

APPELLATE PROCEDURE OUTLINE



Kansas Supreme Court
and
Court of Appeals

Revised
July 2014

Appellate Procedure Outline

The following is a simplified explanation of the basic steps required to docket an appeal and proceed through the steps necessary to complete the appeal.

There are two appellate courts in Kansas: the Court of Appeals which is an intermediate appellate court and the Supreme Court which is the court of last resort.

The Court of Appeals is located in Topeka in the Kansas Judicial Center and consists of fourteen judges. The judges may sit en banc (as a panel of fourteen) but usually sit in panels of three judges. The Court of Appeals is a traveling court and may sit in any county in the State.

The Supreme Court is also located in the Kansas Judicial Center, Topeka, and consists of seven justices. The justices of the Supreme Court always sit en banc at the Judicial Center.

Once an appeal or original action is filed with the Supreme Court or Court of Appeals, the status can be checked online at www.kscourts.org. See “Appellate Case Inquiry System” in the ‘FEATURED LINKS’ section.

By statute the Clerk of the Supreme Court is also the Clerk of the Court of Appeals and **all papers to be filed in either court are to be mailed or delivered to:**

Heather L. Smith, Clerk
Appellate Courts of Kansas
Kansas Judicial Center, Room 374
301 SW 10th Avenue
Topeka, Kansas 66612-1507

Copies of all filings must be served on all parties or their counsel. All filings **must** include a certificate of service in substantially the following format:

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing [Insert title – e.g. motion for extension of time] was deposited in the United States Mail, postage prepaid, on [insert date], to:

[Insert Names and Addresses of
everyone on whom service is made.]

Attorney Name
Registration Number and
Name of Party Represented Or
Name of Pro Se Litigant

Procedures for filing original actions pursuant to Supreme Court Rule 9.01 are detailed below. The remainder of this outline details the steps necessary to docket an appeal from a lower court or tribunal.

I. ORIGINAL ACTIONS
Supreme Court Rule 9.01

- A. Petitions for mandamus and quo warranto are filed in the Supreme Court. Petitions for habeas corpus may be filed either in the Supreme Court or the Court of Appeals.
- B. A petition for mandamus or quo warranto must be accompanied by a \$145 docketing fee and any applicable surcharge (currently \$10) or an affidavit of indigency. No docketing fee is required in habeas corpus actions.
- C. Send an original and eight copies of the petition to the Clerk of the Appellate Courts.
- D. A copy must be served on all respondents or their counsel of record. A certificate showing service on all respondents must accompany the petition.

MANDAMUS: See also K.S.A. 60-801

QUO WARRANTO: See also K.S.A. 60-1200

HABEAS CORPUS: See also K.S.A. 60-1501

II. DOCKETING AN APPEAL

The following documents should be delivered to the Clerk of the Appellate Courts within 21 days after the notice of appeal has been filed with the clerk of the district court.

- A. Docketing Statement, original and one copy
(See page 4 of this outline.)
- B. Notice of Appeal (certified, file-stamped copy)
(See page 16 of this outline.)
- C. Journal Entries
(See page 17 of this outline.)
 - 1. Final order or decision appealed from
(certified, file-stamped copy)
 - 2. Any posttrial motions and rulings thereon
(certified, file-stamped copies)
 - 3. Request for transcript
(See page 23 of this outline.)
 - 4. Docketing fee
(See page 25 of this outline.)

See **Supreme Court Rule 2.04**

NOTE: If you are attempting to docket an appeal beyond the 21-day requirement of Rule 2.04, a motion to docket out of time must accompany the docketing statement. (See page 14 of this outline.)

*All of the above items should be filed with the
Clerk of the Appellate Courts at the same time.*

III. DOCKETING STATEMENT
Supreme Court Rule 2.041

Basic Requirements

- A. Appellate Court Clerk must receive an **original and one copy**.
- B. Must be on letter size (8½ x 11) paper.
- C. There should be a concise factual statement. The docketing statement is not binding and is not a substitute for the brief.
- D. May be single spaced.
- E. Certificate of service is required.
- F. Docketing statement should follow format of sample forms (included on the following pages).
- G. If docketing beyond the 21-day requirement of Rule 2.04, you must include an original and three (3) copies of a motion to docket out of time. See page 14.

(07/01/12)

Docketing Statement – Civil Appeal

IN THE (SUPREME COURT) (COURT OF APPEALS) OF THE STATE OF KANSAS

Case Caption: County Appealed From: _____
 District Court Case No(s): _____
 Proceeding Under Chapter: _____
 Party Filing Appeal: _____
 Party or Parties Who Will Appear as Appellees: _____

DOCKETING STATEMENT - CIVIL

The docketing statement is used by the court to determine jurisdiction and to make calendar assignments under Rules 7.01(c) and 7.02(c). This is not a brief and should not contain argument or procedural motions.

1. **Civil Classification:** From the list of civil topic sub-types listed at the end of this form, choose the **one** which best describes the **primary** issue in this appeal.

2. **Proceedings in the District Court:**
 - a. Trial judge from whose decision this appeal is taken: _____
 - b. List any other judge who has signed orders or conducted hearings in this matter: _____
 - c. Was this case disposed of in the district court by:
 - _____ Jury trial
 - _____ Bench trial
 - _____ Summary judgment
 - _____ Dismissal
 - _____ Other
 - d. Length of trial, measured in days (if applicable): _____
 - e. State the name of each court reporter or transcriptionist who has reported or transcribed any or all of the record for the case on appeal. (This is not a substitute for a request for transcript served on the individual reporter or transcriptionist under Rule 3.03.)

- f. State the legal name of all entities that are NOT listed in the case caption (including corporations, associations, parent, subsidiary, or affiliate business entities) but are parties or have a direct involvement in the case on appeal:

- g. State the name, address, telephone number, fax number, and e-mail address of every attorney who represented a party in district court if that attorney's name does NOT appear on the certificate of service attached to this docketing statement. Clearly identify each party represented.

3. **Jurisdiction:**

- a. Date journal entry, judgment form, or other appealable order filed: _____

- b. Is the order appealed from a final order, *i.e.*, does it dispose of the action as to all claims by all parties? _____

- c. If the order is not a final disposition as to all claims by all parties, did the district court direct the entry of judgment under K.S.A. 60-254(b)? _____
If not, state the basis on which the order is appealable.

- d. Date any posttrial motion filed: _____

- e. Date disposition of any posttrial motion filed: _____

- f. Date notice of appeal filed in district court: _____

- g. Other relevant dates necessary to establish this court's jurisdiction to hear the appeal, *i.e.*, decisions of administrative agencies or municipal courts and appeals therefrom:

- h. Statutory authority for appeal: _____

- i. Are there any proceedings in any other court or administrative agency, state or federal, which might impact this case or this court having jurisdiction (yes or no)? _____
If "yes," identify the court or agency in which the related proceeding is pending. List the case captions and the case or docket numbers.

4. **Constitutional Challenges to Statutes or Ordinances:**
Was any statute or ordinance found to be unconstitutional by the district court (yes or no)? _____
If "yes," what statute or ordinance? _____
5. **Related Cases/Prior Appeals:**
- a. Is there any case now pending or about to be filed in the Kansas appellate courts which:
- (1) Arises from substantially the same case as this appeal (yes or no)? _____
If "yes," give case caption and docket number. _____
- (2) Involves an issue that is substantially the same as, similar to, or related to an issue in this appeal (yes or no)? _____
If "yes," give case caption and docket number. _____
- b. Has there been a prior appeal involving this case or controversy (yes or no)? _____
If "yes," give case caption and docket number. _____
6. Brief statement (less than one page), without argument, of the material facts. This is not intended to be a substitute for the factual statement that will appear in the brief.
7. Concise statement of the issues proposed to be raised. You will not be bound by this statement but should include issues now contemplated. Avoid general statements such as "the judgment is not supported by the law."

Attorney's Signature

Attorney's Name (typed or printed)
Kansas Attorney Registration Number
Address
Telephone Number
Fax Number
E-mail address
Name of the Party Represented
Date: _____

ATTACH PROOF OF SERVICE
(List all parties served, including name, address, and who they represent.)

CIVIL TOPIC SUB-TYPES: Select the **one** sub-type which best describes this appeal. See Question 1 above.

- | | |
|--|---|
| Administrative — KS Corporation Commission | Governmental Immunity |
| Administrative — Licensing | Habeas — appeal from district court |
| Administrative — Public Utility Rate Case | Insurance |
| Administrative — Taxation | Jurisdiction |
| Administrative — Workers Compensation | Juvenile Offenders Code |
| Administrative — Other | K.S.A. 60-1507 |
| Certified Question | Libel and Slander |
| Children — Adoption | Mandamus — appeal from district court |
| Children — CINC | Negligence |
| Children — Termination of Parental Rights | Oil and Gas |
| Conservators/Conservatorships | Personal Property |
| Constitutional Law | Probate |
| Contracts | Procedure |
| Creditors and Debtors | Quo Warranto — appeal from district court |
| Damages — Personal Injury | Real Property |
| Damages — Property | Statutory Interpretation or Construction |
| Damages — Punitive | Teacher Employment/Due Process |
| Divorce | Torts (specify sub-type) |
| Election Contest | Wrongful Death |
| Eminent Domain | Zoning |
| Employment | Other (please specify): _____ |

(07/01/12)

Docketing Statement – Civil Cross-Appeal

IN THE (SUPREME COURT) (COURT OF APPEALS) OF THE STATE OF KANSAS

Case Caption:

County Appealed From: _____

District Court Case No(s): _____

Party Filing Cross-Appeal: _____

Party or Parties Who Will Appear as

Cross-Appellees: _____

DOCKETING STATEMENT - CIVIL - CROSS-APPEAL

The docketing statement is used by the court to make calendar assignments under Rules 7.01(c) and 7.02(c). This is not a brief and should not contain argument or procedural motions.

1. Date notice of cross-appeal filed in district court: _____
2. Brief statement (less than one page), without argument, of the facts material to the cross-appeal. This is not intended to be a substitute for the factual statement which will appear in the brief.
3. Concise statement of the issues proposed to be raised. You will not be bound by this statement but should include issues now contemplated. Avoid general statements such as "the judgment is not supported by the law."

Attorney's Signature

Attorney's Name (typed or printed)

Kansas Attorney Registration Number

Address

Telephone Number

Fax Number

E-mail address

Name of the Party Represented

Date: _____

ATTACH PROOF OF SERVICE

(List all parties served, including name, address, and who they represent.)

(07/01/12)

Docketing Statement - Criminal

IN THE (SUPREME COURT) (COURT OF APPEALS) OF THE STATE OF KANSAS

Case Caption: _____
County Appealed From: _____
District Court Case No(s): _____
Party Filing Appeal: _____

DOCKETING STATEMENT - CRIMINAL

The docketing statement is used by the court to determine jurisdiction and to make calendar assignments under Rules 7.01(c) and 7.02(c). This is not a brief and should not contain argument or procedural motions.

1. Criminal Classification:

- a. Conviction of (offense[s], statute[s], and classification[s] of crime[s]):

- b. Date of offense(s) committed: _____

2. Proceedings in the District Court:

- a. Trial judge from whose decision this appeal is taken: _____
- b. List any other judge who has signed orders or conducted hearings in this matter: _____
- c. Was this case disposed of in the district court by:
 Jury trial
 Bench trial
 Plea
 Dismissal
- d. Length of trial, measured in days (if applicable): _____
- e. State the name of each court reporter or transcriptionist who has reported or transcribed any or all of the record for the case on appeal. (This is not a substitute for a request for transcript served on the individual reporter or transcriptionist under Rule 3.03.)

- f. State the name, address, telephone number, fax number, and e-mail address of any attorney who represented a party in the district court if that attorney's name does NOT appear on the certificate of service attached to this docketing statement. Clearly identify each party represented.

3. **Jurisdiction:**

- a. Date sentence was pronounced from the bench: _____
- b. Date notice of appeal filed in district court: _____
- c. Custodial status:
 - (1) Is the defendant subject to appeal bond or incarcerated? _____
 - (2) Earliest possible release date, if incarcerated: _____
If sentencing is challenged on appeal, it is the State's obligation to notify the clerk of the appellate courts in writing of any change in the custodial status of the defendant during the pendency of the appeal. See Rule 2.042.
- d. Statutory authority for appeal: _____
- e. Are there any co-defendants (yes or no): _____
If "yes," what are their names?

- f. Are there any proceedings in any other court or administrative agency, state or federal, which might impact this case or this court having jurisdiction (yes or no)? _____
If "yes," identify the court or agency in which the related proceeding is pending.
List the case captions and the case or docket numbers.

4. **Constitutional Challenges to Statutes or Ordinances:**

- Was any statute or ordinance found to be unconstitutional by the district court (yes or no)? _____
- If "yes," what statute or ordinance? _____

5. **Related Cases/Prior Appeals:**

- a. Is there any case now pending or about to be filed in the Kansas appellate courts which:
 - (1) Arises from substantially the same case as this appeal (yes or no)? _____
If "yes," give case caption and docket number.

 - (2) Involves an issue that is substantially the same as, similar to, or related to an issue in this appeal (yes or no)? _____
If "yes," give case caption and docket number.

- b. Has there been a prior appeal involving this case or controversy (yes or no)? _____
If "yes," give caption and docket number.
-
6. Brief statement (less than one page), without argument, of the material facts. This is not intended to be a substitute for the factual statement which will appear in the brief.
7. Concise statement of the issues proposed to be raised. You will not be bound by this statement but should include issues now contemplated. Avoid general statements such as "the judgment is not supported by the law."

Attorney's Signature

Attorney's Name (typed or printed)
Kansas Attorney Registration Number
Address
Telephone Number
Fax Number
E-mail address
Name of the Party Represented
Date: _____

ATTACH PROOF OF SERVICE
(List all parties served, including name, address, and who they represent.)

(07/01/12)

Answer to Docketing Statement

IN THE (SUPREME COURT) (COURT OF APPEALS) OF THE STATE OF KANSAS

Case Caption:

Appellate Court Case No.: _____

DOCKETING STATEMENT - ANSWER

The docketing statement is used by the court to determine jurisdiction and to make calendar assignments under Rules 7.01(c) and 7.02(c). The docketing statement and answer are not briefs. The answer to the docketing statement should consist only of a concise statement of additional facts or clarification of issues which the appellee or cross-appellee believes are necessary to provide the court a fair summary of the case. If the statement of facts and issues in the docketing statement is sufficient, there is no need to file an answer. **THE ANSWER SHOULD NOT CONTAIN ARGUMENT OR PROCEDURAL MOTIONS.**

1. Brief statement (less than one page), without argument, of any material facts not set forth in the docketing statement. This is not intended to be a substitute for the factual statement that will appear in the brief.
2. Concise statement of clarification of any issues set forth in the docketing statement.

Attorney's Signature

Attorney's Name (typed or printed)
Kansas Attorney Registration Number
Address
Telephone Number
Fax Number
E-mail address
Name of the Party Represented
Date: _____

ATTACH PROOF OF SERVICE
(List all parties served, including name, address, and who they represent.)

§ 12.14 Motion to Docket Appeal Out of Time

IN THE (SUPREME COURT)(COURT OF APPEALS) OF THE STATE OF KANSAS

[Insert Name],)
)
 Plaintiffs-Appellants,)
)
 vs.) [Insert District Court Case Number]
)
 [Insert Name],)
)
 Defendant-Appellee.)
 _____)

MOTION TO DOCKET APPEAL OUT OF TIME

Appellant asks to docket this appeal out of time because she has now secured all supporting documents that are needed to accompany the docketing statement.

1. *Background.* Jane Pleader is the appellant in this case. This is an appeal from the trial and jury verdict in the District Court of [Insert Name] County, Kansas. Notice of Appeal of this matter was filed in that court on [Insert Date.] More than 21 days have expired since the filing of the Notice of Appeal.
2. *Authority.* Supreme Court Rule 2.04.
3. *Reasons.* Appellant’s counsel has received a telephone call from a clerk in the office of the clerk of the appellate courts advising her that she failed to include file-stamped, certified copies of the journal entries of judgment and the notice of appeal, as required by the appellate rules. Counsel has now obtained certified copies of the journal entries of judgment and the notice of appeal. These are included with this submission for filing with the remainder of the materials required for docketing this appeal. These combined documents complete the requirements for docketing the appeal.

For these reasons, appellant asks permission to docket the appeal today.

Attorney's Signature

Attorney's Name (typed or printed)
Kansas Attorney Registration Number
Address
Telephone Number
Fax Number
E-mail Address
Name of the Party Represented

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Motion to Docket Appeal Out of Time was sent, by United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.]

Attorney's Name and Registration Number

PRACTICE NOTE: This motion should accompany the docketing statement and certified file-stamped copies of all documents required under Rule 2.04. The motion should cite specific reasons for late docketing. Failure to docket on time because of "excusable neglect" is an insufficient reason. If counsel believes excusable neglect exists, the basis for that belief should be stated in the motion.

IV. NOTICE OF APPEAL
Supreme Court Rules 2.01 and 2.02

- A. One certified copy
- B. Must contain a legible district court clerk's file stamp.
- C. Must have original certification signed by clerk of the district court.
- D. Must state to which appellate court the appeal is taken.
- E. See examples as follows:

(07/1/12)

IN THE [Insert Number] JUDICIAL DISTRICT
DISTRICT COURT OF [Insert Name] COUNTY, KANSAS
(CRIMINAL)(CIVIL) DEPARTMENT

[Insert Name],)
Plaintiffs-Appellees,)
)
vs.) [Insert District Court Case Number
) and Division Number, if applicable]
)
)
[Insert Name],)
Defendant-Appellant.)
_____)

NOTICE OF APPEAL

(Name the appealing party or parties) appeal(s) from (designate the judgment or part of the judgment or other appealable order) to the Supreme Court of the State of Kansas.

This appeal is directly to the Supreme Court on the ground that (state ground on which direct appeal is permitted, including citation of statutory authority).

Appellant or Attorney for Appellant(s)
Address
Telephone Number
Fax Number
E-mail address
Kansas Attorney Registration Number

(Add certificate of service on all parties in compliance with K.S.A. 60-205.)

(07/01/12)

**IN THE [Insert Number] JUDICIAL DISTRICT
DISTRICT COURT OF [Insert Name] COUNTY, KANSAS
(CRIMINAL)(CIVIL) DEPARTMENT**

[Insert Name],)	
Plaintiffs-Appellees,)	
)	
vs.)	[Insert District Court Case Number
)	and Division Number, if applicable]
)	
[Insert Name],)	
Defendant-Appellant.)	
_____)	

NOTICE OF APPEAL

(Name the appealing party or parties) appeal(s) from (designate the judgment or part of the judgment or other appealable order) to the Court of Appeals of the State of Kansas.

Appellant or Attorney for Appellant(s)
Address
Telephone Number
Fax Number
E-mail address
Kansas Attorney Registration Number

(Add certificate of service on all parties in compliance with K.S.A. 60-205.)

**V. JOURNAL ENTRIES
Supreme Court Rule 2.04**

- A. One certified copy
- B. Must be signed by district judge.

- C. Must contain a legible district court clerk's file stamp.
- D. Must have original certification signed by clerk of the district court.
- E. If there is more than one journal entry or decision, the appellate court requires one certified, file-stamped copy of each.
- F. Copies of posttrial motions and orders must all be certified by the district court.

NOTE: In administrative appeals (and in other appeals involving proceedings at multiple levels, e.g. appeal of decision from a district magistrate judge), under Rule 2.04 the appellant must also file with the docketing statement a certified copy of the agency decision and certified copies of any petitions for reconsideration and rulings thereon. The list on the following pages enumerates documents required in some of those appeals.

VI. ADMINISTRATIVE AND OTHER APPEALS INVOLVING PROCEEDINGS AT MULTIPLE LEVELS

Documents, in addition to those specifically enumerated in Rule 2.04, which should be submitted to the appellate court:

A. Administrative Appeals

1. **Workers Compensation** — Documents required under statutory amendments effective October 1, 1993:
 - A. Decision of Administrative Law Judge
 - B. Request for Board Review
 - C. Board's Order
 - D. Petition for Judicial Review to the Court of Appeals
2. **Human Rights Commission** (formerly Commission on Civil Rights)
 - A. Commission's Order
 - B. Petition for Reconsideration
 - C. Order on Petition for Reconsideration
 - D. Petition for Judicial Review to the district court

- E. Journal Entry from the district court
 - F. Notice of Appeal to the Court of Appeals
3. **Court of Tax Appeals**
- A. Decision of Court of Tax Appeals
 - B. Petition for Reconsideration
 - C. Order on Petition for Reconsideration, if any
 - D. Petition for Judicial Review to the Court of Appeals
 - E. Request for Transcript
 - F. Request for Certification of Record
4. **Kansas Corporation Commission** (excluding utility rate cases)
- A. KCC Order
 - B. Petition for Reconsideration
 - C. Order on Petition for Reconsideration
 - D. Petition for Judicial Review to the district court
 - E. Journal Entry from the district court
 - F. Notice of Appeal to the appropriate Appellate Court
5. **Department of Human Resources – Unemployment Benefits**
- A. Hearing Examiner’s Decision
 - B. Notice of Appeal to Referee
 - C. Referee’s Order
 - D. Notice of Appeal to the Board of Review
 - E. Board of Review’s Order
 - F. Petition for Judicial Review to the district court

- G. Journal Entry from the district court
- H. Notice of Appeal to the Court of Appeals

6. **Driver's License Cancellation, Suspension, Revocation, or Denial of License**

- A. Order of the Division of Motor Vehicles
- B. Petition for Judicial Review to the district court
- C. Journal Entry from the district court
- D. Notice of Appeal to the Court of Appeals

7. **Teacher Termination**

- A. Notice of Nonrenewal or Termination
- B. Request for Hearing
- C. Hearing Officer's Opinion
- D. Notice of Appeal to the district court
- E. Journal Entry from the district court
- F. Notice of Appeal to the Court of Appeals

B. Other Appeals

1. **Zoning Decisions**

EITHER

- A. Decision of officer administering the provisions of the zoning ordinance or resolution
- B. Appeal to the Board of Zoning Appeals
- C. Board of Zoning Appeals Order
- D. Notice of Appeal to the district court
- E. Journal Entry from the district court

F. Notice of Appeal to the Court of Appeals

OR

A. Final Decision by city or county

B. Notice of Appeal to the district court

C. Journal Entry from the district court

D. Notice of Appeal to the Court of Appeals

2. **Municipal Court Decisions**

A. Order of municipal court

B. Notice of Appeal to the district court

C. Journal Entry from the district court

D. Notice of Appeal to the Court of Appeals

3. **District Magistrate Decision**

A. Order of district magistrate judge

B. Notice of Appeal to the district court

C. Journal Entry from the district court

D. Notice of Appeal to the Court of Appeals

4. **Small Claims**

A. Order of small claims judge

B. Notice of Appeal to the district court

C. Journal Entry from the district court

D. Notice of Appeal to the Court of Appeals

VII. REQUEST FOR TRANSCRIPT
Supreme Court Rule 3.03

- A. One file-stamped copy
- B. **Must** show service on the court reporter and opposing parties and be filed with the district court clerk.
- C. It is the duty of the appellant to request a transcript of any hearing which the appellant considers necessary to properly present the appeal.
- D. Appellant requests the transcript within 21 days of the filing of the notice of appeal in the district court.
- E. If all required transcripts have already been completed, the appellant must file a statement to that effect when docketing, showing service on the opposing party or opposing attorney.
- F. If no transcript is to be ordered, the appellant must file a statement to that effect when docketing, showing service on the opposing party or opposing attorney.

NOTE: Include in the heading or the body of the request for transcript that this request is for an appeal. This will alert the court reporter to time constraints imposed by Rule 3.03(e).

§ 12.19 Request for Transcript

**IN THE [Insert Number] JUDICIAL DISTRICT
DISTRICT COURT OF [Insert Name] COUNTY, KANSAS
(CRIMINAL)(CIVIL) DEPARTMENT**

[Insert Name],)
Plaintiffs-Appellees,)
)
vs.) [Insert District Court Case Number
) and Division Number, if applicable]
)
[Insert Name],)
Defendant-Appellant.)
_____)

REQUEST FOR TRANSCRIPT

[Insert Name] asks for the following transcripts to be prepared for the appeal of this case:
[Insert a list of the specific transcripts or portions of transcripts needed, including the date of the hearing.]

1. Transcript of Jury Trial [Insert Date] through [Insert Date] except this request does not include the jury voir dire.
2. Transcript of hearing on defendant’s motion to suppress. [Insert Date].
3. *Authority.* Supreme Court Rule 3.03.

Attorney’s Signature

Attorney’s Name (typed or printed)
Kansas Attorney Registration Number
Address
Telephone Number
Fax Number
E-mail Address
Name of the Party Represented

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Request for Transcript was sent by United States Mail, postage prepaid, on [Insert Date], to:

[Insert names and addresses of those on whom service is made.
The court reporter who took the transcript **MUST** be served.]

Attorney's Name and Registration Number

PRACTICE NOTE: If you are unsure which court reporter should be served, contact the district court clerk. Rule 354 requires the trial judge to enter on the appearance/trial docket the name of the court reporter taking proceedings. If the proceedings were electronically recorded, service is made on the clerk of the district court. Rule 365.

It is critical that the request state the transcript is for appeal because the court reporter's time begins to run upon service of the request. See Rule 3.03(e).

VIII. TRANSCRIPTS

Supreme Court Rule 3.03

- A. Payment of transcript must be made in full within 14 days of the court reporter's demand for payment.
- B. Court reporter will not begin preparation of transcript until he or she receives the estimated cost.
- C. The court reporter will prepare the transcript within 40 days after receipt of the estimated cost of transcript.
- D. Extensions of time may be granted to the court reporter upon showing of good cause.
- E. Upon completion, the transcript is filed with the **clerk of the district court** where it will be made available to the appropriate parties upon request. A certificate of completion will be served by the court reporter on all parties and the Clerk of the Appellate Courts.
- F. Upon receipt of the transcript by the clerk of the district court, the clerk will complete the compilation of the record.

IX. DOCKETING FEE

Supreme Court Rule 2.04

One of the following is required:

- A. Check for \$155 (\$145 and the current \$10 surcharge) made payable to the Clerk of the Appellate Courts, or
- B. If appellant is indigent but represented by counsel, one of the following:
 - 1. Order of indigency signed by judge, or
 - 2. Certification of attorney that appellant was declared indigent in district court and so remains.
- C. If appellant is proceeding *pro se* and seeks to have the docketing fee waived, he or she must have an order from the district court judge stating that:
 - 1. The judge believes the appellant is indigent, and
 - 2. In the interest of the party's right of appeal, the appeal should be docketed in forma pauperis.

X. RECORD ON APPEAL
Supreme Court Rule 3.02

- A. Within 14 days of docketing the clerk of the district court will furnish to each party a table of contents for the record on appeal.
- B. A request for addition to the record should be made to the clerk of the district court as early as possible after receipt of the table of contents.
- C. A *pro se* litigant may review the record at the district court clerk's office during the time allotted for writing that party's brief.
- D. Upon completion of the appellee's brief, the appellate court clerk will then notify the district court clerk to transmit the record to the appellate court.

XI. MOTIONS
Supreme Court Rule 5.01

- A. Must be on letter size (8½ x 11) paper.
- B. Copies
 - 1. Court of Appeals — original and three (3) copies
 - 2. Supreme Court — original and eight (8) copies
 - 3. One copy must be served on opposing party or their counsel of record.
 - 4. The motion must contain proof of service on opposing party or their counsel of record.
- C. Original must be signed.

XII. BRIEFS
Supreme Court Rules 6.01, 6.07, and 6.09

(Sample cover page and table of contents follow.)

- A. Color code for cover page of brief:
 - 1. Appellant — yellow
 - 2. Appellee — blue
 - 3. Reply — grey

4. Amicus or Intervenor — green
 5. Petition for Review — white
- B. Page limitation for appellant and appellee — 50 pages exclusive of cover, table of contents, appendix, and certificate of service
- C. In both the Supreme Court and the Court of Appeals, oral argument is limited to 15 minutes per side unless additional time is requested by printing “oral argument” on the lower-right portion of the front of appellant’s brief, followed by 20, 25, or 30 minutes. The appellee will automatically receive the same amount of time. See Rules 7.01(e) and 7.02(f).
- D. Filing date with the Clerk of the Appellate Courts
1. Appellant — 40 days from docketing if no transcript is ordered, or 30 days from date transcript is filed with the clerk of the district court.
 2. Appellee — 30 days after service of appellant’s brief
- E. Extension of time to file brief
1. Request by motion
 2. Court of Appeals — original and three (3) copies
Supreme Court — original and eight (8) copies
 3. Service upon opposing counsel
 4. May be granted upon good cause being shown
- F. Copies of brief to be served
1. Sixteen copies to Clerk of the Appellate Courts
 2. Two copies to opposing counsel
 3. Certificate of service should be included as the last page of the brief

§ 12.35 Briefing Checklist

This checklist is designed to help a brief writer comply with the Kansas Supreme Court Rules. It begins at the cover page and moves through the major sections of a brief. Refer to the sample brief at § 12.36, *infra*. If you have questions, call the appellate clerk's office at 785.296.3229 or email appellateclerk@kscourts.org.

- Is the cover page of the brief the correct color? Rule 6.07(b)(1).
- Does the following information appear on the cover of the brief? Rule 6.07(b)(2).

The appellate court docket number.

The words IN THE COURT OF APPEALS OF THE STATE OF KANSAS or IN THE SUPREME COURT OF THE STATE OF KANSAS.

The caption of the case as it appeared in the district court, except that a party must be identified not only as a plaintiff or defendant but also as an appellant or appellee.

The title of the document, *e.g.*, “Brief of Appellant” or “Brief of Appellee,” etc.

The words “Appeal from the District Court of _____ County, Honorable _____, Judge, District Court Case No. _____”.

The name, address, telephone number, fax number, e-mail address, and attorney registration number of one attorney for each party on whose behalf the brief is submitted. An attorney may be shown as being of a named firm. Additional attorneys joining in the brief must not be shown on the cover but may be added at the conclusion of the brief.

The words “oral argument” printed on the lower right portion of the brief cover, followed by the desired amount of time, if additional time for oral argument is requested.

- Does the body of the brief appear in black type or print on 8½” by 11” white bond paper? Rule 6.07(a)(1).
- Is the text printed in a conventional style font not smaller than 12 point with no more than 12 characters per inch? Rule 6.07(a)(2).
- Is the text double-spaced, except block quotations and footnotes? Rule 6.07(a)(2).

- Is the left margin not less than 1½ inches and the top, bottom and right margins not less than 1 inch? Rule 6.07(a)(3).
- Is only one side of the paper used? Rule 6.07(a)(5).
- If the brief exceeds 15 pages in length, are at least 10 of the required 16 copies assembled with full length spiral binders on the left side? Rule 6.07(c).
- Is the length of the brief, excluding the cover, table of contents, appendix, and certificate of service, within the page limitation allowed? Rule 6.07(d).
- Does the brief contain a table of contents that includes page references to each division and subdivision in the brief, including each issue presented, and the authorities relied on in support of each issue? Rule 6.02(a)(1).
- Does the brief contain a brief statement of the nature of the case, *e.g.*, whether it is a personal injury suit, injunction, quiet title, etc., and a brief statement of the nature of the judgment or order from which the appeal was taken? Rule 6.02(a)(2).
- Does the brief contain a brief statement, without elaboration, of the issues to be decided in the appeal? Rule 6.02(a)(3).
- Does the brief contain a concise but complete statement, without argument, of the facts that are material to determining the issues to be decided in the appeal? Rule 6.02(a)(4).
- Are the facts keyed to the record on appeal by volume and page number? Rule 6.02(a)(4).
- Have the parties been referred to in the body of the brief by their status in the district court, *e.g.*, plaintiff, defendant, etc., or by name? Rule 6.08.
- If the appeal involves a child under the code for care of children, a juvenile offender, a party to an adoption proceeding, the victim of a sex crime, or a juror or venire member, have their identities been protected by using initials only or given name and last initial? Rule 7.043.
- Does each issue begin with citation to the appropriate standard of appellate review and a pinpoint reference to the location in the record on appeal (volume and page number) where the issue was raised and ruled on? Rule 6.02(a)(5).
- Does the appendix, if one is included, consist only of limited extracts from the record on appeal? Rule 6.02(b).

- Is there a certificate of service included as the last page of the brief? Rule 6.09(a)(2).
- Have the brief and certificate of service been signed?
- Have 2 copies of every brief been served on all adverse parties united in interest? Rule 6.09(a)(1).
- Have 16 total copies of the brief been filed with the clerk of the appellate courts? Rule 6.09(a)(3).

§ 12.36 Sample Brief

No. 11-000000-A

—————
**IN THE
[COURT OF APPEALS]
[SUPREME COURT] OF THE
STATE OF KANSAS**
—————

STATE OF KANSAS
Plaintiff-Appellee

vs.

JOHN DOE
Defendant-Appellant

—————
BRIEF OF APPELLANT
—————

Appeal from the District Court of xxx County, Kansas
Honorable xxx, Judge
District Court Case No. xx CR xxx

—————
Attorney Name, Bar Number
Name of Firm or Agency
Address
City, State ZIP
Telephone Number
Email Address
Attorney for the Appellant

Oral Argument: 15 minutes

2013

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Nature of the Case

A jury found John Doe guilty of two counts of aggravated robbery, a severity level three person felony; one count of aggravated battery, a severity level four person felony; and one count of aggravated assault, a severity level seven person felony. The district court imposed a controlling 112-month prison sentence, and Mr. Doe appealed.

Statement of Issues

- Issue I:** **The State failed to present sufficient evidence to convict Mr. Doe of aggravated robbery because the taking was complete before the force or threat of bodily harm occurred.**
- Issue II:** **Mr. Doe’s two convictions for aggravated robbery are multiplicitous, and violate the Fifth and Fourteenth Amendments to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights.**
- Issue III:** **Because the district court failed to ask the jurors if the verdicts the district court recited were, in fact, the jurors’ verdicts, this Court must vacate Mr. Doe’s convictions for aggravated battery and aggravated assault.**

Statement of Facts

Based on the events of June 14, 2009, the State charged John Doe with two counts of aggravated robbery and one count each of aggravated battery, aggravated assault, and possession of drug paraphernalia. (R. I, 15-16).

At trial, Mack Jones, the Store Manager at a xxx store in xxx, Kansas, testified that Mr. Doe had entered his store at approximately 10:30 P.M. on June 14, 2009. (R. XIII, 341-42). Due to Mr. Doe’s suspicious behavior, Jones began to watch Mr. Doe. (R. XIII, 343). Eventually, Jones saw Mr. Doe “place a magazine down the front of his pants,” and then “walk through the front of the store past the checkstands and out the door.” (R. XIII, 344). After Mr. Doe placed the magazine in his pants, but before he left the store, Jones called customer service and “told them

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to have” Mary Drew, another store employee, “meet [him] at the front of the store” so they could “stop [Mr. Doe] from leaving the store and ask him to come back inside.” (R. XIII, 344-45). Jones and Drew then confronted Mr. Doe outside the store, and asked him “to come back into the store to talk about merchandise that was not paid for.” (R. XIII, 345-46). Mr. Doe “turned around,” and acted as if he were returning to the store, but then stabbed Jones in the stomach with a knife, pointed the knife at Drew, and fled the parking lot. (R. XIII, 329-30, 333-34, 348-49).

At no point during his testimony did Jones mention what had ultimately happened to the magazine, which had a cover price of \$5.99. (R. XII, 152, 192, R. XIII, 325; State’s Exhibit 5). According to Drew’s testimony, however, Mr. Doe had handed the magazine to Jones before the struggle, and the magazine had then “flown” out of Jones’ hands and back into the store, where police found it when they arrived. (R. XX, 149).

After the State rested its case, defense counsel moved for a directed verdict, arguing that, because the use of force or threat of bodily harm to Jones and Drew had not occurred until after Mr. Doe had already taken, and, in fact, returned the magazine, the State had presented insufficient evidence to allow a rational factfinder to convict him of either of the counts of aggravated robbery. (R. XIII, 366). The district court ruled that it was “up to the jury to determine the fact[s],” and overruled defense counsel’s motion. (R. XIII, 374). Defense counsel also argued that the evidence could only support one conviction for aggravated robbery, because there was “only one owner involved, that being the store, not the employees.” (R. XIII, 375). The State acknowledged that the counts might be “multiplicitous for sentencing purposes,” but argued that the evidence supported two convictions based on the two victims. (R. XIII, 376). The

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district court “adopt[ed] the argument of the State,” but noted that, “[f]or sentencing purposes, it may be multiplicitous.” (R. XIII, 377).

The jury ultimately found Mr. Doe guilty of two counts of aggravated robbery and one count each of aggravated battery and aggravated assault. Neither party requested the district court to poll the jury; nor did the district court ask the jury if the verdicts the district court had read were, in fact, the jury’s verdicts. (R. XIII, 460). Based on Mr. Doe’s criminal history score of “I,” the district court imposed a controlling 112-month prison sentence. (R. XIV, 28). Mr. Doe appealed. (R. I, 68).

Arguments and Authorities

Issue I: The State failed to present sufficient evidence to convict Mr. Doe of aggravated robbery because the taking was complete before the force or threat of bodily harm occurred.

Standards of Review and Preservation of the Issue

“[W]hen sufficiency of the evidence is challenged following conviction in a criminal case,” this Court asks “whether, after reviewing all the evidence, viewed in a light most favorable to the prosecution,” this Court is “convinced a rational factfinder could have found the defendant guilty beyond a reasonable doubt.” *State v. Martinez*, 290 Kan. 992, 1003, 236 P.3d 481 (2010) (citing *State v. Gant*, 288 Kan. 76, 83, 201 P.3d 673 [2009]). To the extent this issue involves a question of statutory interpretation, however, this Court has unlimited review. *State v. Henning*, 289 Kan. 136, 139, 209 P.3d 711 (2009).

Defense counsel raised this argument below. (R. XIII, 366). Moreover, “[t]here is no requirement that a criminal defendant challenge the sufficiency of the evidence before the trial

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court in order to preserve it for appeal.” *State v. Farmer*, 285 Kan. 541, 545, 175 P.3d 221 (2008).

Analysis

In order to prove that Mr. Doe was guilty of the aggravated robbery of Jones and Drew, the State had to prove, among other things, that any taking “was by force or by threat of bodily harm.” (R. 7, 8, 16; R. XIII, 425). K.S.A. 21-3427; P.I.K. Crim. 3d 56.31. In other words, the State not only had to prove that a taking occurred and that, at some point, Mr. Doe used force or threat of bodily harm; it also had to prove that Mr. Doe took the property *by* force or threat of bodily harm, *i.e.*, that the force or threat of bodily harm was a “causative factor” of the taking. *See, State v. Finch*, 223 Kan. 398, 402-03, 573 P.2d 1048 (1978) (suggesting the term “by” is “synonymous with” the term “by means of.”)

In order to prove that Mr. Doe took the magazine from Drew and Jones *by* force or threat of bodily harm, therefore, the State had to prove that Mr. Doe used that force or threat of bodily harm as a *means* of taking the property. Such an interpretation is consistent with the plain language of the statute. Even if this Court disagrees, however, it must at least acknowledge that the language of the statute is ambiguous, and interpret that ambiguity strictly in favor of Mr. Doe. *State v. Knight*, 44 Kan. App. 2d 666, 681, 241 P.3d 120 (2010).

Such an interpretation of K.S.A. 21-3427 is also consistent with our Supreme Court’s holding in *State v. Aldershof*, 220 Kan. 798, Syl. ¶ 1, 556 P.2d 371 (1976). In *Aldershof*, two sisters were sitting in a booth in a drinking establishment. One of the women got up to use the restroom and left her sister to watch over her purse, which was sitting on the table. While the woman was in the restroom, the defendant came to the booth and took both women’s purses:

one from its position on the table, and the other from the remaining woman's lap. She immediately ran after him, followed him to the parking lot, and managed to grab him on the back of his shirt. He then turned and struck her in the eye with his hand. A jury convicted him of robbery. *Aldershof*, 220 Kan. at 799.

On appeal, the defendant argued that, because “the undisputed evidence show[ed] that no force or threat was used in the taking of the purses,” and that “any force or violence in the case came after the purses had already been stolen,” he was, at most, guilty of “theft, not robbery.” *Aldershof*, 220 Kan. at 799-800. Our Supreme Court recognized that “the general rule is that the violence or intimidation must precede or be concomitant or contemporaneous with the taking.” *Aldershof*, 220 Kan. at 800. After adopting this general rule, the Court stated that the appropriate test to determine whether one is guilty of robbery or merely theft is “whether or not the taking of the property has been completed at the time the force or threat is used by the defendant.” *Aldershof*, 220 Kan. at 803. Applying this test to the facts before it, the Court held that the taking of the purses was complete when the defendant “snatched the purses and left the premises of the tavern” because, at that point, he had “obtained control over the purses with the intent to deprive the owner permanently of their possession,” thereby committing the crime of theft. The Court concluded that, “[w]hen the thief left the tavern with the purses under his control, in our judgment the taking had been completed and any violence thereafter used by the thief in an attempt to prevent the owner from regaining possession of the same could not convert the theft into a robbery, although it may well have been the basis for a charge of battery under K.S.A. 21-3412.” *Aldershof*, 220 Kan. at 803-04.

Approximately seven years later, the Court considered a slightly different factual situation in *State v. Long*, 234 Kan. 580, 675 P.2d 832 (1984), rev'd on other grounds *State v. Keeler*, 238 Kan. 356, 710 P.2d 1279 (1985). In *Long*, the victim and her husband sold milk on an honor system; patrons took milk from a refrigerator in a sale building and paid by placing their money in a locked, slotted money box mounted on a wall. *Long*, 234 Kan. at 581. On the evening of the theft, the victim entered the sale building to find “the defendant crouched in front of the money box. It had been pried open. The defendant had his hands in his pockets,” and there was money on the floor beneath the box. *Long*, 234 Kan. at 581 (quoting *Long*, 8 Kan. App. 2d 733). The victim stood in front of the door to prevent the defendant from leaving, but he shoved her out of the way and drove off in his car. *Long*, 234 Kan. at 581. A jury found the defendant guilty of robbery. *Long*, 234 Kan. at 580.

On appeal, the defendant argued that he had only used force “after the taking to effect his escape,” and was not, therefore, guilty of robbery. *Long*, 234 Kan. at 582. The Court cited the *Aldershof* test, but noted that prior Kansas cases were not “in accord with one another,” as some of them “imply a taking is not complete until the property has been removed from the premises of the owner,” while “others indicate the taking is accomplished at the moment the thief, with the intent to steal, removes the property from its customary location.” *Long*, 234 Kan. at 583-85 (citing *Aldershof*, 220 Kan. at 803-04; *State v. Miller*, 53 Kan. 324, 36 P. 751 [1894]).

In *Miller*, the defendant placed his payment on the counter. The victim put the payment in his money drawer, removed the appropriate change from the drawer, and placed the change on the counter. The defendant then reached over the counter, and grabbed the money of the victim in the drawer. The victim caught the defendant’s hand, and when the victim refused to let go, the

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defendant cut the victim's hand. He then ran out of the store. *Miller*, 53 Kan. at 325. On appeal, our Supreme Court affirmed the defendant's conviction for robbery, noting that it could not say that the "defendant had obtained complete possession of the money before using violence to [the victim]. It does not even appear that he had withdrawn his hand from the drawer" at the time the violence occurred. *Miller*, 53 Kan. at 327.

The *Long* Court compared the facts before it to those in *Miller*, and stated that the only difference was that, unlike the defendant in *Miller*, the appellant had "managed to place most of the money in his pocket before being confronted by the victim, whereas in *Miller* the defendant was stopped by the victim after he had grabbed the money from the drawer, but before he could secrete it on his person." The Court then "conclude[ed] that a thief does not obtain the complete, independent and absolute possession and control of money or property adverse to the rights of the owner where the taking is immediately resisted by the owner before the thief can remove it from the premises or from the owner's presence." *Long*, 234 Kan. at 586.

Eight years after deciding *Long*, our Supreme Court cited *Miller*, *Long*, and *Aldershof* in *State v. Dean*, 250 Kan. 257, 824 P.2d 978 (1992). In *Dean*, the victim pumped three dollars worth of gasoline into the defendant's car, and then requested payment. Instead of paying for the gasoline, however, the defendant stated, "I don't have any money. How about this." As he spoke these words, he raised his right arm underneath a jacket as if he had a weapon. The victim, believing he was about to be shot, jumped away from the car, and the defendant drove away from the gas station. *Dean*, 250 Kan. at 258. The State charged the defendant with aggravated robbery. The defendant moved to dismiss the charge, arguing that the facts did not support a charge of robbery. The district court agreed and dismissed the case, and the State appealed.

Dean, 250 Kan. at 258. On appeal, our Supreme Court determined that the facts before it were most similar to those in *Long* because the defendant in *Dean* had not left the premises or even attempted to drive away before threatening the victim. Because the defendant made his threat to prevent resistance to the taking and not as a means of escape, the Court reversed the district court's dismissal of the aggravated robbery charge.

Finally, a little over six years after deciding *Dean*, our Supreme Court released its opinion in *State v. Bateson*, 266 Kan. 238, 970 P.2d 1000 (1998). In *Bateson*, a woman entered her office to find the defendant bent over her desk and ninety-five dollars in cash missing from her purse. When she immediately demanded its return, the defendant left the office and walked quickly up the stairs. The victim followed directly behind him. As she attempted to open the door, however, it came back rapidly and hit her, presumably because the defendant had intentionally slammed it in her face. *Bateson*, 266 Kan at 238-39. On appeal, the defendant challenged the sufficiency of the evidence underlying his conviction for aggravated robbery, arguing that “[a]ny force was subsequent to taking of the property.” *Bateson*, 266 Kan. at 240. Our Supreme Court agreed, stating that the defendant had obtained possession of the property by stealth, and that the “defendant had control of the property when he left [the victim’s] office.” *Bateson*, 266 Kan. at 245, 247.

Here, Jones witnessed Mr. Doe conceal a magazine in his pants. (R. XIII, 344). Instead of immediately approaching Mr. Doe and questioning him or trying to detain him, Jones instead called for backup, and directed Drew to meet him at the front of the store so they could stop Mr. Doe from leaving the store and ask him to come back inside. (R. XIII, 344-45). Jones and Drew then confronted Mr. Doe *outside* the store, where Mr. Doe relinquished the magazine to Jones.

(R. XIII, 328, 334, 336, 345-46). When the police arrived, they found the magazine inside the foyer area of the store. (R. XII, 152).

Our Supreme Court has previously held that a defendant completes the taking of property required under our theft statute when he or she “conceals” merchandise “on his [or her] person” with the intent to permanently deprive the owner of that property. *State v. Saylor*, 228 Kan. 498, 500-01, 618 P.2d 1166 (1980). In the present case, then, the taking was complete when Mr. Doe concealed the magazine on his person. *Saylor*, 228 Kan. at 500-01. Moreover, Mr. Doe walked out of the building with the magazine before anyone attempted to stop him. Like the victim in *Aldershof*, who did not confront the defendant until he had already left the bar, Jones and Drew did not confront Mr. Doe until after he had already walked out of the store. In fact, if anything, the facts in the present case are even less indicative of a robbery than were the facts in *Aldershof*. It appears that, in *Aldershof*, the victim pursued the defendant *immediately* after he took the purses, and that she caught up with him as soon as she could. *Aldershof*, 220 Kan. at 799. In the present case, however, Jones did not *immediately* confront Mr. Doe, and he made no effort to keep him from leaving the store. Instead, he called for backup, and instructed Drew to meet him at the front of the store so they could stop Mr. Doe from leaving the store and *ask him to come back inside*. (R. XIII, 344-45). (Italics added). While “it may be wise to wait to apprehend a thief who has not used force or violence until after he has left a populated store,” one who does so “would be apprehending a thief who committed larceny, not a robber.” *People v. Randolph*, 466 Mich. 532, 548, n. 18, 648 N.W. 2d 164 (2002).

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And, even if Jones and Drew *had* immediately pursued Mr. Doe, rather than trying to physically retrieve the magazine, physically detain Mr. Roberson, or at least physically block his exit, such facts would not necessarily elevate Mr. Doe's theft to robbery. In *Bateson*, the victim immediately demanded her money back from the defendant and proceeded to follow six to eight feet behind him as he exited her office and made his way out of the building. *Bateson*, 266 Kan. at 246. Nevertheless, because the defendant made no threats and used no force before exiting the office, and instead simply walked rapidly away, our Supreme Court held that no robbery had occurred. *Bateson*, 266 Kan. at 245. Similarly, Mr. Doe made no threats and used no force before walking out of the store with the magazine in his possession. Thus, as in *Bateson*, no robbery occurred.

The facts in the present case also differ significantly from those in *Miller*, *Long*, and *Dean*. First, unlike the defendant in *Miller*, who had not even managed to remove the money from the cash register, let alone conceal it on his person and leave the store before the violence occurred, Mr. Doe not only hid the magazine in his pants, but walked out of the store before Jones and Drew confronted him. Second, unlike the victim in *Long*, who confronted the defendant before he could leave the store and attempted to block the defendant's exit, it appears that Jones and Drew *purposefully* allowed Mr. Doe to exit the store before confronting him, and made no effort to block the door. Third, the facts in the present case would only be similar to those in *Dean* if Mr. Doe had gone through the checkout line with the magazine clearly visible, but, instead of paying for it, had menaced the cashier and *then* left the store. Even under those facts, of course, Mr. Doe would have only been guilty of the aggravated robbery of the

cashier, not the aggravated robbery of any individuals who subsequently confronted him outside the store.

Finally, one additional fact sets this case apart from other cases in which our Supreme Court has considered whether the use of force or threat of bodily harm has either preceded or occurred contemporaneously with a taking: in the present case, Drew's uncontroverted testimony establishes that Mr. Doe actually *gave the magazine back* to Jones before any violence occurred. At that point, according to that uncontroverted testimony, the magazine was in *Jones'* possession, not Mr. Doe's. (R. XIII, 328, 334, 336). And, under our Supreme Court's holding in *Finch*, a defendant does not take property *by* force or the threat of bodily harm if the force or threat occurs *after* the defendant has abandoned the property. *Finch*, 223 Kan. at 402-03.

This Court must reverse Mr. Doe's convictions for aggravated robbery and remand to the district court with directions to resentence him.

Because the evidence the State presented at trial would support a conviction for misdemeanor theft, but not aggravated robbery, this Court should reverse Mr. Doe's convictions for aggravated robbery and remand to the district court with directions to resentence him on the lesser included offense of misdemeanor theft under K.S.A. 21-3701(b)(5). *Bateson*, 266 Kan. 238 at 246-47 (citing *State v. Kingsley*, 252 Kan. 761, 782, 851 P.2d 370 [1993]). (R. XII, 192; State's Exhibit 5). *See*, K.S.A. 21-3701(b)(5) ("Theft of property of the value of less than \$1,000 is a class A nonperson misdemeanor.")

The State presented no evidence that Mr. Doe took the magazine by force or threat of bodily harm. This Court must, therefore, vacate his convictions for aggravated robbery and remand to the district court with directions to resentence him for misdemeanor theft.

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Issue II: Mr. Doe’s two convictions for aggravated robbery are multiplicitous, and violate the Fifth and Fourteenth Amendments to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights.

Standard of Review and Preservation of the Issue

Defense counsel raised this issue below. (R. XIII, 375). Moreover, this Court “may consider a multiplicity issue for the first time on appeal ‘to serve the ends of justice or prevent a denial of fundamental rights.’” *State v. Colston*, 290 Kan. 952, 971, 235 P.3d 1234 (2010). Finally, this Court has unlimited review over the question of whether two convictions are multiplicitous. *State v. Schoonover*, 281 Kan. 453, 462, 133 P.3d 48 (2006).

Analysis

In *Schoonover*, the Kansas Supreme Court “provided a roadmap for determination of multiplicity issues.” *State v. Gomez*, 36 Kan. App. 2d 664, 669, 143 P.3d 92 (2006). In order to determine if convictions are multiplicitous, a Court must determine whether the convictions are for the same offense. Convictions are for the same offense if they (1) arise from the same conduct, and (2) constitute only one offense by statutory definition. Convictions do not arise from the same conduct if the conduct is “discrete, *i.e.*, committed separately and severally.” If, however, the charges arise from the same act or transaction, then the conduct is unitary, and the convictions do arise from the same conduct. Under such circumstances, a reviewing Court must next determine whether the convictions are for violations of the same statute, or two or more different statutes. If the former is true, the Court must apply the “unit of prosecution test”; if the latter is true, then the Court applies the “same-elements” test. *Gomez*, 36 Kan. App. 2d at 669 (citing *Schoonover*, 281 Kan. at Syl. ¶ 15).

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In *Schoonover*, our Supreme Court set forth the following test for determining whether convictions arise from the same conduct: “If the conduct is discrete, *i.e.*, committed separately and severally, the convictions do not arise from the same offense and there is no double jeopardy violation. If the charges arise from the same act or transaction, the conduct is unitary.” *State v. Pham*, 281 Kan. 1227, 1246, 136 P.3d 919 (2006) (citing *Schoonover*, 281 Kan. at 496). The Court also provided a list of factors for use in determining whether conduct is unitary: (1) whether the acts occur at or near the same time; (2) whether the acts occur at the same location; (3) whether there is a causal relationship between the acts, in particular whether there was an intervening event; and (4) whether there is a fresh impulse motivating some of the conduct. *Pham*, 281 Kan. at 1247 (citing *Schoonover*, 281 Kan. at 497).

In *Pham*, several men entered a home where a married couple lived with their two daughters and their two sons. After forcing all six members of the family into the living room, the defendant tied them up and told one of the other men to shoot them if they moved. When the defendant left the room, the daughters managed to escape and call the police. Before fleeing, the gunmen shot one of the sons twice. When the police arrived, the mother noticed that two pieces of jewelry were missing from her dresser drawer: a diamond pendant that belonged to one of her daughters and a diamond bracelet that belonged to the other daughter. *Pham*, 281 Kan. at 1231-34, 1247.

On appeal, the defendant argued that his six convictions for aggravated robbery – one for each of the six family members who were present at the time the defendant took the jewelry – were multiplicitous. *Pham*, 281 Kan. at 1236, 1245. The State conceded that not all six counts

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could survive, but argued that our Supreme Court should affirm two of the convictions – one for each daughter – because each daughter had lost jewelry. *Pham*, 281 Kan. at 1246.

In determining whether the defendant’s convictions were multiplicitous, our Supreme Court first considered whether the taking of the bracelet and the taking of the necklace constituted unitary conduct, noting that the defendant had entered *one* bedroom and opened *one* drawer to obtain the two pieces of jewelry, both of which the mother had placed there. The Court “conclude[d] this constituted one transaction, *i.e.*,” that the convictions arose “from the same conduct,” and proceeded to the next step in the analysis. *Pham*, 281 Kan. at 1247.

Importantly, the *Pham* Court did not analyze whether the defendant or his codefendants used force or the threat of bodily harm at or near the same time or place, whether there was an intervening event or events between any uses of force or threats of bodily harm, or whether a fresh impulse motivated any of the force or threats of bodily harm. Instead, the Court analyzed only the facts surrounding the actual taking of the jewelry. *Pham*, 281 Kan. at 1247. For purposes of the first step in the multiplicity analysis, therefore, it appears that the relevant conduct in an aggravated robbery case is the taking or takings, and not the force or threats of bodily harm. That is, in determining whether Mr. Doe’s conduct was unitary, this Court should apply the *Schoonover* factors to the taking of the magazine only, not to Mr. Doe’s use of force or the threat of bodily harm. And if the conduct in *Pham* was unitary, where the defendant took *two* pieces of jewelry from one purse in one dresser drawer in one bedroom, then surely the conduct in the present case was unitary, where Mr. Doe took only *one* magazine from one shelf in one store.

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Because both of Mr. Doe's convictions arose from violations of K.S.A. 21-3427, this Court must apply the "unit of prosecution" test. *Schoonover*, 281 Kan. at 497. Under that test, "[t]here can be only one conviction for each allowable unit of prosecution." *Schoonover*, 281 Kan. at 497-98. The determination of the allowable unit of prosecution does not "necessarily depend upon whether there is a single physical action or a single victim. Rather the key is the nature of the conduct proscribed." *Gomez*, 36 Kan. App. 2d at 670 (citing *Schoonover*, 281 Kan. at 472). If the legislative intent is unclear, this Court applies the rule of lenity. *Pham*, 281 Kan. at 1248 (citing *Bell v. United States*, 349 U.S. 81, 83, 99 L.Ed. 905, 75 S. Ct. 620 [1955]).

In *Pham*, our Supreme Court considered whether the defendant's six convictions for aggravated robbery were multiplicitous. *Pham*, 281 Kan. at 1233. The Court noted that it was "unclear from the statute . . . whether the legislature intended for all six family members to be claimed as victims for the robbery of jewelry (a) belonging to only two and (b) taken from the bedroom of a third who was holding the jewelry for safekeeping." Similarly, it is "unclear from the statute . . . whether the legislature intended for" both Drew and Jones "to be claimed as victims for the robbery of" a magazine that belonged to neither of them. "In the absence of clear legislative intent, the rule of lenity presumes a single physical action harming multiple victims is only one offense." *Pham*, 281 Kan. at 1248.

Moreover, the fact that Mr. Doe inflicted bodily harm upon one victim and threatened another does not mean that his convictions survive the multiplicity analysis. In the present case, the jury found Mr. Doe guilty of two counts of aggravated robbery: one count for taking property from Jones and inflicting bodily harm upon him, and one count for taking property from Drew while armed with a dangerous weapon. (R. I, 58). Similarly, in *Pham*, the jury convicted

the defendant of one count of aggravated robbery for taking property from the presence of one of the sons and inflicting bodily harm upon him, and five counts of aggravated robbery for taking property from the presence of the remaining five family members while armed with a dangerous weapon. *Pham*, 281 Kan. at 1231-34. In vacating all but one of the defendant's convictions, the *Pham* Court indicated that the number of victims (1) physically harmed or (2) threatened with a dangerous weapon does not define the unit of prosecution in an aggravated robbery case.

Finally, our legislature has not amended K.S.A. 21-3427 since our Supreme Court issued its opinion in *Pham*. In the absence of such an amendment, this Court must presume that legislature concurs with the Court's interpretation of the statute. *See, Hall v. Dillon Companies, Inc.*, 286 Kan. 777, 785, 189 P.3d 508 (2008) (“[W]hen the legislature does not modify a statute in order to avoid a standing judicial construction of that statute, the legislature is presumed to agree with that judicial construction.”) If our legislature intended for each victim present, harmed, or threatened during a taking to constitute a separate unit of prosecution in an aggravated robbery case, it would have amended the statute to say as much after our Supreme Court decided *Pham*. That the legislature has not done so demonstrates that it did not intend for the taking of a single object from the presence of two individuals to constitute two counts of aggravated robbery, even if the defendant inflicts bodily harm upon, or threatens, each victim.

Because the conduct in the present case was unitary and because, “[i]n the absence of clear legislative intent, the rule of lenity presumes a single physical action harming multiple victims is only one offense,” this Court must vacate one of Mr. Doe's convictions for aggravated robbery. *Pham*, 281 Kan. at 1248.

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Issue III: Because the district court failed to ask the jurors if the verdicts the district court recited were, in fact, the jurors' verdicts, this Court must vacate Mr. Doe's convictions.

Introduction

After the district court read the jury's verdict aloud, it failed to ask the jurors whether that verdict did, in fact, represent the jury's verdict. This Court must, therefore, reverse Mr. Doe's remaining convictions.

Preservation of the Issue and Standard of Review

Mr. Doe did not raise this issue below. Nevertheless, "[t]here are several exceptions to the general rule that a new legal theory may not be asserted for the first time on appeal" including where "(1) the newly asserted theory involves only a question of law arising on proved or admitted facts and is finally determinative of the case; [and] (2) the consideration of the theory is necessary to serve the ends of justice or to prevent denial of fundamental rights." *State v. Johnson*, 40 Kan. App. 2d 1059, 1073, 198 P.3d 769 (2008) (citing *State v. Hawkins*, 285 Kan. 842, 845, 176 P.3d 174 [2008]).

This issue raises a question of law, does not rely on disputed facts, and is "finally determinative of the case." Moreover, this issue implicates the fundamental right to a unanimous jury verdict. *See, U.S. v. Morris*, 612 F.2d 483, 489 (10th Cir. 1979) (The right to a unanimous verdict is "so fundamental that it may not be waived.") Finally, this Court has previously reached this issue for the first time on appeal. *Johnson*, 40 Kan. App. 2d 1073-81.

Because this issue involves the interpretation of K.S.A. 22-3421, this Court has unlimited review. *State v. Henning*, 289 Kan. 136, 139, 209 P.3d 711 (2009). This Court also has

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unlimited review over questions of jury unanimity. *State v. Dayhuff*, 37 Kan. App. 2d 779, 784, 158 P.3d 330 (2007).

Analysis

Under K.S.A. 22-3421, “The verdict shall be written, signed by the presiding juror and read by the clerk to the jury, *and the inquiry made whether it is the jury’s verdict*. If any juror disagrees, the jury must be sent out again; but if no disagreement is expressed, and neither party requires the jury to be polled, the verdict is complete and the jury discharged from the case.” (Italics added).

This Court has held that “K.S.A. 22–3421 requires the trial court to inquire in open court whether the jury agrees with the verdict, even when the parties waive polling” in order to “ensure a defendant’s constitutional right to a unanimous verdict and to safeguard the concept of finality with respect to the jury verdict.” *State v. Gray*, 45 Kan. App. 2d 522, 249 P.3d 465 (2011), *petition for review denied* September 23, 2011 (citing *Johnson*, 40 Kan. App. 2d at 1076). A district court’s “failure to follow the statutory mandate of K.S.A. 22–3421 to inquire as to whether the verdict was the jury’s verdict” constitutes reversible error. *Gray*, 45 Kan. App. 2d at 525.

In the present case, the district court simply read the jury’s verdicts aloud, and, once the parties declined to have the jury polled, declared, “Ladies and gentlemen of the jury, this will conclude your - - your services as [a] juror for this year and this month.” The district court then discharged the jury. (R. XIII, 460-62). Because the district court failed to inquire whether the jurors agreed with the verdicts it had just read aloud, this Court must vacate Mr. Doe’s remaining convictions and remand for a new trial.

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The State's failure to comply with the requirements of K.S.A. 22-3421 requires this Court to vacate Mr. Doe's remaining convictions and remand for a new trial on those charges.

Conclusion

For the aforementioned reasons, Mr. Doe respectfully requests that this Court (1) reverse one of his aggravated robbery convictions as multiplicitous; (2) reverse his remaining aggravated robbery conviction for insufficient evidence and remand it to the district court with directions to resentence Mr. Doe for misdemeanor theft or for attempted aggravated robbery; and (3) reverse his remaining convictions and remand for a new trial.

Respectfully submitted,

Attorney Name, Bar Number
Name of Firm or Agency
Address
City, State ZIP
Telephone Number
Email Address
Attorney for the Appellant

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Certificate of Service

The undersigned hereby certifies that service of the above and foregoing Brief of Appellant was made by mailing, postage prepaid, two copies to Joe Smith, xxx County District Attorney, 600 W. Main Street, Anywhere, KS 00000; one copy to Derek Schmidt, Attorney General, 120 SW 10th Ave., Topeka, KS 66612; and sixteen copies to Heather L. Smith, Clerk of the Appellate Courts, Kansas Judicial Center, 301 SW 10th Ave., Topeka, KS 66612 on the _____ day of October, 2011.

Attorney Name, Bar Number

XIII. MOTIONS FOR REHEARING
Supreme Court Rules 7.05 and 7.06

- A. Court of Appeals — Supreme Court Rule 7.05
 - 1. Motion must be served within 14 days after decision is filed.
 - 2. A copy of the court’s opinion must be attached to the motion.
- B. Supreme Court — Supreme Court Rule 7.06
 - 1. Motion must be served within 21 days after decision is filed.
 - 2. A copy of the court’s opinion must be attached to the motion.

XIV. PETITIONS FOR REVIEW
Supreme Court Rule 8.03

- A. A petition for review is filed in the form of a brief with a white cover. A cross-petition, response, or reply to a petition for review should also have a white cover.
- B. Cannot exceed 15 pages, exclusive of the appendix.
- C. Original and 9 copies
- D. Must be filed in the office of the Clerk of the Appellate Courts within 30 days after the Court of Appeals decision is filed. This 30-day period is JURISDICTIONAL.
- E. Must have a copy of the Court of Appeals opinion attached to the original and all copies.

PLEASE NOTE: Before filing a Petition for Review, read Supreme Court Rule 8.03 in its entirety.

The Appellate Clerk's Office is also a good source of general information pertaining to court-related matters. Examples of available information are:

Bar Admissions

- Application to take the bar examination
- Application for temporary permit to practice law
- Filing to be a legal intern

Court Reporters

Applications to take the court reporters examination

Attorney Registration

- Payment of annual registration fee
- Information on attorneys in state by county, judicial district, congressional district, and state-wide alphabetical listing
- Online Attorney Directory: www.kscourts.org

Supreme Court Nominating Commission

- Membership roll
- Non-partisan selection procedure information

District Court Nominating Commissions

- Membership rolls by district
- Selection procedure information

Judicial Qualifications Commission

Procedures for filing complaints against judges for violations of canons of judicial ethics.

Client Protection Fund Commission

Procedures for filing claims if an attorney has misappropriated a client's money (for conduct occurring on or after July 1, 1993)

Kansas Attorney Complaints

If a complaint arises about lawyer services, write the Disciplinary Administrator, 701 Jackson Street, Topeka, Kansas 66603