

Updates in Criminal Law

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**Friday, April 29th
1:00 – 1:50 p.m.**

A Ham-Fisted Attempt to Cover Major Changes in Criminal Law in 2021-2022

Attempt by Aaron J. Cunningham

Disclaimer

- The following analysis of changes in law was conducted by humans (specifically lawyers and admittedly one of the lowest classifications of human life) who are capable of error. Just because I interpret these changes in a certain way does not mean a judge will.

Overview

- Changes in Law enacted in 2021-2022
- Analysis of Delta 8 THC
- Major Appellate Law Updates

Felon Firearm Rights Restoration

- What has classically been 10-year prohibition is now 8
- What has classically been 5-year prohibition is now 3
- HOWEVER, instead of the clock starting at conviction (earlier), it now starts at completion of sentence (either prison, probation, parole (whichever is later)).

Comparison Chart for KSA 21-6304 as Amended by HB2058

Law Prior to July 1, 2021		Law on and After July 1, 2021	
Prohibition	Included Offenses	Prohibition	Included Offenses
Permanent	Person felony while <u>in possession of</u> a firearm. Article 57 of Ch 21 (any drug felony) while <u>in possession of</u> a firearm. <u>No expungement/pardon provision.</u>	Permanent	Person felony while <u>using</u> a firearm. Article 57 of Ch 21 (any drug felony) while <u>using</u> a firearm. <u>Expungement/pardon provision.</u>
10 year from <u>conviction or release from prison</u>	Felony while <u>not in possession of</u> a firearm under the following statutes 21-5402 1st degree murder 21-5403 2nd degree murder 21-5404 Voluntary manslaughter 21-5405 Involuntary manslaughter 21-5408 Kidnapping 21-5412(b) or (d) Agg assault deadly weapon 21-5413(b) or (d) Agg battery deadly weapon 21-5415(a) Criminal threat 21-5420(b) Agg. robbery 21-5503 Rape 21-5504(b) Agg. sodomy 21-5505(b) Agg. sexual battery 21-5807(b) Agg. burglary article 57 of chapter 21 Drug felonies Expungement/pardon provision exists. Nonperson felony possessing firearm. No expungement/pardon provision.	8 year from <u>end of sentence</u>	Felony while <u>not using</u> a firearm under the following statutes 21-5402 1st degree murder 21-5403 2nd degree murder 21-5404 Voluntary manslaughter 21-5405 Involuntary manslaughter 21-5408 Kidnapping 21-5412(b) or (d) Agg assault deadly weapon 21-5413(b) or (d) Agg battery deadly weapon 21-5415(a) Criminal threat 21-5420(b) Agg. robbery 21-5503 Rape 21-5504(b) Agg. sodomy 21-5505(b) Agg. sexual battery 21-5807(b) Agg. burglary article 57 of chapter 21 Drug felonies <u>No expungement/pardon provision exists.</u> Nonperson felony while using a firearm moved to 3 month prohibition.
5 years from <u>conviction or release from prison</u>	<u>Any felony</u> not listed in the 10 year prohibition group above, was not found to be <u>in possession of</u> a firearm when the crime was committed. No expungement/pardon provision.	3 years from <u>end of sentence</u>	<u>Any person felony</u> not listed in the 8 year prohibition group above, was not found to be using a firearm when the crime was committed. Expungement/pardon provision.
	See 10 year prohibition provisions above for nonperson felony while in possession of firearm. Current law had no prohibition for nonperson felony when no firearm was in possession.	3 Months from end of sentence	Any nonperson felony not listed in the three areas shown above. Use of firearm or no use of firearm included. Expungement/pardon provision.

NOTES:

Expungement/pardon provision provides prohibition ends if charge is expunged or pardoned.

End of sentence is latest of end of prison, probation, or parole.

Changes Made

- Added a provision for people to have their rights restored through expungement
 - - previously, no expungement required for rights to restore under Kansas law
 - - However, Federal law required (and still requires) expungement
- Other changes:
 - Lifetime prohibitions still lifetime.
 - 10-year prohibitions are now 8-years
 - 5-year prohibitions are now 3-years
 - clock starts at the end of sentence/probation/parole/etc.
 - Clock used to start at date of conviction
- Person felony w/ firearm = LIFETIME
- Drug felony w/ firearm = LIFETIME
- Non-person felony w/ firearm = 8 years (used to be 10)
- Person, non-person, and drug w/out firearm = 3 years (used to be 5)
- List of certain crimes w/out expungement or pardon = 8 years (used to be 10)

Example 1

- Defendant, Edward Nigma gets convicted of a level 5 drug felony w/out a firearm on January 1, 2021
- We will assume that Nigma gets put into Drug Court and successfully completes in 18-months
- Under the old law, Nigma not permitted to possess firearms until January 1, 2026
- Under new law, Nigma not permitted to possess firearms until 3-years after probation/drug court ends . . . So, July 1, 2025 (he can possess firearms about 6-months sooner).

Example 2

- Defendant, Harvey Dent is convicted on January 1, 2021 of a non-person felony while in possession of a firearm. For this example, let's assume Dent goes to prison for 2-years and has 1-year of post-release.
- Under the old law, Dent cannot possess firearms until January 1, 2031.
- Under amended law, Dent cannot possess firearms until 8-years after completion of sentence/post-release. Dent gets out of prison on January 1, 2023 and off post-release on January 1, 2024 . . . Then the 8-year ban begins. Dent not allowed to possess firearms until January 1, 2032.
- So, in some instances the duration of their firearms prohibition will be shorter and in some cases it will be longer.

Statutes Impacted:

- K.S.A. 21-6301 Criminal Use of Weapons
- K.S.A. 21-6304 Criminal Possession of a Firearm by Convicted Felon
- K.S.A. 21-6614 Expungement of Certain Convictions

Sexual Extortion

- New Level 4 and Level 7 Person Felony for Sexual Extortion
- Cover actions with intent to coerce or actually causing another person to: A) engage in sexual contact, sexual intercourse or conduct that is sexual in nature; or B) produce, provide or distribute an image, video or other recording of a person in a state of nudity or engaging in conduct that is sexual in nature

Statute Impacted:

- Created K.S.A. 21-5515
- (a) Sexual extortion is communicating by any means a threat to injure the property or reputation of a person, commit violence against a person, or distribute an image, video or other recording of a person that is of a sexual nature or depicts such person in a state of nudity:
 - (1) With the intent to coerce such person to: (A) Engage in sexual contact, sexual intercourse or conduct that is of a sexual nature; or (B) produce, provide or distribute an image, video or other recording of a person in a state of nudity or engaging in conduct that is of a sexual nature; or
 - (2) that causes such person to: (A) Engage in sexual contact, sexual intercourse or conduct that is of a sexual nature; or (B) produce, provide or distribute an image, video or other recording of a person in a state of nudity or engaging in conduct that is of a sexual nature.
- (b) Sexual extortion as defined in:
 - (1) Subsection (a)(1) is a severity level 7, person felony; and
 - (2) subsection (a)(2) is a severity level 4, person felony.
- (c) This section shall be a part of and supplemental to the Kansas criminal code.

Sexual Battery/Aggravated Sexual Battery

- Language excepting the spouse as a potential victim is removed
- Spouses can now be victims of sexual battery (we're married is not a defense)

Statute Impacted:

- K.S.A. 21-5505 Sexual Battery/Aggravated Sexual Battery

Auto Theft

- Creates a prima facie case that someone has intent to permanently deprive the owner of the vehicle if the Defendant tries to elude law enforcement in a stolen vehicle
- Minimum fine if attempting to elude in a stolen vehicle is \$500

Statutes Impacted:

- K.S.A. 8-1568 Fleeing and Eluding LEO
- K.S.A. 21-5804 Prima Facie Evidence to Establish “Intent to permanently deprive”
 - (e) In a prosecution for theft as defined in K.S.A. 21-5801, and amendments thereto, and such theft is of a motor vehicle as defined in K.S.A. 8-126, and amendments thereto, fleeing or attempting to elude a police officer as defined in K.S.A. 8-1568(a)(1)(B) or (b), and amendments thereto, shall be prima facie evidence of intent to permanently deprive the owner of the motor vehicle of the possession, use or benefit thereof.

Attempt to Elude (Oncoming Traffic)

- Creates Level 7 person felony if someone:
 - 1) tries to ditch LEOs by driving into the oncoming lane of traffic IF IT IS A DIVIDED HIGHWAY; or
 - 2) goes into an opposing lane on any roadway which causes a third party to do an evasive maneuver to avoid collision; or
 - 3) drives through an intersection and causes a third party to do an evasive maneuver to avoid collision; or
 - 4) causes a collision involving another driver

Statute Impacted:

- K.S.A. 8-1568 Fleeing and Eluding LEO

Child Abuse/Neglect Investigations

- All investigating agencies in investigating an allegation of child abuse must in some manner visually observe the alleged child victim and document observations in a report.
- (Can't just have one agency do it for everyone)

Statute Impacted

- K.S.A. 38-2226

Officer Exposure to Body Fluids (Court Ordered Testing)

- Expands Court's authority to order testing beyond HIV and Hepatitis B (done for COVID-19 purposes)
- Amendment requires the Court to order the Defendant to be tested for any infectious disease if it "appears from the nature of the charge that the transmission of bodily fluids from one person to another may have been involved" and one of the following exist: 1) victim/prosecutor request the court to order the test; or 2) defendant stated they had infectious disease or used words to suggest it

Statutes Impacted:

- K.S.A. 65-6001 Definition of “Infectious Disease Test”
- K.S.A. 65-6009 Disclosure of Test Results for those Arrested/Convicted

To-Go Alcohol Beverages

- Basically, business otherwise permitted to normally sell alcohol can now sell it for off-premises consumption if they meet all requirements set forth in this change

Requirements for To-Go Alcohol

- Containers with alcohol must've been purchased by patron at licensed premises
- Containers must be sealed or resealed and placed in a clear, tamper-proof bag
- Dated receipt must be given to the patron
- No original/unopened containers of spirits may be removed from the premises (it has to be opened and resealed by the licensed premises)
- Can't be done after 11:00 p.m. unless it was purchased and partially consumed prior to 11:00 p.m.

Statute Impacted:

- K.S.A. 41-2653 Removal of Unconsumed Alcohol from Establishment

Emergency Management Act-Violations

- During COVID-19 Crisis Emergency Management Act Violations were designated as a civil violations as opposed to Class A misdemeanors.
- Since July 1, 2021, it is once again a Class A misdemeanor to violate an emergency management act

Statute Impacted:

- K.S.A. 48-939 – Restored

Industrial Hemp Act Changes

Shamelessly Stolen from Robert A. Anderson Jr.

Fundamentals to Understand

1. Hemp & marijuana, while they look very similar, are not the same thing
2. Hemp and marijuana both fall under the genus “Cannabis”.
3. Both hemp and marijuana contain chemical structures known as cannabinoids
4. The two primary cannabinoids are: CBD and THC
5. There are many different types of CBD and THC
6. When we talk about marijuana and THC, specifically what we are talking about is Delta-9 THC (also found in hemp)
7. THC, in any form, has a psychoactive effect (will get you “high”)
8. CBD, will not get you high.

Cannabis (Plant Genus)

Marijuana

- Contains high-levels of Delta-9 THC (pun intended); but also, Delta-8/6/4, etc. and CBD

Hemp

- Contains low levels of cannabinoids generally, but contains Delta-9/8/6/4, etc. and CBD

K.S.A. 2-3901

Hemp & Hemp Products prior to April 29, 2021

- “Industrial Hemp” (or the plant itself) means: “all parts and varieties of the plant *cannabis sativa* L., whether growing or not, that contain a delta-9 tetrahydrocannabinol concentration of not more than 0.3% on a dry weight basis
- “Hemp Products” means “all products made from industrial hemp, including, but not limited to, cloth, cordage, fiber, food, fuel, paint, paper, particleboard, plastics, seed, seed meal and seed oil for consumption and authorized seed or clone plants for cultivation, if seeds originate from industrial hemp varieties.
- In other words, nearly any “hemp product” made from a lawful hemp plant was legal – regardless of cannabinoid profile or concentration levels.

Is this stuff currently legal?

April 29, 2021 Amendments

- Definition of “Hemp Products” is amended. It reads:
- (4) “Hemp Products” means all products made from industrial hemp, including, but not limited to, cloth, cordage, fiber, food, fuel, paint, paper, particleboard, plastics, seed, seed meal and seed oil for consumption and ~~authorized seed or clone plants for cultivation, if the seeds originate from industrial hemp varieties~~ *any extract from industrial hemp intended for further processing. Final “hemp products” may contain a tetrahydrocannabinol concentration of not more than 0.3%. As used in this paragraph, “tetrahydrocannabinol concentration” means the same as K.S.A. 65-6235(b)(3), and amendments thereto.*

What is the effect of this change?

- “Industrial Hemp” (or the plant itself) is still required to have a Delta-9 THC concentration less than 0.3% on a dry weight basis.
- “Hemp Products” are now products made from industrial hemp that are intended for further processing.
- Final “hemp products” (meant for the consumer) are required to have a tetrahydrocannabinol concentration of not more than 0.3%.
- K.S.A. 65-6235(b)(3) defines “tetrahydrocannabinol concentration” as “the **combined percentage of tetrahydrocannabinol** and its optical isomers, their salts and acids and salts of their acids, reported as free tetrahydrocannabinol on a **percent by weight basis**.”

Questions we might ask ourselves to determine if any given item/product is legal or illegal:

- Does it come from marijuana? – ILLEGAL
- Does it have THC in it? Probably Illegal under K.S.A. 65-4105(h), however, THC (in its many forms) is not necessarily illegal if we are talking about “Industrial hemp”; waste products from industrial hemp; hemp products; and final hemp products
- Ok, so what about products that are hemp-derived?
 - Is the product from a lawful plant (industrial hemp)? If no, ILLEGAL
 - This is actually an interesting point, we don’t know if legal hemp in other states = same
- **Ok, assume the product comes from a lawful industrial hemp plant, and it has THC?**
 - **only legal if the total THC concentration is less than 0.3% on a percent by weight basis**
- So . . . Are the Delta-8 THC products being sold in Hays and throughout Ellis County legal?
 - - almost certainly no – we will have a Judge in Ellis County weigh in on this soon
 - - CBD products are almost certainly 100% legal – again, what is the THC concentration?

Let's make it more complicated . . .

- Law enforcement really doesn't have a way to test this stuff, actually
- Most hemp products, almost certainly violate the consumer protection act
- K.S.A. 2-3908 prohibits manufacture, marketing, sale, or distribution of cigarettes containing **industrial hemp**; cigars containing **industrial hemp**;
- Chew, dip or other smokeless material containing **industrial hemp**;
- Teas containing **industrial hemp**
- Liquids, solids, or gases containing **industrial hemp** for use in vaporizing devices; and
- Any other hemp product containing any ingredient derived from industrial hemp that is prohibited pursuant to the Kansas food, drug and cosmetic act

Legality of Hemp Products Simplified:

(1) Is the thing from Lawful hemp plant?

(2) Is the thing a consumer product that has a total THC concentration of less than 0.3%?

If yes to both, then probably legal

If No to either, then probably illegal

However, Even then, I'm guessing Distributor does not have a license and I'm betting the product actually violates the consumer protection act.

Attorney General's Opinion

- December 2nd, 2021
- Delta-8 tetrahydrocannabinol (Delta-8 THC) comes within the definition of a Schedule I controlled substance and is unlawful to possess or sell in Kansas unless it is made from industrial hemp and is contained in a lawful hemp product having no more than 0.3% total tetrahydrocannabinols (THC). Unlawful hemp products include cigarettes, cigars, teas, and substances for use in vaping devices. Delta-8 THC derived from any source other than industrial hemp is a Schedule I controlled substance and unlawful to possess or sell in Kansas. Other federal and state laws and regulations place additional limits on the legality of products containing THC and other cannabinoids. Cited herein: K.S.A. 2-3901, 2-3908, 21-5702, 65-2365, 65- 4105.

Appellate Law

Shamelessly Stolen from the Attorney General's Office

Exigent Circumstances Aren't Exigent Enough Anymore . . .

- *State v. Lange* - United States Supreme Court case decided on 6/23/21 held under the 4th amendment, pursuit of a fleeing suspect does not always justify a warrantless entry into a home. Whether warrantless entry is merited hinges on case by case totality of the circumstances

State v. Lange

- Officer observe Lange driving and was preparing to do traffic stop
- As officer lit Lange up, Lange was pulling into garage
- As officer got out, Lange began shutting garage door
- Officer entered into garage and began questioning Lange
- Lange was arrested for DUI after subsequent investigation

State v. Lang Court Ruling

- Suspect evading capture alone is not sufficient for warrantless entry into home
- Look for other factors/exceptions (destruction of evidence, possible harm to others, possibility of escape)
- Most of the time these things are also present ^^ in this case, the officer just failed to articulate these things
- If legitimately no other exigency exists, then ask for consent, if the person says “no,” then get a warrant

Community Caretaking Has Limits

- *Caniglia v. Strom* – United States Supreme Court case decided last year
- SCOTUS held community caretaker exception to the warrant requirement does not extend into the home
- *(As always, the specific facts of this case are important)*

Caniglia v. Strom

- Husband and wife are in fight, husband asks wife to shoot him, wife does not (good call wife) and instead goes to hotel
- Next morning, wife can't get ahold of husband, calls law enforcement to do a welfare check
- Law enforcement show up at home, make contact with Caniglia on porch and determine he's a danger to himself
- Caniglia agrees to psychiatric evaluation IF officers do not confiscate firearms

Caniglia v. Strom (cont.)

- Officers say they won't (and cross their fingers behind their back) and then proceed to do exactly that with the wife permitting them to enter into the home and do so
- Supreme Court made clear if this was a gun in a vehicle, it's a different outcome, but the home is sacred and deserves more protection
- Just get a warrant and take the guns . . .

“Benefit Derived” in Identity Theft

- *State v. Valdiviezo-Martinez* – Kansas Supreme Court case decided 5/21/21 which held identity theft can occur even when benefit derived is “legitimately” earned

State v. Valdiviezo-Martinez

- Dude uses fake social security number on employment paperwork to get the job
- Dude works for company for years and is compensated for his employment
- Court ruled that even though the employee put in the hours to earn the money, he was deriving an economic benefit from the fraudulent use of the social security number and could be prosecuted for identity theft

Endangering of a Child Clarification

- *State v. Holley* – Kansas Supreme Court case decided in 2021
- State is not required to establish a likelihood of harm occurring to the child as part of the elements for Endangering/Agg Endangering of a Child

State v. Holley

- Dude pulls out gun in car and points it at adult front seat passenger
- Child/children are in the backseat of same care at this time
- Gun is never pointed at children
- Court says it doesn't matter, it's a situation in which they could be placed in harm
- Probability of harm is just a factor for the jury to consider, not an element required to be proven

Reasonable Suspicion/Waiting on K-9s

- *State v. Arrizabalaga* – Kansas Supreme Court case which reaffirmed the standard for Reasonable Suspicion

Reasonable Suspicion:

- “Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.... Reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. Both factors—quantity and quality—are considered in the ‘totality of the circumstances—the whole picture’ [citation omitted] that must be taken into account when evaluating whether there is reasonable suspicion.”

Law Enforcement is the Standard

- “We make our determination with deference to a trained law enforcement officer’s ability to distinguish between innocent and suspicious circumstances, . . . remembering that reasonable suspicion represents a ‘minimum level of objective justification’ which is ‘considerably less than proof of wrongdoing by a preponderance of the evidence.’”

Practical Takeaway??

- Reaffirms that the standard for suppression is **NOT** “is there a reasonable explanation for all the weird stuff the Defendant was doing,” but rather, “would a well-trained objective law enforcement officer find the Defendant’s behavior suspicious?”

Process for K-9s under Arrizabalaga

- Once officer establishes reasonable suspicion, officer is to take investigative steps by:
 - 1. Engaging in further questioning (consensual encounter)
 - 2. Seeking consent to search the vehicle
 - 3. Deploying a drug dog

But wait . . . (no really, they will have to wait)

- Court determined that once reasonable suspicion has been established and investigative measures have been taken, if defendant refuses consent, you can hold defendant as long as needed for nearest K-9 to respond (but must first undertake other investigative steps of asking more questions and seeking consent).

Appellate Update as of January 2022

Criminal History/Criminal Threats

- Trend in case law starting to develop in appellate courts
- Even if defendant does not object . . . Have to have criminal threat documentation filed to prove up appropriate history (otherwise remand will happen)
- *State v. Herrman*, No. 122,884 (unpublished, 2-1 decision)
- When in doubt – over-document
- Important reminder to make sure PSIs have subsections of statutes for penalties . . .

HOWEVER!!!

- If a defendant wants to allege his or her prior misdemeanor was uncounseled, the defendant must object to the PSI. The issue cannot be raised for the first time on appeal because the defendant cannot meet his or her burden to establish error.
- *State v. Roberts*, __ Kan. __, 498 P.3d 725, 726 (2021) (A notice of error in the criminal history prepared for sentencing that is not raised at or before sentencing is a “later challenge” to criminal history under K.S.A. 2020 Supp. 21-6814(c) and shifts the burden to the offender to prove the error.”)

More Criminal History Crisis

- The statutory *Wetrich* fix does not apply to crimes committed prior to its enactment.
 - *State v. Hillard*, __ Kan. __, 491 P.3d 1223, 1240 (2021).

Probation Revocation

- Please remember that the graduated sanctions requirements are set at the time the crime is committed.
 - E.g. The court cannot use the dispositional departure exception if that exception didn't exist when the crime was committed.
 - *State v. Coleman*, 311 Kan. 332, 460 P.3d 828 (2020).

Departures

- “The fact that a defendant's criminal history does not include similar or identical crimes to the crime of conviction cannot be a mitigating factor as a matter of law.”
 - But passage of time can still be a valid factor.
- *State v. Montgomery*, ___ Kan. ___, 494 P.3d 147, 154 (2021).

Jury Instructions

- Just because an instruction is factually appropriate and legally accurate, it's not automatically error for the instruction not to be given.
 - *State v. Liles*, __ Kan. __, 490 P.3d 1206, 1213–14 (2021) (rejecting the requirement to give a cautionary instruction when a witness testifies with the hope of a benefit).

Jury Instructions (Cont.)

- At the moment, if there is a factual dispute about whether a death occurred during the res gestae of a felony, self-defense instructions are required in felony murder cases.
 - *State v. Holley*, 313 Kan. 249, 485 P.3d 614 (2021) (motion for rehearing granted).

The PIK is Wrong! – PIK 55.031

- For statutory rape, there is no intent requirement.
 - Also, in any crime where one subsection mentions a culpable mental state, the lack of a culpable mental state in other sections could mean the legislature meant to exclude it.
 - *State v. Dinkel*, No. 113,705, 2021 WL 4343322, at *1 (Kan. Sept. 24, 2021).
 - But if the complaint has an intent, match the complaint.

The PIK is Wrong! (Cont.)

- PIK Crim. 4th 64.091 mistakenly omits the knowingly requirement in K.S.A. 21-6422(a)(1) (commercial sexual exploitation of a child)
 - *State v. Jackson*, No. 123,122, 2021 WL 4805240, ___ Kan. App. ___ (October 15, 2021).

The PIK is Wrong (Again)

- *State v. Holder*, 314 Kan. 799
- Arguing about the rebuttable presumption of distribution in K.S.A. 21-5705(e)
- Discussion of rebuttable presumptions vs. permissive presumptions
- K.S.A. 21-5705(e) states:
 - In any prosecution under this section, there shall be a rebuttable presumption of an intent to distribute if any person possesses the following quantities of controlled substances . . .
- PIK 57.022 states:
 - If you find defendant possessed (one of the quantities), you may infer that the defendant possessed with intent to distribute. You may consider the inference along with all the other evidence in the case. You may accept or reject it in determining whether the State has met the burden of proving the intent of the defendant. The burden never shifts to the defendant.

Rather Presumptuous . . .

- The PIK instruction sets out a *permissive inference*
- K.S.A. 21-5705(e) sets out a *rebuttable presumption*
- Ergo – PIK instruction is legally inappropriate because it does not accurately reflect the law in 21-5705(e)

So is the presumption unconstitutional?

- We don't know . . . They obfuscated
- Supreme Court determined he did not have standing to raise the issue . . .
- The suspense is killing me

Caution on Stipulations

- According to the Kansas Supreme Court, defendants must waive their right to a jury trial for any stipulated element.
 - The case was a criminal possession of a firearm case.
 - “The defendant's stipulation to element of one of charged crimes was tantamount to guilty plea and, thus, jury trial waiver was required prior to acceptance of such stipulation.” *State v. Johnson*, 310 Kan. 909, 453 P.3d 281 (2019).

Multiplicitous Convictions

- If you obtain multiple convictions on alternative counts, the counts merge, and you can only have one sentence.
 - *State v. Vargas*, 492 P.3d 412, 418 (Kan. 2021).
 - Not sure how that works if they are different crimes.

Restitution

- The Kansas Supreme Court took up several cases challenging whether a jury trial is required to impose restitution. The court held no jury trial was necessary but severed multiple provisions dealing with civil judgments.

Restitution is Sort of Constitutional . . .

- Boiled down, anything that gives restitution the effect of a civil judgment is unconstitutional.
 - The lead case is *State v. Arnett*, No. 112752 (decided October 15, 2021).
 - Currently, the Office of Judicial Administration is not permitting collection agencies to collect on restitution.
 - An attempt at a statutory fix is expected.

Garnishment?

- “A court may still enforce its order of criminal restitution through lawful means if the court has cause to believe a defendant is not in compliance. Those means still include the potential for court-ordered garnishment. And the defendant still retains the ability to object to such garnishment and justify why garnishment is not appropriate.”

The Wetrich DUI Fix!

- “When sentencing defendants as repeat offenders under K.S.A. 2020 Supp. 8-1567, driving under the influence (DUI), the Legislature intended courts to count as prior convictions those out-of-state offenses comparable to Kansas' DUI statute in title, elements, and prohibited conduct, even if the elements of the out-of-state crime are broader.”
- *State v. Myers*, ___ Kan. ___, 499 P.3d 1111, 1112 (2021).

The Wetrich DUI fix (cont.)

- Missouri's Driving While Intoxicated will count as prior a DUI.
- The comparability factors in K.S.A. 2020 Supp. 8-1567(j) do not require judicial fact-finding in contravention of *Apprendi*.
 - Elements only comparisons are fine.

Thank You

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