NOT DESIGNATED FOR PUBLICATION

No. 105,311

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

SANDRA A. ODELL,
Appellant.

MEMORANDUM OPINION

Appeal from Stevens District Court; CLINT B. PETERSON, judge. Opinion filed January 18, 2013. Reversed and remanded.

Randall L. Hodgkinson, of Kansas Appellate Defender Office, for appellant.

Paul F. Kitzke, county attorney, and *Derek Schmidt*, attorney general, for appellee.

Before BUSER, P.J., ATCHESON, J., and KNUDSON, S.J.

Per Curiam: A jury convicted Sandra Odell of two counts of traffic in contraband in a correctional institution (K.S.A. 2009 Supp. 21-3826) after she smuggled cigarettes and a lighter into the Stevens County jail. On appeal, Odell claims that assorted trial errors by the district court resulted in reversible error. We conclude that instructional error did occur and, as a result, reverse the convictions and remand for a new trial.

FACTUAL AND PROCEDURAL BACKGROUND

On January 15, 2010, Teresa Spikes, a corrections officer for the Stevens County Sheriff's Department, booked Sandra Odell into the Stevens County jail, which is part of the Hugoton Law Enforcement Center in Hugoton, Kansas. Odell was serving weekends on a commitment order, and this was her second weekend at the jail.

According to Spikes, when Odell arrived at the jail, Spikes told Odell to empty her pockets, and Odell informed her that she did not have anything in her pockets. Spikes testified that she asked Odell "if she had any [or] anything illegal that would be considered contraband; cigarettes, [lighters,] drugs, weapons, anything that she knew would not be allowed in the jail." Odell stated that she did not have any contraband.

Spikes gave Odell jail clothing and took her to the restroom. Spikes testified that after she had Odell remove her clothing—except for her undergarments—she conducted a simple pat-down search for hidden contraband by feeling around the waistband of Odell's underwear and looking underneath her breasts. Spikes did not perform a cavity search or did she ask Odell to remove any of her undergarments.

The next day, while Spikes was observing the inmates from the jail's control room, she noticed Odell and Pamela McElroy—the only inmates occupying the B pod—get up from a table in the commons area and quickly go into McElroy's cell. Spikes activated a "two-way speaker," which allowed her to communicate with the inmates and hear what's going on inside the cells. Spikes then heard "a striking sound from a lighter," and Odell exclaimed, "'[Obscenity] me. It's out.'" Spikes informed Odell and McElroy over the intercom that they "had better not be smoking," and both responded that they were not smoking. Spikes observed McElroy immediately exit her cell and sit back down at the table. Odell went into her cell and flushed the toilet before returning to the commons area.

Shortly thereafter, McElroy told Spikes that she was feeling anxious, so Spikes took McElroy to the garage and permitted her to smoke a cigarette. Spikes explained that occasionally inmates who have cigarettes in their lockers are allowed to smoke outside of the jail. While McElroy was smoking her cigarette, she told Spikes that Odell had smuggled cigarettes and a lighter into the jail and Odell had both of these items in her possession.

Spikes proceeded to sit down with Odell in the commons area. She told Odell, "'If you have something that you know you're not suppose[d] to have, you might want to give it to me.'" Odell stated that she did not have anything, and Spikes subsequently told Odell that "it would be in her best interest, if she had anything to give it to [Spikes]." According to Spikes, Odell started to cry, stood up, and went into her cell. Odell returned with a package of Marlboro cigarettes and a lighter. She admitted to Spikes that she brought the items into the jail. According to Spikes, the package of cigarettes had toothpaste on the back, and Spikes explained that inmates typically use toothpaste as an adhesive to hide prohibited items underneath beds or behind toilet paper.

Spikes also explained that jail officials do not generally enter a cell after a prisoner's release; however, prison officials clean and search the cell for hidden contraband. After a thorough inspection, prison officials secure the cell's door and the door remains locked until the cell is assigned to another prisoner.

The State charged Odell with two counts of traffic in contraband, *i.e.*, cigarettes and a lighter, in a correctional institution. A jury trial was held on August 16, 2010. Odell was found guilty of both counts of traffic in contraband. On September 21, 2010, the district court sentenced Odell to a controlling prison term of 45 months. Odell filed a timely appeal.

JURY INSTRUCTIONS

Odell contends the trial court presented clearly erroneous jury instructions by instructing the jury on an uncharged crime—possession of contraband in a correctional institution— rather than the crime specified in the charging document—introduction or distribution of contraband. As a result, Odell contends the jury was instructed on the crime of traffic in contraband that was broader than the narrow charging language contained in the information.

The State charged Odell with two counts of traffic in contraband in a correctional institution, contrary to K.S.A. 2009 Supp. 21-3826. K.S.A. 2009 Supp. 21-3826(a) defines "[t]raffic in contraband":

> "Traffic in contraband in a correctional institution . . . is *introducing or attempting to introduce into or upon* the grounds of any correctional institution . . . or *taking, sending, attempting to take or attempting to send from* any correctional institution . . . or any *unauthorized possession* while in any correctional institution . . . or *distributing within* any correctional institution . . . any item without the consent of the administrator of the correctional institution . . . ." (Emphasis added.)

In the charging documents, the State alleged that Odell "feloniously and intentionally *introduce*[*d*] *or distribute*[*d*] into . . . a correctional institution or any jail . . . contraband, to-wit: cigarettes" and "[a] lighter, without the consent of the administrator of the jail." (Emphasis added.)

Instead of instructing the jury that the State was required to prove Odell *introduced* cigarettes and/or a lighter into a correctional institution *or distributed* such items within the facility, the district court instructed the jury that the State established Odell's guilt if it proved she intentionally *possessed* these items in a correctional

institution. In short, there was a variance between the charging documents and the elements instructions.

Odell concedes that she failed to object to the instructions she now challenges.

> "K.S.A. 22-3414(3) establishes a preservation rule for instruction claims on appeal. It provides that no party may assign as error a district court's giving or failure to give a particular jury instruction, including a lesser included crime instruction, unless: (a) that party objects before the jury retires to consider its verdict, stating distinctly the matter to which the party objects and the grounds for objection; or (b) the instruction or the failure to give the instruction is clearly erroneous. If an instruction is clearly erroneous, appellate review is not predicated upon an objection in the district court." *State v. Williams*, 295 Kan. 605, Syl. ¶ 3, 286 P.3d 195 (2012).

In the determination of whether an instruction or a failure to give an instruction was clearly erroneous, the reviewing court must first determine whether there was any error at all. To make that determination, "the appellate court must consider whether the subject instruction was legally and factually appropriate, employing an unlimited review of the entire record." 295 Kan. 605, Syl. ¶ 4. If the reviewing court concludes the district court erred in giving or failing to give a challenged instruction, the clearly erroneous analysis moves to a reversibility inquiry, wherein the court assesses "whether it is firmly convinced that the jury would have reached a different verdict had the instruction error not occurred." 295 Kan. 605, Syl. ¶ 5. The party claiming a clearly erroneous instruction maintains the burden to establish the degree of prejudice necessary for reversal. 295 Kan. 605, Syl. ¶ 5.

The State's charging document must set forth "the specific offense alleged against the defendant in order to inform the defendant of the nature of the accusation against him or her and to protect the defendant from being convicted on the basis of facts that were not contemplated in the initial charges. [Citation omitted.]" *State v. Trautloff*, 289 Kan.

793, 802, 217 P.3d 15 (2009). "The wording of a complaint is binding on the State in pursuing its theory before a jury." 289 Kan. at 802-03. Accordingly, "[i]t is the long-established rule in Kansas that instructions should be confined to issues made by the pleadings and should not be broader or narrower than the information." 289 Kan. at 802. Thus, although the State may, in a single-count complaint or information, charge the commission of an offense that "'may be committed by several different methods'" by "'any or all of the methods specified in the statute,'" it is erroneous for a district court to present jury instructions which are broader or narrower than the charging document. See *State v. Hemby*, 264 Kan. 542, 549-50, 957 P.2d 428 (1998). Such an error is only excusable if "the substantial rights of the defendant are not prejudiced. [Citation omitted.]" *Trautloff*, 289 Kan. at 802; see *Hemby*, 264 Kan. at 549.

The State charged Odell with the narrower method of *introducing* contraband into or *distributing* contraband within a correctional institution. The trial court, however, instructed the jury that the State established guilt if it proved that Odell committed the broader method of having intentionally *possessed* contraband in a correctional institution. On its face, giving this instruction was error because it presented the jury with a different and broader method of committing the crime then the two methods actually charged in the information.

The State counters that this divergence was not erroneous because "[t]he elements of what was charged and what was instructed come from the same subsection of K.S.A. [2009 Supp.] 21-3826(a) and not from a different subsection." This argument, however, is not particularly relevant to the legal analysis.

The terms "introduce," "take/send," "possession," and "distribution" are not synonymous or superfluous terms. Focusing on the terms relevant to this case illustrates this point. "Introduce" is defined as "to lead or bring in esp. for the first time." Webster's New Collegiate Dictionary 606 (1973). Whereas, "possession" is defined as "the act of

having or taking into control" or "control or occupancy of property without regard to ownership." Webster's New Collegiate Dictionary 897 (1973). But "distribute," on the other hand, is defined as "to divide among several or many." Webster's New Collegiate Dictionary 333 (1973). We conclude there was instructional error.

Next, we must determine whether this instructional error prejudiced Odell's substantial rights. See *Trautloff*, 289 Kan. at 802; *Hemby*, 264 Kan. at 549. Caselaw instructs that "'prejudice will not be found where the challenged instructions are supported by the evidence, do not charge an additional crime, do not surprise the defendant, and do not mislead the defendant in the preparation of his defense.'" *State v. Wade*, 284 Kan. 527, 536, 161 P.3d 704 (2007). Since Odell failed to object to the challenged instructions, if the error prejudiced Odell's substantial rights, this court must also determine whether the error is clearly erroneous, *i.e.*, the prejudice must have given rise to a real possibility that the jury would have rendered a different verdict if the district court had properly instructed the jury. See *Trautloff*, 289 Kan. at 802-03.

In *Trautloff*, our Supreme Court held that a jury instruction that was broader than the charging document was clearly erroneous. 289 Kan. at 803. The State charged Trautloff with

> "promoting the performance of sexually explicit conduct by a child under 14 years of age 'with the intent to arouse and satisfy the sexual desires or appeal to the prurient interest of the defendant, the child, or another and displayed said picture, an off grid felony, in violation of K.S.A. 21-3516(a)(6).'" 289 Kan. at 801.

The trial court, however, did not limit the jury instructions to the narrow conduct charged in the complaint, *i.e.*, displaying a picture. Instead, the district court instructed the jury pursuant to the broad definitional language provided in the statute:

"'"Promoting'" means procuring, selling, providing, lending, mailing, delivering, transferring, transmitting, distributing, circulating, disseminating, presenting, producing, directing, manufacturing, issuing, publishing, displaying, exhibiting or advertising . . . with intent to arouse or gratify the sexual desire or appeal to the prurient interest of the offender, the child or another.' [Citation omitted.]" 289 Kan. at 801-02.

Our Supreme Court found that this broad jury instruction was erroneous and violated Trautloff's substantial rights:

"The State charged Trautloff with the narrow offense of displaying a picture and then presented extensive evidence of other conduct that had much greater weight and emotional substance than the limited evidence relating to the display. . . . The jury was instructed on the broadest possible theory of misconduct under the statute, and this court cannot rule out the possibility that the jury found Trautloff guilty of conduct that was not charged in the information." 289 Kan. at 802.

The Supreme Court then found that the instruction was clearly erroneous because the evidence presented at trial to prove Trautloff "displayed" a photograph or video was "minimal and circumstantial," and as such, there existed a real possibility that the jury would have rendered a different verdict if the instruction had been proper. 289 Kan. at 803.

We are persuaded that, similar to *Trautloff*, the instructional error violated Odell's substantial rights. When the trial court instructed the jury on *possession* rather than *introduction* or *distribution*, the trial court essentially allowed the jury to convict Odell under the broadest possible theory of misconduct under the statute. While the charging document required the State to show that Odell actually introduced the cigarettes and lighter into the correctional institution or distributed these items within the facility, the district court instructed the jury that Odell was guilty if she simply possessed these items.

We also conclude that the instructional error was clearly erroneous because there is a real possibility the jury would have rendered a different verdict had it received proper instructions. While the evidence of both possession and introduction of the cigarettes and lighter was substantial, there was, at best, minimal circumstantial evidence that Odell distributed this contraband to others within the facility. Although McElroy was present when Odell attempted to smoke in the facility, there was no direct evidence that McElroy, or any other inmate, ever possessed the cigarettes or lighter. As a result, had the jury been properly instructed regarding the charges filed by the State, it may not have concluded that Odell *distributed* the contraband. Under the unique facts of this case, we reverse the convictions and remand for a new trial.

DUE PROCESS OF LAW

For the first time on appeal, Odell argues that "[a]s applied, the prosecution under K.S.A. 21-3826 violates the Due Process Clause because the [S]tate failed to show it provided nondeceptive notice that possession of cigarettes and a lighter in the Stevens County Jail constitutes a crime."

At Odell's trial, Undersheriff Evans testified that it is the Stevens County jail's policy to inform inmates at booking that they are prohibited from bringing contraband into the jail, which includes "*cigarettes*, weapons, pocketknives, nail clippers, *lighters*," and other similar items. (Emphasis added.) He testified that inmates are given the opportunity to surrender prohibited items "with no repercussion[s]" at booking, and if an inmate chooses to do so, the items are "bagged, tagged, and locked" in their locker at the Law Enforcement Center with their other personal items. Undersheriff Evans explained that it is a crime for an inmate to bring such items into the jail without his consent. According to the Undersheriff, as administrator of the jail, he has the ability to allow certain items to enter the jail, which would otherwise be prohibited; however, he

indicated that no inmate has ever been given permission to bring cigarettes or a lighter into the jail.

According to Spikes, when Odell arrived at the jail, she told Odell about the jail's policy prohibiting cigarettes:

> "[SPIKES:] Okay. When [Odell] came in, I told her to empty her pockets. And she said she didn't have anything. So I asked her—it's normal, I mean, I asked her if she had any anything illegal that would be considered contraband; cigarettes, drugs, weapons, anything that she knew would not be allowed in the jail.
> "[PROSECUTOR:] Okay. And what was her response, from that point?
> "[SPIKES:] No. She said no.
> "[PROSECUTOR:] She said she did not have possession of those?
> "[SPIKES:] Yes.
> "[PROSECUTOR:] Did you inform her that she was not allowed to possess those items in the jail?
> "[SPIKES:] Yes.
> "[PROSECUTOR:] And what was her response to you, at that point?
> "[SPIKES:] She knew that.
> "[PROSECUTOR:] Did she indicate she understood?
> "[SPIKES:] Yes.
> "[PROSECUTOR:] Now, you asked her if she had—you specifically asked her if she had cigarettes or a lighter on her—in her possession?
> "[SPIKES:] Yes.
> "[PROSECUTOR:] And her answer was?
> "[SPIKES:] No."

Moreover, in addition to Spikes' testimony that she told Odell about the jail's policy, according to Spikes, Odell not only indicated that she understood the policy, but she already knew the items were prohibited inside the jail.

Preliminarily, constitutional grounds for reversal asserted for the first time on appeal are not properly before an appellate court for review. *State v. Gomez*, 290 Kan. 858, 862, 235 P.3d 1203 (2010). Although there are exceptions to this general rule, *State v. Dukes*, 290 Kan. 485, 488, 231 P.3d 558 (2010), Odell does not assert or brief any exception to the general rule or provide pertinent authority addressing this procedural bar. Because Odell did not raise this issue below or brief the procedural bar on appeal, we consider this issue waived and abandoned. See *State v. McCaslin*, 291 Kan. 697, 708-09, 245 P.3d 1030 (2011).

Moreover, our dissenting colleague reframes the procedural due process issue Odell raises for the first time on appeal. This reframing of Odell's appellate argument raises new arguments involving substantive due process—an issue also not raised or briefed by Odell or the State on appeal. An issue not briefed by the appellant is deemed waived or abandoned on appeal. *State v. Martin*, 285 Kan. 994, 998, 179 P.3d 457, *cert. denied* 555 U.S. 880 (2008). For this reason, this issue as reframed by the dissent is also not appropriate for appellate review.

MULTIPLICITY

Odell contends that her two convictions for traffic in contraband under K.S.A. 2009 Supp. 21-3826 are multiplicitous in violation of the Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights.

Odell filed a pretrial motion requesting a merger or a dismissal of one of the charges on the ground that the charges were multiplicitous. The district court denied Odell's motion finding that the charges were not multiplicitous because cigarettes and a cigarette lighter are "two separate [and] distinct pieces of contraband." The district judge explained:

"[Defense counsel], I disagree with your analysis. I think the cigarettes and the cigarette lighter are two separate distinct pieces of contraband. The analogy for the cocaine in *Allen* doesn't apply in this case because we're not dealing with two charges for the same substance. Like [the State] said, if you try to file charges for each cigarette, then I think you would have a reasonable argument. In this case, however, I believe the State is within its cloak of discretion. Therefore, your motion is denied."

Odell contends the district court erred when it denied her motion to dismiss one of the counts of traffic in contraband as multiplicitous because her convictions were based upon the same conduct and K.S.A. 2009 Supp. 21-3826 only allows for a single unit of prosecution. Questions involving multiplicity are questions of law subject to unlimited appellate review. *State v. Thompson*, 287 Kan. 238, 243, 200 P.3d 22 (2009).

"Multiplicity is the charging of a single offense in several counts of a complaint or information," which creates the potential for a defendant to receive multiple punishments for a single offense in violation of the Double Jeopardy Clauses of the Fifth Amendment to the United States Constitution and § 10 of the Kansas Constitution Bill of Rights. *State v. Colston*, 290 Kan. 952, 971, 235 P.3d 1234 (2010).

In *State v. Schoonover*, 281 Kan. 453, 133 P.3d 48 (2006), the Kansas Supreme Court announced the analytical framework for determining whether multiple convictions constitute double jeopardy. *Colston*, 290 Kan. at 971. "'[T]he overarching inquiry is whether the convictions are for the same offense.' [Citation omitted.]" *Thompson*, 287 Kan. at 244. "This inquiry is divided into two components, both of which must be met for there to be a double jeopardy violation: (1) Do the convictions arise from the same conduct? [and] (2) If so, by statutory definition, are there two offenses or only one? [Citation omitted.]" *Colston*, 290 Kan. at 971.

Under the first prong of the double jeopardy analysis, an appellate court must determine whether the convictions are based upon the "same conduct." See *Thompson*,

287 Kan. at 244. If the conduct is not unitary, *i.e.*, the same, the analysis ends. 287 Kan. at 244. The second prong of the double jeopardy analysis requires an investigation into whether the statutory provisions involved "provide for two offenses or only one." 287 Kan. at 244. The test used to make this determination depends upon whether the convictions arise from a single statute or from multiple statutes. 287 Kan. at 244.

In *Schoonover*, 281 Kan. 453, Syl. ¶ 16, the Kansas Supreme Court set forth the following four factors to consider when determining whether a defendant's conduct was 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.' [Citation omitted.]" *Thompson*, 287 Kan. at 244.

Odell contends that all four of these factors are satisfied in this case because the acts occurred at the same time, at the same location, possession of cigarettes and a lighter are causally related, and a single impulse motivated the conduct—possession of cigarettes and a lighter are motivated by an individual's desire to smoke. On the other hand, the State, does not contest that Odell's conduct was unitary. We are persuaded that application of the *Schoonover* factors to this case indicates that Odell's convictions arose from unitary conduct.

Because Odell's convictions arose out of the same conduct, it is necessary to address the second prong of the *Schoonover* analysis. The second prong of the double jeopardy analysis requires an investigation into whether the statutory provisions involved "provide for two offenses or only one." *Thompson*, 287 Kan. at 244. Because Odell's convictions arise from multiple violations of a single statute, the unit of prosecution test is applicable. See *Thompson*, 287 Kan. at 245. Determining a statute's unit of prosecution

involves the interpretation of statutory language, a question of law over which this court has unlimited review. *State v. Harris*, 284 Kan. 560, 572, 162 P.3d 28 (2007).

The unit of prosecution test analyzes "how the legislature has defined the scope of conduct composing one violation of a statute." *Thompson*, 287 Kan. at 245. In essence, this test asks whether the legislature intended the defendant's conduct to constitute "'only one violation of the statute or to satisfy the definition of the statute several times over.' [Citation omitted.]" 287 Kan. at 246. "Under this test, the statutory definition of the crime determines what the legislature intended as the allowable unit of prosecution. There can be only one conviction for each unit of prosecution. [Citation omitted.]" 287 Kan. at 245. "The determination of the appropriate unit of prosecution is not necessarily dependent upon whether there is a single physical action or a single victim. Rather the key is the nature of the conduct proscribed." *Schoonover*, 281 Kan. at 472.

Odell argues that K.S.A. 2009 Supp. 21-3826 allows for only a single unit of prosecution, even if that conduct involves possession of several items of contraband. In its brief, the State does not analyze the applicability of the unit of prosecution test.

We are persuaded that the plain language of K.S.A. 2009 Supp. 21-3826 provides for multiple units of prosecution in cases where multiple items of contraband are introduced, distributed, or possessed within a correctional facility. Important to this conclusion is that the criminal statute at issue defines contraband, in part, as "any item." K.S.A. 2009 Supp. 21-3826(a). When interpreting a statute, an appellate court must "ascertain the legislature's intent through the statutory language it employs, giving ordinary words their ordinary meaning. [Citation omitted.]" *State v. Stallings*, 284 Kan. 741, 742, 163 P.3d 1232 (2007). Given the plain meaning of the legislature's use of the singular noun "item" convinces us there is one unit of prosecution for each item of contraband.

MIRANDA RIGHTS

Next, Odell contends the incriminating statements she made to Spikes were elicited in violation of her *Miranda* rights because Spikes subjected her to custodial interrogation when she isolated her in the commons area of the B pod to investigate whether she possessed illegal contraband. See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Odell filed a pretrial motion to suppress the statements she made to Spikes. After an evidentiary hearing, the district court denied Odell's motion. The district judge explained:

> "Well, it doesn't appear to me that there was any kind of custodial interrogation. [Defense counsel]'s arguments that if a jailer wanted to speak with an inmate at any time, that *Miranda* would be required. Ms. Spikes testified that she just sat her down, did not make her, did not isolate her or put her in a room by herself, but just talked to her out in the commons area. So, on that basis I'm going to deny the motion to suppress as non-interrogation, noncustodial interrogation." (Emphasis added.)

Odell, however, failed to lodge a timely and specific objection at trial to the introduction of the challenged statements. When the trial court has denied a motion to suppress, the moving party must object to the introduction of that evidence at the time it was offered at trial to preserve the issue for appeal. *McCaslin*, 291 Kan. at 726; see also K.S.A. 60-404 ("A verdict or finding shall not be set aside . . . by reason of the erroneous admission of evidence unless there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection.").

Several caselaw exceptions have been recognized that allow an appellate court to consider a new legal theory. See *Dukes*, 290 Kan. at 488. Odell did not brief the issue of whether an exception should be applied, however, and an issue not briefed by the

appellant is deemed waived and abandoned. See *McCaslin*, 291 Kan. at 709. The *Miranda* issue is, therefore, not properly before us. Moreover, after Odell's trial, the United States Supreme Court issued *Howes v. Fields*, 565 U.S. __, 132 S. Ct. 1181, 1187-94, 182 L. Ed. 2d 17 (2012), which clarifies Fifth Amendment jurisprudence in cases of prisoner interrogations. Under these circumstances, we decline to analyze this *Miranda* issue.

ALTERNATIVE MEANS

Odell contends the State violated her right to a unanimous jury verdict by failing to present sufficient evidence to support each of the alternative means alleged in the charging document for the commission of traffic in contraband in a correctional institution. Odell appears to contend that an alternative means issue is present, even though the jury was only instructed as to a single method of commission, because the State *charged* her with alternative means of committing the offense.

A criminal defendant has a statutory right to a unanimous jury verdict. See K.S.A. 22-3421; *State v. Wright*, 290 Kan. 194, 201, 224 P.3d 1159 (2010). However, in the present case, the district court erroneously instructed the jury on one uncharged method of committing the offense of traffic in contraband—possession—rather than the two methods specified in the charging document—introduction or distribution.

An alternative means issue arises if the charged offense may be committed in more than one way and "the prosecution declines to elect one or the other, resulting in a jury instruction on both." *State v. Brooks*, 46 Kan. App. 2d 601, 608, 265 P.3d 1175 (2011), *rev. granted* 294 Kan. ___ (June 13, 2012). Assuming, without deciding, that this was an alternative means crime, there is no question that the jury rendered a unanimous verdict because the district court instructed the jury on only one method of committing of

this crime—possession. See *State v. Charles*, No. 102,981, 2011 WL 1196912, at *3-4 (Kan. App. 2011) (unpublished opinion), *rev. granted* September 23, 2011.

Accordingly, Odell's argument fails because the jury could only convict her based upon the possession of contraband, and as such, the jury instructions insured a unanimous jury verdict despite the wording of the complaint and information, both of which charged her with two other methods of committing this crime.

CUMULATIVE ERRORS

For her final issue, Odell argues that cumulative trial errors require the reversal of her convictions because these errors deprived her of the right to a fair trial.

"Cumulative error will not be found when the record fails to support the errors raised on appeal by the defendant. [Citations omitted.] One error is insufficient to support reversal under the cumulative effect rule. [Citation omitted.]" *State v. Cofield*, 288 Kan. 367, 378, 203 P.3d 1261 (2009).

We have identified an instructional error that requires reversal of the convictions. There were no cumulative errors. This issue is without merit and moot.

Reversed and remanded.

* * *

ATCHESON, J., concurring in part and dissenting in part: I concur in the majority's rulings on the issues except for the due process violation. On that point, I respectfully dissent and would find that the oral notification of proscribed conduct given here, without something more, imparted constitutionally inadequate notice to sustain the criminal prosecution and felony convictions of Defendant Sandra Odell. The constitutional defect

compromises elemental legal principles of fair notice and requires the convictions be vacated and the charges dismissed.[1]

[1]With regard to the *Miranda* issue, see *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), would bypass the procedural grounds on which the majority relies to affirm the district court's ruling that the interrogation of Odell was not custodial. I would uphold the determination on the merits. Based on the district court's factual findings and the United States Supreme Court's decision in *Howes v. Fields*, 565 U.S.___, 132 S. Ct. 1181, 1191-92, 182 L. Ed. 2d 17 (2012), Odell was not confined during the interrogation in a way that would require *Miranda* warnings. The restraints on her liberty at that time were neither materially greater nor more coercive than those imposed on inmates generally by virtue of their being housed in the jail. Ongoing detention in a penal facility does not in and of itself amount to a restraint necessitating *Miranda* warnings. 132 S. Ct. at 1191-92. While Howes had been convicted and was serving a sentence and Odell was a pretrial detainee unable to make bail, that does not seem to be a material distinction.

The court can and should consider Odell's due process challenge.

Although Odell did not assert a due process challenge to her convictions in the district court, we ought to consider the issue on the merits. In limited circumstances, an appellate court may address a point not raised earlier if it involves a question of law that resolves the case based on proven or undisputed facts or if it addresses the denial of a fundamental right or serves the ends of justice. *State v. Dukes*, 290 Kan. 485, 488, 231 P.3d 558 (2010). The violation of Odell's due process rights secured in the Fourteenth Amendment to the United States Constitution satisfies those grounds. First, the legal issue may be settled by accepting the facts favorably to the State, and a determination for Odell requires dismissal. Second, the right to fair notice of conduct creating criminal liability, particularly felony offenses, is of constitutional magnitude and prevents arbitrary, oppressive, or otherwise impermissible deprivations of liberty. So the absence of fair notice denies a fundamental right, and vacating a conviction imposed without that notice serves justice.

The genesis of the error bolsters the decision to take up the issue on the merits. The error derives from the failure of the Stevens County jail to provide constitutionally sufficient notice to detainees of what would be considered contraband for purposes of criminal prosecution under the traffic-in-contraband statute, K.S.A. 21-3826. And the error occurred when Odell was held in that facility. Neither the State nor the district court could have done anything to correct the constitutional defect, thus preserving the integrity of the prosecution, had Odell asserted the error at the trial level. So Odell has gained no tactical advantage from her failure to raise the issue before now in contrast to a defendant attempting to assert a correctable trial error for the first time on appeal.[2]

[2]Ordinarily, an appellate court should not, for example, entertain a defendant's request to reverse a conviction based on the erroneous admission of improper testimony when counsel lodged no trial objection. Alerted with an objection, the district court could have excluded the testimony altogether or substantially mitigated any harm with an admonition to the jury to disregard it.

The majority suggests that I have "reframed" Odell's argument because my analysis discusses separately the procedural and substantive aspects of Fourteenth Amendment due process as they apply to the oral notice the jail provided. On appeal, Odell submitted the notice lacked both "adequate [constitutional] safeguards" and failed to fairly inform her that possession of the cigarettes and the lighter would subject her to criminal penalties as opposed to merely administrative sanctions within the jail. Odell generally characterized the shortcomings as due process violations without offering additional labels. The thrust of Odell's argument rested on the constitutional insufficiency of oral notice alone in giving sufficient warning of conduct the State has chosen to criminalize—what she terms "nondeceptive notice." In its brief, the State counters that Odell received actual oral notice that she could not have cigarettes or a lighter in the jail. According to the State, the oral notice fully satisfied Odell's due process rights. So sufficiency of oral notice as a matter of constitutional due process has been joined and ought to be considered.

My analysis is not somehow judicially improper because it explores aspects of the issue from perspectives or using terminology the parties avoided. An appellate court may look beyond the precise arguments presented in the briefing of an issue, especially if those arguments are legally unsatisfactory. The briefs merely reflect the parties' assessments of the best advocacy for their respective positions—not the universe of every rationale for a given result. Appellate courts decide issues; they do not arbitrate or grade arguments. So the judicial resolution of an issue need not be rendered in lockstep with the argument or the terminology of one side or the other. A panel of this court recently so recognized in *State v. Knight*, No. 105,092, 2012 WL 2325849, at *7 (Kan. App. 2012 (unpublished opinion) *petition for rev. filed* July 16, 2012), in ruling for the State on a criminal defendant's challenge to how the district court answered a question from a deliberating jury.

The issue properly framed: Does oral notification alone provide constitutionally sufficient fair notice of conduct that may be prosecuted as a felony?

The constitutional harm here arises from a fundamental flaw—the notion that criminal liability may be premised *solely* on oral notification of the offending conduct. The United States Constitution requires that the government provide "fair notice" of conduct it has criminalized and for which transgressors may be deprived of their liberty. See *FCC v. Fox Television Stations, Inc.*, 567 U.S. ___, 132 S. Ct. 2307, 2317, 183 L. Ed. 2d 234 (2012) ("A fundamental principle of our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972). The concept of fair notice is protected in both procedural and substantive due process aspects of the Fourteenth Amendment and, therefore, binds state governments. See *Papachristou*, 405 U.S. at 165; *Cole v. Arkansas*, 333 U.S. 196, 201-02, 68 S. Ct. 514, 92 L. Ed. 644 (1948).

At its very foundation, fair notice requires the government publish in writing those legislative enactments criminalizing specific activity. In certain situations, as I later outline, more might be required. But written notice of that proscribed conduct entails a foundational and irreplaceable component of due process. Such notice must be afforded the constituents of that government as a necessary predicate to any of them becoming the accused in a felony prosecution. Absent written notice, oral identification of a crime—however precise and comprehensible that might be in a given instance—fails to impart a warning that satisfies procedural and substantive due process. That obligation seems especially compelling when the government has chosen to criminalize behavior exclusively through legislative enactment or codification, as Kansas has done. The State deprived Odell of constitutionally acceptable notice, and the prosecution was fatally deficient as a result.

The concept that criminal laws should be written down entails so basic a component of jurisprudence in this country that it is almost never disputed and, thus, seldom discussed in the caselaw. I have found no appellate decision addressing a prosecution for a crime in which some substantive components have been disclosed only in oral communications from government actors. The peculiarities of the traffic-in-contraband statute, the attendant judicial construction meant to render it constitutional, and the facts of this case combine to test that concept.

Under K.S.A. 21-3826, a person may be convicted of trafficking in contraband in a penal institution if he or she brings into or possesses in a correctional facility "any item" without the consent of the administrator of the facility. The statute applies to visitors to a penal institution, facility employees, and inmates. Its violation is a felony. There is no question that the Stevens County jail was a facility covered under the statute and Odell was subject to its prohibition. Read literally, the statute requires each visitor, employee, or inmate to get approval from the facility administrator for the contents of his or her pockets and, in the case of a lawyer meeting with an inmate client, everything in his or

her briefcase. The statute has not been construed or applied that way in practice. Rather, published written notice of forbidden items in a given facility has been used as a proxy for individualized administrative approval of permitted items.

In *State v. Watson*, 273 Kan. 426, 435, 44 P.3d 357 (2002), the Kansas Supreme Court upheld the constitutionality of the statute as a proper delegation of legislative authority to administrators of penal facilities to designate proscribed items deemed to be contraband, so long as they disseminate "adequate warning" as to what will be considered prohibited, thereby affording persons constitutionally required "fair notice" and "safeguard[ing] against arbitrary and discriminatory enforcement." The court found that the broad language of the statute itself—literally applying to anything—"demands . . . safeguards" providing "adequate notice [to] . . . ensure that the statute is implemented in a constitutional manner." 273 Kan. at 432. In *Watson*, the Pratt County jail gave written notice of prohibited items that satisfied constitutional requirements of due process. The court, therefore, had no reason to explore the bare minimum necessary to effect fair notice. The court commented on the general lack of caselaw construing prison contraband statutes delegating explicit notice obligations to facility administrators. The few cited cases all involved notice of prohibitions disseminated and openly published in writing—commonly in printed forms given to inmates or visitors and prominently displayed signs.

Here, in contrast, the *only* notice given Odell (or apparently anyone else) was oral, when a jailer would attempt to outline forbidden items to a person being booked into the facility. The jailers seem to have been left to improvisation in that no written script or text guided their oral renditions. That alone breeds arbitrariness in that different jailers may offer varied notification and even the same jailer may not say the same thing every time. As I discuss later, even if oral notice alone could be constitutionally satisfactory, though it is not, what the jailer apparently told Odell still failed to sufficiently communicate the criminality of the conduct upon which this prosecution rests.

Substantive and procedural due process require more than oral notification.

The Due Process Clause of the Fourteenth Amendment has both procedural and substantive components. Both are implicated here.

Procedural due process ultimately aims to afford "fair notice" and a concomitant opportunity to be heard in a meaningful way before a person suffers a deprivation of liberty or a loss of property. *Papachristou*, 405 U.S. at 162 (noting "well-recognized group of cases insisting that the law give fair notice of the offending conduct"); *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 59 S. Ct. 618, 83 L. Ed. 618 (1939) (A criminal statute is "repugnant" to due process requirements if it fails to "inform[] as to what the State commands or forbids," and, thus, offends "ordinary notions of fair play . . . ."); see *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a 'meaningful time and in a meaningful manner.'"); *Mullane v. Central Hanover Tr. Co.*, 339 U.S. 306, 313, 70 S. Ct. 652, 94 L. Ed. 865 (1950) (The Due Process Clause "at a minimum" requires that "deprivation of life, liberty, or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."). In the criminal justice system, procedural due process includes notice of conduct that will subject citizens to punishment. But the notice must be given at a time and in a manner that those persons may conform their conduct to the warning and, thereby, avoid facing liability. See *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972). That is to say, fair notice must be available to a person before he or she commits a prohibited act. As the Court recognized in *Lanzetta*, 306 U.S. at 453, "[i]t is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression." And that notice must, at a minimum, be in writing. See *Watson*, 273 Kan. at 430 ("'[A]n enactment . . . [must] give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly.'") (quoting *Grayned*, 408 U.S. at 108). The terms "statute" and "enactment" call up the handiwork of

legislative bodies and presuppose a written product. In turn, a law that fails to supply fair notice "'impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis with the attendant dangers of arbitrary and discriminatory application.'" 273 Kan. at 430 (quoting *Grayned*). Although the *Grayned* Court was condemning a statute drafted with vague wording, those vices are no less pernicious and constitutionally improper when a written criminal statute has been supplemented with oral clarifications upon which a prosecution rests. Procedural due process, then, attaches before the commencement of a criminal prosecution and includes fair notice of what actions amount to a prosecutable offense.[3]

[3]Procedural due process afforded through the Fourteenth Amendment includes various protections in the Bill of Rights to the United States Constitution that have been incorporated to apply to state governments. The Fourth Amendment right to be free of unreasonable government searches and seizures is an example. The Fifth Amendment right against self-crimination is another. Persons enjoy those rights even before they have been formally charged with criminal offenses. See *Miranda*, 384 U.S. at 482 (right against self-crimination attaches to custodial interrogation preceding any formal charges). The right to fair notice of what amounts to criminal conduct similarly operates both before and during a formal criminal prosecution.

Apart from procedural safeguards, the Due Process Clause also affords a limited range of fundamental substantive rights deemed essential to ordered liberty consistent with a civilized society. Although some jurists and judicial theorists malign substantive due process as little more than a device for courts to create rights that otherwise have no foundation in the explicit language of the constitution, see *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S 52, 72, 129 S. Ct. 2308, 174 L. Ed. 2d 38 (2009), the doctrine remains a vital part of American jurisprudence, see 557 U.S. at 73-74 & n.4 (acknowledging that "history or tradition" offer strata in which substantive due process rights may be rooted); *Lawrence v. Texas*, 539 U.S. 558, 564-65, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003); see *Faretta v. California*, 422 U.S. 806, 819-20 & n.15 , 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (The Court recognizes constitutional rights, such as the Sixth Amendment right to self-representation, even though "not literally expressed in the

document" when they "are essential to due process of law in a fair adversary system."). Substantive due process, in part, embraces rights essential to a fundamentally fair judicial process adjudicating disputes especially between the government and its citizens. Justice Benjamin Cardozo described substantive due process rights as part of "the very essence of a scheme of ordered liberty" and inseparably entwined with "a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundament." *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S. Ct. 149, 82 L. Ed. 288 (1937). More recently, the United States Supreme Court has reiterated that substantive due process protections guard against oppressive or arbitrary government confinement of citizens. *Foucha v. Louisiana,* 504 U.S. 71, 80, 112 S. Ct. 1780, 118 L. Ed. 2d 437 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."); 504 U.S. at 90 (Kennedy, J., dissenting) ("As incarceration of persons is the most common and one of the most feared instruments of state oppression and state indifference, we ought to acknowledge at the outset that freedom from this restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments of the Constitution.").

Written notice of what conduct will subject persons to criminal punishment straddles substantive and procedural due process and properly fits within both spheres. The history and tradition runs deep. Hammurabi remains one of the world's great law givers because, nearly 4,000 years ago, he authored a legal code. While some of the substantive provisions Hammurabi recorded were notable, the code's epochal significance lay in the very idea that the law should be written and, thus, both fixed and knowable. See *Clorox Co. v. Chromium Corp.*, 158 F.R.D. 120, 125 (N.D. Ill. 1994) ("From the code of Hammurabi to the code of the United States, our judicial foundation have been embedded in the principle that law must be manifested in a written form."). The virtue of fixed, knowable law infuses the jurisprudence of this country. And it is both implicit and explicit in constitutionally protected rights. See *Rogers v. Tennessee*, 532 U.S. 451, 457, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001) ("[T]his Court has often recognized the 'basic

principle that a criminal statute must give fair warning of the conduct that it makes a crime.'") (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 350, 84 S. Ct. 1697, 12 L. Ed. 2d 894 [1964]).

The Sixth Amendment to the United States Constitution, for example, requires that those accused of crimes be afforded notice of the particular charges against them. The right has always been construed to require written notice. See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 167, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963) (notice required under Sixth Amendment includes the right to indictment, a written statement of the charges); *United States v. Pirro*, 212 F.3d 86, 92 (2d Cir. 2000) (Sixth Amendment notice requirement "offended" by indictment that fails to state the essential elements of the offense). An accused's right to such constitutional notice of the charges extends to state prosecutions, *Cole*, 333 U.S. at 201-02, as does the more general due process requirement of fair notice, *Papachristou*, 405 U.S. at 165.

In *Cole*, the defendants were charged in an information—a written statement of the alleged crime—with one offense upon which the jury was instructed and then convicted them. On appeal, however, the Arkansas Supreme Court found the defendants guilty of a related, though more serious, charge. The United States Supreme Court, in an opinion Justice Hugo Black authored, reversed the decision, recognizing that "[n]o principle of procedural due process is more clearly established than [a defendant be given] notice of the specific charge." 333 U.S. at 201. Later in the opinion, Justice Black described the constitutional defect in terms characteristic of a breach of substantive due process rights afforded criminal defendants. As a result of the Arkansas Supreme Court's ruling, the defendants in that case were "denied safeguards guaranteed by due process of law—safeguards essential to liberty in a government dedicated to justice under law." 333 U.S. at 202.

In short, a person accused of a crime must be given written notice of that accusation to comport with a fundamental right recognized as a necessary ingredient of basic fairness. If that be so—and it most certainly must in light of decisions such as *Cole*—then *a fortiori*, citizens have at least an equally compelling and fundamental right to be informed in writing as to what conduct may cause them to be accused in the first place. Any sensible conception of fair notice requires nothing less. And simple logic defies the notion that general notice of criminal conduct might be imparted orally to the citizenry as a whole while an alleged transgressor would then be entitled to written notice only when being charged with a purported transgression.

On a less grand scale, this court has held that convicted criminals serving prison sentences may not be deprived of good-time credits in administrative hearings when the institution has given only oral notice identifying the offending conduct as a rules violation. See *Le v. Simmons*, 24 Kan. App. 2d 591, 593-94, 948 P.2d 1142 (1997). In that case, the Department of Corrections argued that the inmate had received "verbal notification" of the conduct that would subject him to punishment if he so acted—possessing tweezers while in administrative segregation. This court rejected the prison's oral notice of proscribed conduct as insufficient to protect against the loss of an inmate's constitutionally protected liberty interest in good-time credit. In administrative disciplinary proceedings, inmates receive far less due process than do accused criminals in judicial proceedings. See *Wolff v. McDonnell*, 418 U.S. 539, 560-61, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1974); *Washington v. Roberts*, 37 Kan. App. 2d 237, 240-41, 152 P.3d 660 (2007) (In an administrative disciplinary proceeding, an inmate does not enjoy the """full panoply of rights due a [criminal] defendant."""). If, however, the diminished due process afforded inmates requires written notification of conduct that will violate administrative rules, then the same must be true of conduct subjecting an individual to criminal punishments, including incarceration, through the judicial process.

Codification of crimes in Kansas supports written notice under the traffic-in-contraband statute.

Kansas, virtually from its inception, has codified the criminal law, see *State v. Berberich*, 248 Kan. 854, 858, 811 P.2d 1192 (1991), meaning that legislative enactments define offenses. In doing so roughly a century and a half ago, Kansas joined what was then a modern trend—replacing common-law offenses with statutory proscriptions. See 1 LaFave, Substantive Criminal Law § 2.1(c), pp. 106-107 (2d ed. 2003). Codification shifted responsibility for defining criminal offenses from the courts through its published decisions to the legislature through the passage of statutes. Although the common law is explicated in judicial opinions, and thus written, the exposition is fragmentary in that a person would have to search out and review a range of those opinions on a given subject to grasp the breadth of a legal rule. For that reason, criminal justice systems dependent upon common-law offenses have been criticized as failing to provide "fair warning" of wrongful conduct. 1 LaFave, Substantive Criminal Law § 2.1(f), p. 117. Conversely, related statutes are typically collected and published in codes covering particular subjects and, thus, are more readily accessible. The Kansas Criminal Code is an apt example.

The legislative codification of crimes only underscores the fundamental importance of written notice of that wrongful conduct. Under the traffic-in-contraband statute, K.S.A. 21-3826, notification from the facility administrator is an essential part of the criminal prohibition without which the statute itself would fail to give fair notice of the offending conduct. The administrator's notification, then, operates as an extension of the statute necessary to its constitutional adequacy. It ineluctably follows that the notification should be of the same character and quality as the statute—in a written form of some permanency. Here, the jailer's oral notice lacked those attributes and, therefore, failed to afford constitutional fair notice.

That conclusion is not undone by the notion that statutes may be narrowed or clarified through judicial decisions to satisfy constitutional requirements of fair notice. See *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770 n.11, 108 S. Ct. 2138, 100 L. Ed. 2d 771 (1988). Those judicial determinations are themselves written. Similarly, some statutes prohibiting conduct expressly refer to administrative regulations to define impermissible acts. In turn, however, those regulations are written. See *United States v. International Min'ls Corp.*, 402 U.S. 558, 559-60, 563-65, 91 S. Ct. 1697, 29 L. Ed. 2d 178 (1971) (affirming conviction for violation of federal criminal statute incorporating by reference conduct outlined in the Code of Federal Regulations); *United States v. Mersky*, 361 U.S. 431, 437-38, 80 S. Ct. 459, 4 L. Ed. 2d 423 (1960).

The State's premise that it may provide nothing more than oral notification of conduct it has criminalized does not measure up to basic constitutional requirements of due process. If the rule were otherwise, the State simply could have town criers announce amendments to the Kansas Criminal Code at noon on July 1 each year from the steps of the county courthouse. The citizenry would then have oral notice of the State's criminal offenses. But that would be patently unacceptable. I presume Hammurabi would have cringed at that idea, and his code had to be carved into stone tablets to be published. With the advent of the printing press and (more recently) photocopiers and computers, the dissemination of written notice cannot be dismissed as prohibitively burdensome or costly. That would be a doubtful dodge to allow oral notification alone in this or some other felony case.

Where, as here, the proscribed conduct amounts to a felony, the State's obligation to provide fair (written) notice takes on far greater importance than with a civil statute imposing a monetary penalty. Felony convictions usually entail extended terms of punishment, including imprisonment for more than a year with substantial periods of probation or postrelease supervision. They strip offenders of significant public and civil rights, including holding elective office, voting, serving on juries, and possessing

firearms. See K.S.A. 21-4615; *e.g.*, 18 U.S.C. § 922(g)(1) (2006). Those convictions also preclude licensure in certain professions or trades and generally make employment more difficult. The potentially harsh punishments imposed for felonies require written notice of the offending conduct.

At the Stevens County jail, for example, there appears to have been no public notice to visitors as to what items may be considered improper under K.S.A. 21-3826, and, thus, might subject them to criminal prosecution. Likewise, there appears to have been no fixed notice to which inmates might refer to determine if they could receive particular items during their incarceration. The evidence in this case shows that the jail administrator considered nail clippers to be a prohibited item under the traffic-in-contraband statute, but the jailer never told Odell as much. It is unclear whether other inmates understood nail clippers to be forbidden or whether a friend of Odell's would potentially run afoul of the law by bringing nail clippers into the jail to give to her. That's why fair notice of felony offenses requires some accessible written form of the substantive proscriptions. Oral notice alone—even if accurate, as the town crier's rendition would be—fails the constitutional tests of substantive and procedural due process.[4]

[4] I do not expect fair notice of misdemeanor offenses could be effected through oral notification alone. But the issue is not presented on the facts, so I do not consider it. Nor do I presume exactly what due process requirements for fair notice would attend civil penalties or forfeitures.

Arguments for the sufficiency of oral notice fall short.

In *Watson*, 273 Kan. at 435, the court considered whether the traffic-in-contraband statute was impermissibly vague and concluded not, so long as the administrator of a given penal facility published adequate notice of the proscribed items. The void-for-vagueness doctrine doesn't undercut the conclusion that fair notice, at minimum, requires written rather than merely oral notice of actions considered to be felonies. The doctrine

mandates that the words composing the notice be reasonably understandable in communicating what conduct or actions are prohibited. *Grayned*, 408 U.S. at 108 ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined."); *Watson*, 273 Kan. at 430. But the doctrine does not specifically address whether the words need be in written form, although almost invariably they are because defendants typically challenge the clarity of the language of the criminal statutes applied to them. Courts decline to entertain such a challenge when the statutory language, in fact, clearly gives notice that the defendant's actions lie within that language and the purported vagueness would come into play only as to some other conduct of a hypothetical violator. *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 494-95 & n.7, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982); *State v. Williams*, 46 Kan. App. 2d 36, 43-44, 257 P.3d 849 (2011), *rev. granted* March 9, 2012. But, as I have suggested, the doctrine presupposes the words otherwise comport with constitutional requirements that, in my view, require they be written and published in some fashion. The void-for-vagueness doctrine is beside the point, just as it would be if a statute retroactively criminalized conduct in violation of the Ex Post Facto Clause or imposed harsher penalties based on a defendant's race in violation of the Equal Protection Clause. And while the language of the traffic-in-contraband statute would be impermissibly vague standing on its own without a clarifying description of prohibited items from a prison or jail administrator, that doesn't mean an oral clarification satisfies constitutional requirements that fair notice be in writing. Nothing in *Watson* or any other authority I found suggests the constitutional sufficiency of oral notice alone.

The possibility that written notice alone might be insufficient in some particularized circumstances does not undo written notice as a floor upon which fundamental fairness rests but merely demonstrates that something more may be required in certain instances. Obviously, in addition to being in writing, a jail administrator's list of contraband must be reasonably disseminated to those persons subject to its restrictions and, in turn, vulnerable to prosecution for trafficking in violation of K.S.A. 21-3826. An

administrator could not conform to *Watson* or the requirements of fair notice by preparing a written list and then sticking it in a file cabinet. The forbidden items would have to be reasonably publicized in some permanent form, such as signs posted in accessible areas of the facility or printed notices given visitors and inmates.

Someone would have to read the written list to illiterate inmates and, perhaps, document in the inmate's file that he or she had been so informed, when, and by whom. Non-English speaking inmates would have to be given written notice in their native language or have a translator read the notice to them. Those sorts of steps would be necessary for inmates confined in penal institutions because they otherwise lack access to reliable alternative means of obtaining fair notice. Augmenting required written notice in that way for certain individuals cannot curtail or dispense with the general constitutional right to fair notice.

Apart from those circumstances, however, fair notice does not require that statutes be readily available in languages other than English or that the government supply readers to assist illiterate persons. Written statutes are readily accessible, and persons with particular needs in assimilating them generally may be expected to make their own arrangements for doing so. The same would be true for visitors to a facility with posted notification of forbidden items.

Odell's prosecution and conviction offend the fundamental right to fair notice.

In sum, whatever the jailer may have told Odell about cigarettes and lighters as prohibited items—no matter how clear it may have been—that oral communication alone cannot form a constitutionally acceptable basis for a felony prosecution. Oral notification, as the sole means of establishing and communicating conduct that has been criminalized, fails to provide the fair notice required to satisfy the procedural and substantive due process protections afforded all citizens before they may be haled into court and

subjected to proceedings that may deprive them of their liberty and strip them of their civil rights.

If a government has obtained a conviction based on a felony statute that fails to provide the defendant fair notice, that conviction cannot stand and must be vacated. *FCC v. Fox Television Stations, Inc.*, 567 U.S. ___, 132 S. Ct. 2307, 2317, 183 L. Ed. 2d 234 (2012). So it should be with Odell.

The oral notice afforded Odell was constitutionally deficient in failing to identify her conduct as criminal.

Even if the premise of the State's position were correct and oral notice alone could provide constitutionally adequate due process, the jailer's explanation of prohibited items to Odell was grossly inadequate for that purpose. The oral notice was particularly deficient in conveying potential criminal liability for a violation. In similar circumstances, the Colorado Supreme Court affirmed the dismissal of criminal charges against a visitor charged with bringing contraband into a penal institution. *People v. Holmes*, 959 P.2d 406, 414 (Colo. 1998) (notice must convey "that introducing specific items into the facility is criminal conduct").

As outlined in the majority opinion, the jailer booking Odell attempted to explain to her what could not be brought into the facility. The jailer testified she asked Odell "if she had anything illegal that would be considered contraband; cigarettes, drugs, weapons, anything that she knew would not be allowed in the jail." The jailer only indicated she mentioned lighters as a prohibited item when prompted with leading questions from the prosecutor. But we are required to accept that testimony. As I have noted, the jailer, however, failed to offer a full and accurate list of prohibited items, since she omitted, at the very least, nail clippers.

The jailer seems to have identified three categories or groups of forbidden items. First would be illegal things, and they would be considered contraband, according to the jailer. I infer the jailer meant items that would be against the law to possess outside a penal facility. That would include illicit drugs, and if the inmate were between 18 and 21 years old, alcohol. Betting slips for professional sports contests would fall in that category. Cigarettes, lighters, and nail clippers would not. The second category consists of those specifically named items: cigarettes, drugs, weapons, and (with State assistance) lighters. It is unclear whether "drugs" refers to prescription and over-the-counter pharmaceuticals only or overlaps with the first category to include controlled substances. Weapons presumably include those items that could readily and obviously inflict some substantial degree of bodily harm, such as guns, knives, box cutters, and ice picks. A nail file and knitting needles might qualify. An emery board probably wouldn't. The final category borders on the metaphysical—those things Odell knows should not be allowed to have in a jail. I suppose the not-otherwise-mentioned alcohol would fall in that category. But it's hard to say what else makes the cut. What actually is prohibited may vary from facility to facility, since each administrator may compile a customized list of offending items. So Odell really would not have much way of surmising.

I do not intend to be unduly critical of the jailer who appears to have been trying to do her job without being overbearing or confrontational. The result, however, was less than illuminating and plainly failed to cover a lot of territory very well. I do, however, fault the jail administrator. It would not have been difficult or expensive to prepare a standard form listing prohibited items that could be presented to the inmate, signed, and placed in the inmate's file or some other repository. And for emphasis, jailers booking people into the jail could read the list, as well.

In this case, the way the evidence came in, Odell was told she could not possess cigarettes or a lighter as an inmate. As a general matter, the content of the notification

would have been wholly inadequate for all kinds of other items. Odell, however, cannot reap any benefit from those insufficiencies.

But the jailer's oral rendition failed to convey any meaningful information to Odell about potential consequences for possessing cigarettes or a lighter. And that does make a difference. Odell could reasonably assume possession of otherwise illegal items might subject her to criminal prosecution. After all, if she had them outside the jail, they would be just as illegal. But, of course, neither cigarettes nor lighters fall in that category. The distinction between illegal things, on the one hand, and otherwise lawful items, on the other, cultivates the reverse implication. So Odell reasonably might have concluded that secreted cigarettes and a lighter would be confiscated and she could receive a loss of privileges for her effort. Nothing, however, fairly suggested to her that she would be looking at more jail time, let alone a trip to a penitentiary.

The language of K.S.A. 21-3826 doesn't lend any clarity. The statute, as practically construed, permits an administrator to designate items that will be treated as contraband triggering prosecution for trafficking. But the statute in no way suggests that items necessarily must be either permitted or considered prosecutable contraband. An administrator could treat some things as improper and, thus, subject to confiscation without branding them contraband violating K.S.A. 21-3826. Those could be comparatively innocuous objects, such as candy that in quantity might prompt theft or become a medium of exchange for illicit items.

Notice, whether oral or written, must fairly apprise persons of the criminal nature of the proscribed conduct. See *Holmes*, 959 P.2d at 414. Absent such warning, a person could be unfairly prosecuted for possession of an otherwise lawful item in a jail or prison. 959 P.2d at 416 ("A notice that provides only that a particular item is prohibited does not provide notice that an item has been identified as 'contraband'" triggering criminal prosecution under Colorado's traffic-in-contraband statute.). The Colorado Supreme

Court held that due process requires that a person be afforded notice "that the introduction of the prohibited item is criminal conduct." 959 P.2d at 417. In *Watson*, 273 Kan. at 432-33, the Kansas Supreme Court found *Holmes* to be persuasive authority in construing K.S.A. 21-3826 and specifically cited the decision on this point. The rule laid down in *Holmes* is sound and reflects only that an administrative designation conform to the principles of fair notice. As in *Watson*, the Colorado jail provided written notice of prohibited items, so the *Holmes* court did not plumb the constitutional insufficiency of oral notice.

The additional notice requirement pertaining to criminal consequences is not onerous. It need only inform persons covered by the traffic-in-contraband statute that possession of certain items may subject them to criminal prosecution. Precise charges or penalties need not be described. See *Holmes*, 959 P.2d at 414. Here, Odell received nothing remotely comparable in the Stevens County jail. The oral notice failed to afford her due process. On that basis, consistent with the holding in *Holmes* and the related discussion in *Watson*, the prosecution of Odell violated her constitutional rights and should be dismissed.