same as or different from the duration of the first trust. But, to the extent the property of a second trust is attributable to property of the first trust, such property shall be subject to any rules governing maximum perpetuity, accumulation, or suspension of the power of alienation that apply to the property of the first trust.

Discretionary Distribution Standard (Section 21)

The bill allows an authorized fiduciary to exercise the decanting power regardless of whether, under the discretionary distribution standard of the first trust, the fiduciary could have made or would have been compelled to make a discretionary distribution of principal at that time.

Second-trust Instrument Noncompliance (Section 22)

Under the bill, if exercise of the decanting power would be effective under the UTDA except the second trust does not comply in part with the UTDA, the decanting is effective. The following rules will apply with respect to the principal of the second trust attributable to the exercise of the power:

- A provision in the second-trust instrument that is not permitted under the UTDA is void to the extent necessary to comply;

- A provision required by the UTDA to be in the second-trust instrument, but is absent, is deemed to be included to the extent necessary to comply.

The bill further specifies that, if a trustee or other fiduciary of a second trust determines the above provisions apply to a prior exercise of the decanting power, the fiduciary must take corrective action consistent with their fiduciary duties.

Animal Trusts (Section 23)

The bill defines "animal trust" to mean a trust or interest in a trust created to provide for the care of one or more animals. "Protector" means a person appointed in an animal trust to enforce the trust on behalf of the animal, or, if no such person is appointed in the trust, a person appointed by the court for such purpose.

Under the bill, the decanting power may be exercised of an animal trust that has a protector to the extent the trust could be decanted under the UTDA if each animal that benefits from the trust were an individual, if such protector consents in a signed record.

The bill provides that a protector for an animal has the same rights under the UTDA as a qualified beneficiary.

Notwithstanding other provisions of the UTDA, if a first trust is an animal trust, in an exercise of the decanting power, the second trust is required to provide that trust property may be applied only to its intended purpose for the time period the first benefited such animal.

Kansas Uniform Trust Code—Second Trusts (Section 24)

The bill provides that references in the Kansas Uniform Trust Code to a trust instrument or terms of a trust also include a second-trust instrument and its related terms.

Second Trust Settlor (Section 25)

Under the bill, and for purposes other than the UTDA, a settlor of a first trust shall be deemed to be the settlor of a second trust with respect to the portion of the principal of the first trust that is subject to the decanting power.

The bill specifies that, in determining settlor intent with respect to the second trust, the intent of the first trust settlor, the intent of the second trust settlor, and the authorized fiduciary may be considered.

Later-discovered Property (Section 26)

Pursuant to the bill, if exercise of the decanting power was intended to transfer all the principal of the first trust to one or more second trusts, later-discovered property belonging to the first trust and property paid to or acquired by the first trust after exercise of the decanting power shall be part of the trust estate of the second trust or trusts.

Under the bill, if exercise of the decanting power was intended to distribute less than all the principal of the first trust to a second trust or trusts, such property as described above remains part of the trust estate of the first trust.

The bill also specifies that an authorized fiduciary may provide in an exercise of the decanting power, or by the terms of a second trust, for disposition of such property described above.

Debts and Liabilities (Section 27)

Under the bill, a debt, liability, or other obligation enforceable against the property of a first trust is enforceable to the same extent against property held by a second trust after exercise of the decanting power.

Uniformity (Section 28)

The bill requires that in applying and construing the UTDA, consideration be given to the need to promote uniformity of the law among states that enact such law.

Electronic Signatures (Section 29)

The bill states that the UTDA modifies, limits, or supersedes the electronic signatures in the federal Global and National Commerce Act, but does not modify, limit, or supersede certain other federal laws, or authorize electronic delivery of any of the notices described in that Act.

Severability (Section 30)

The bill provides that if any provision of the UTDA is held to be invalid, such invalidity would not affect other provisions or applications of the UTDA that can be given effect without such invalid provision or application.

Amendments Concerning the RAP (Sections 31-32)

[*Note:* The statutory rule against perpetuities (RAP) contained in the Kansas Probate Code states that a nonvested property interest is invalid unless such property is certain to vest or terminate no later than 21 years after the death of an individual who is alive when the interest is created, or unless such interest either vests or terminates within 90 years after its creation.]

Modification or Termination of Noncharitable Irrevocable Trust by Consent (Section 31)

The bill amends a provision in the Kansas Uniform Trust Code governing modification or termination of noncharitable irrevocable trusts by consent to specify application of the RAP shall not be presumed to constitute a material purpose of the trust.

Exclusion from the Statutory RAP (Section 32)

The bill amends law in the statutory RAP governing exclusions to the RAP to add an exclusion for trusts created or amended by will, *inter vivos* agreement, or exercise of power of appointment on or after July 1, 2023, that meet the following criteria:

- The governing instrument has specified the RAP does not apply; and

- The trustee or other person to whom proper power has been granted or delegated has power to sell, lease, or mortgage property for a period of time beyond the period that would otherwise be required for an interest created under the governing instrument to vest.

Kansas Income Tax Act Definitions (Section 33)

The bill expands the definition of "resident trust" in the Kansas Income Tax Act to include the requirement that such resident trust has at least one income beneficiary who was a resident of the state on the last day of the taxable year.