KYDMS. (Keep Your Damn Mouth Shut). What on earth does that have to do with being a judge? Plenty, in my opinion.

Sometime last year, I read an article in The Bencher magazine, a publication for the American Inns of Court, about judges. It mentioned a New Hampshire judge who has “KYDMS” taped to his bench so that only he can see it. You see, many judges were, or are in the case of part-time judges, trial lawyers in private practice, and opinionated ones at that. So, we naturally have a tendency to pontificate from the bench, or worse. I believe the “KYDMS” message is some of the best advice I have read about being a judge. (Yes, I have it up on my bench).

After only a few years on the bench, we have seen the gamut of bad behavior, indifference, and malfeasance. Our nerves are shot. It is easy to explode, to lash out, to vilify, to demean, and yes, to act arrogantly. But yet, by the Code of Judicial Conduct, we are to be patient, dignified, and courteous to litigants, witnesses, lawyers and anyone else appearing before us. [(See Canon 3, B(4)].

Judge Robert Mulch, Scott City, was born and raised in Scott City, Kansas. His father was a farmer and former state legislator and his mother was a school teacher. After graduating from Scott City Community High School, Bob went on to Fort Hays College and then Washburn where he earned a degree in 1963 in Political Science and Economics. He continued his education at Washburn Law School. While in school he was diagnosed with a melanoma and had to have surgery and cancer treatments. He was able to finish law school, but the illness proved to be life changing. Although he started his legal career as a city prosecutor in Wichita, he also spent time as the County Attorney in Scott City and practicing law with a medium sized firm in Wichita. Then at the age of 32, he stayed true to the promise he made to himself years earlier. After his fight with cancer he had vowed that if he was still alive at 32 he would travel the world.

He traveled to 35 foreign countries over the next 8 years. He worked on contract as an Assistant Attorney General for the
Spotlight on: Robert V. Mulch

(Continued from page 1)

Trust Territories of Pacific Islands and lived in Saipan, “where
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At age 40, he received a call from his father requesting his
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However, none of the tragedy has kept Judge Mulch down for
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Judge Mulch has served as municipal judge in Scott City for
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-Hill City       Jim Deines
-Halsead        Mark Wilkerson
-Burton         Mike Llamas
-Sedgwick       Greg Nye
-Lincoln        Brian Grace
-Pratt           Robert Eisenhauer

2007 MUNICIPAL COURT
JUDGES CONFERENCE

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(Continued from page 1)
A sitting judge plans to apply for nomination as a district judge in a non-partisan district. The judge asks whether a judge who is seeking a district court appointment may ask an attorney (who has appeared or may appear before the judge) to submit a letter of support to the nominating commission.

The application form adopted by the particular nominating commission involved requires the form to be returned with the following included:

1. The names of two persons who can discuss the applicant’s general character and background.
2. The names of three other persons who can discuss the applicant’s professional competence and qualifications for a judicial position.
3. The names of attorneys involved in the applicant’s three most recent cases in which the applicant did significant work.
4. Current judges should list the three most recent trials over which the judge presided.
5. Not more than 10 letters of support may be submitted.

The application form does not require the applicant to ask attorneys to write letters of support. A judge should not do so. Such an act would not “promote public confidence in the integrity and impartiality of the judiciary.” Canon 2A (2005 Kan.Ct.R.Annot. 559).

The issuance of bonds to finance the construction of a new jail in the judge’s district will be submitted to the electorate by ballot for approval. The question before us is whether the judge can publicly encourage the voters to approve the bond issue.

Yes. Canon 4B (2005 Kan.Ct.R.Annot. 569) provides in pertinent part that judges “…may speak, write, lecture, teach, and participate in other extra-judicial activities concerning…” the administration of justice.

The issuance of bonds to finance the new jail directly involves the administration of justice and may, therefore, be encouraged by the judge.

Prior to becoming a judge, the judge and judge’s spouse purchased an office building in a small county seat town. The building was titled in the name of the spouse and the judge asserts that the spouse is the owner of the building. The building bears the surname of the judge, which the judge plans to remove. The judge and another lawyer, hereinafter, the other lawyer, engaged in the private practice of law in this building separately as sole practitioners and the other lawyer continues to do so. The judge’s spouse operates an insufficient funds check collection business in the building at this time with assistance of the other lawyer. We understand that the spouse has leased the building to the other lawyer or, if not, she proposed to do so

(Continued on page 4)
The method of obtaining U.S. citizenship has been the primary focus of our federal congressional representatives over the last few months. It was an issue 60 years ago in Kansas as well.

Martin Ludwig Cohnstaedt was born in Germany in 1917. He came to the United States in 1937, attended various schools, and in 1946 became a sociology and economics teacher at Sterling College in Sterling, Kansas. In 1947 he filed a petition to become a naturalized citizen of his new homeland. There is no dispute that Martin was of good character and reputation. When asked as part of the application interview, he stated that he subscribed to the principles enumerated in the Constitution of the United States and that he agreed to support and defend the Constitution and laws against all enemies and to bear true faith and allegiance to the United States.

However, as part of his interview he also stated that he believed the existence of armed service was not necessary in a Christian nation, and that he was willing to repealed all laws providing for armed services. He stated that he was not an ordained minister but he was a member of the Society of Friends. He further stated that he was willing to perform any duty which the government required which did not conflict with his religious beliefs, but that he could not contribute anything to be used solely and directly in furtherance of armed conflict. He said he was opposed to sending arms and ammunition to our allies in the recent war; that he was not willing to work in a munitions factory in time of war and assist in manufacture of munitions for the purpose of destroying enemy forces whose aim it would be to destroy the armed forces of the United States. He stated in time of war it would be permissible for civilians to remove the wounded from a battlefield and he would do so, but he would not deliver ammunition to men at the front who were engaged in combat duty.

Well, needless to say, at the end of World War II, after allied forces had just defeated Hitler Germany, this conversation did not sit too well with the immigration authorities. Martin’s petition was denied.

Prior to 1946, the Supreme Court of the United States had held that an alien who refused to bear arms would not be admitted to citizenship. That changed with its decision in Girouard v. United States, 328 U.S. 61 (1946). In Girouard, the Court found that a promise to bear arms was not a prerequisite to citizenship. The requirement is no where in the statutory oath:

(Continued from page 3)

**Question:** Does this lease transaction violate the Code of Judicial Conduct:

**Answer:** No.

**Discussion:** The financial activities of a judge are covered by Canon 4D, (2005 Kan. Ct. R. Annot. 571). The judge’s spouse has leased or proposed to lease this building to the other lawyer and the spouse continues to have frequent transactions and a continuing business relationship with the other lawyer who will frequently be before the court on which the judge serves. The judge will not be engaging in financial or business dealings with the other lawyer. The financial dealings involved will be between the judge’s spouse and the other lawyer and we do not believe that these dealings reasonably appear to exploit the judge’s judicial position.

We find no violation of the Code of Judicial Conduct.

**Opinion JE 145**

**September 11, 2006**

**Question:** May a sitting Hispanic judge lend her photograph and a short biography to the YWCA as a depiction of a positive role model for young Latinas in the community during “Hispanic Heritage Month?”

**Answer:** Yes. The judge is not receiving an award, the judge is not receiving a gift of money or anything else. The issue raised is whether the depiction of the judge as a role model will convey the impression that the YWCA is in a special position to influence the judge. We find it is not. See Canon 2B, 2005 Kan.Ct.R. Annot. 560 and JE 140.

**Opinion JE 146**

**October 12, 2006**

The judges of a judicial district have hosted a dinner at their personal expense for state representatives and county commissioners in that district for the purpose of allowing the judges, legislators and commissioners to interact in a social setting and get to know each other.

They are now contemplating another one of those dinners but have become concerned as to whether these dinners violate Canon 2B, 2005 Kan.Ct.R. Annot. 560; Canon 4A(1), 2005 Kan.Ct.R. Annot. 569; and Canon 4C(1), 2005 Kan.Ct.R. Annot. 570.

We have examined these Canons and are of the opinion that these dinners do not violate the Canons cited so long as the discussions are limited to issues concerning the improvement of the law, the legal system and the administration of justice as well as matters of general local interest.

(Continued from page 9)
rights and speak with me today?” in the affirmative, or can he just start talking and thereby waive the rights by implication?

According to Miranda, “a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained.” 384 U.S. at 475. However, in North Carolina v. Butler, 441 U.S. 369, 373 (1979) the Supreme Court held that an express statement of waiver is not indispensable to a finding of waiver. The Court must simply be able to find some additional evidence of waiver. “As was unequivocally said in Miranda, mere silence is not enough. That does not mean that the defendant’s silence, coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has waived his rights.”

Therefore, silence alone is not enough, but silence along with other evidence may be enough. In Kirtdoll, after the officer asked Kirtdoll if he understood his rights, and he said he did, the officer launched into questions about various names Kirtdoll was known by. The Kansas Supreme Court looked at Kirtdoll’s age, intellect, the fact that he had rights read to him before, the duration and manner of the interrogation, his ability to communicate with the outside world on request, and the fact that he later did invoke his right to remain silent, in concluding that the defendant did impliedly waive his Miranda rights.

THE ROLE OR THE LAWYER IN A CRIMINAL CASE

In a criminal case, the defendant has the right to make three key decisions: (1) what plea to enter; (2) whether to waive jury trial; and (3) whether to testify in his or her own behalf. Trial counsel has the responsibility for making tactical and strategic decisions including the determination of which witnesses will testify. Even though experienced attorneys might disagree on best tactics or strategy, deliberate decisions based on strategy may not establish ineffective assistance of counsel. Strategic choices based on a thorough investigation of the law and facts are virtually unchallengeable. Strategic choices based on less than a complete investigation are reasonable to the extent that reasonable professional judgment supports the limitation on the investigation. Flynn v. State, ___Kan.____(June 9, 2006).

IDENTITY OF OFFENSES

In another in an ever growing line of cases discussing identity of offenses and multiplicity in charging, with lengthy discussions distinguishing the previous cases, the Supreme Court held in State v. Fanning, ___Kan.____(June 9, 2006) that possession of drug paraphernalia with the intent to manufacture methamphetamine is not identical to attempted manufacture of methamphetamine.

BURDEN OF PROOF IN PROBATION REVOCATION CASES

Reiterating its prior decision in State v. Lumley, 267 Kan. 4 (1999) the Supreme Court held in State v. Gumfory, ___Kan.____(June 9, 2006), that in order to sustain an order revoking probation on the ground that a probationer has committed a violation of the conditions of probation, commission of the violation must be established by a preponderance of the evidence. Once there has been evidence of a violation of the conditions on which probation was granted, the decision to revoke probation rests in the sound discretion of the trial judge. Discretion is abused only if no reasonable person would have taken the position taken by the court.

NO-KNOCK WARRANT SEARCHES DO NOT MANDATE SUPPRESSION OF EVIDENCE SEIZED

Detroit police obtained a search warrant authorizing a search for drugs and firearms at the home of Booker Hudson. When the police arrived to execute the warrant, they announced their presence, but waited only a short time-perhaps “three to five seconds” before turning the knob of the unlocked front door and entering Hudson’s home. They found lots of drugs and firearms. The case eventually wound its way to the United States Supreme Court. In Hudson v. Michigan, ___S.C.t____, 2006 WL 1640577 (June 15, 2006), the Court was asked to decide whether or not violation of the “knock and announce” rule required suppression under the Fourth Amendment of all contraband seized from Mr. Hudson. Michigan conceded that the entry was in violation of the long established “knock and announce” rule and there was not sufficient evidence that this was a “no knock” situation. (For a summary of no-knock v. knock-and-announce standards see The, Verdict, Winter 2004, pg. 5).

(Continued on page 6)
The Verdict

(Courts Watch)

In a 5-4 decision written by Justice Scalia, the Court held that “an impermissible manner of entry does not necessarily trigger the exclusionary rule.” The majority stated that there had to be a causal relationship between the unlawful conduct and the discovery of evidence. Although clearly the entry was unlawful, the evidence was discovered pursuant to the execution of a lawful warrant. The purpose of the “knock and announce” rule is to avoid violence (since an unannounced entry may provoke a defensive violent act by the resident), protection of property (a forcible entry could destroy property), protection of the dignity of the resident (a chance to get clothes on, get out of bed, etc.).

“What the knock-and-announce rule has never protected,” the majority opined, “is one’s interest in preventing the government from seeking or taking evidence described in a valid warrant.” Therefore, “since the interests that were violated in the case have nothing to do with the seizure of evidence, the exclusionary rule does not apply.”

So if the exclusionary does not apply, what is to prevent continued police misconduct and violation of Fourth Amendment rights? “Even if this were accurate,” Justice Scalia wrote, “it would not necessarily justify suppression.” Civil lawsuits under 42 U.S.C. §1983 would certainly be a deterrent. In addition, he writes, “another development over the past half-century that deters civil-rights violations is the increasing professionalism of police forces, including a new emphasis on internal police discipline...it is not credible to assert that internal discipline, which can limit successful careers, will not have a deterrent effect.”

Justices Breyer, Stevens, Souter and Ginsburg filed a dissenting opinion.

SEARCH OF PASSENGER’S PURSE LEFT IN VEHICLE

Police officer stopped a vehicle for an inoperative tail light. Upon stopping the vehicle, the officer noted some suspicious movements among the driver and the two passengers. He also found that the driver had an outstanding warrant. He had the driver step to the rear of the vehicle while he handcuffed him. He continued to notice suspicious movements by the passengers inside the vehicle, including pushing or pulling something from under the front seat. He asked the passengers to exit the vehicle and sit on the grass near the car. They complied. Passenger Groshong took nothing with her as she exited the vehicle and requesting nothing from inside the vehicle. The officer did not handcuff or place either passenger under arrest.

The driver refused the officer’s request to search the vehicle for contraband. However, the officer did have the drug dog with him and had it sniff search around the vehicle. Before letting the dog loose, he conducted a safety check of the interior of the car by illuminating it from the exterior with his flashlight. He observed a small bag containing what appeared to be marijuana lying on the floor between the front seats. After retrieving the baggy, he informed the driver he was going to search the entire vehicle.

At this point, Groshong requested her purse from inside the vehicle. Citing safety concerns, the officer denied the request. He found her purse in the front passenger area of the car, and inside it he found marijuana and a pipe.

Groshong moved to suppress the evidence claiming that the search of her purse violated her Fourth Amendment rights. She argued that her purse was an extension of her and a search of the purse was the same as a search of her person, for which there was no probable cause.

In State v. Groshong, __ Kan. ___ (June 9, 2006) the Kansas Supreme Court held that a law enforcement officer may search a passenger’s purse left in the vehicle when the passenger exits, if the passenger makes no effort to retrieve the purse before probable cause to search the vehicle develops. Once probable cause develops, the purse is treated the same as any other package or container in the vehicle that could hold or conceal the object of the search.

IMPERFECT SELF-DEFENSE

In State v. Lawrence, __ Kan. ___ (June 9, 2006) the Kansas Supreme Court was asked at what point the “imperfect self-defense” instruction should be given under the facts of a first degree murder case.

“Imperfect self-defense” is codified at K.S.A. 21-3403 (1995): “Voluntary manslaughter is the intentional killing of a human being committed upon an unreasonable but honest belief that circumstances existed that justified deadly force…” See also, PIK 3rd 56.05.

Under the doctrine of "imperfect self-defense," when the trier of fact finds that defendant killed another person because defendant actually but unreasonably believed he or she was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and thus can be convicted of no crime greater than involuntary manslaughter.

“Applying this partial defense to intentional killings is simply a recognition of the practical realities of plea bargaining and jury verdicts. Often it is unjust to prosecute and convict such killers of murder and it is equally unjust to acquit them. This new subsection provides a middle category that is theoretically sound and legitimizes the realities of plea bargaining and jury verdicts.” State v. Ordway, 261 Kan. 776 (1997).

(Continued on page 7)
This doctrine is mentioned, herein, solely to distinguish it from the general theory of self-defense, which relies on “a reasonable belief” that use of force was necessary to defend oneself, another or property. Regular self-defense claims are an objective test (were the defendant's beliefs reasonable?). Under imperfect self-defense, a subjective test is used (the defendant’s beliefs were unreasonable, but honest). “Imperfect self defense” is only used in the context of reducing 2nd Degree Murder to Voluntary Manslaughter. In all other contexts, the “reasonable belief” standard for self-defense is used.

SEVERANCE

State v. Winston, ___ Kan. ___ (June 9, 2006) deals with the issuance of severance. Severance is the process of trying two or more defendants separately when they are jointly charged with the same crime. K.S.A. §22-3204 (1995) governs severance in district court cases. “When two or more defendants are jointly charged with any crime, the court may order a separate trial for any one defendant when requested by such defendant or by the prosecuting attorney.” In Winston, the Supreme Court held that severance lies within the sound discretion of the trial court and should occur only after a defendant has established that there would be actual prejudice if a joint trial occurred. In making this decision the court must consider: (1) whether the defendants have antagonistic defenses; (2) whether there is important evidence in favor of one defendant which would be admissible in a separate trial but not in a joint trial; (3) whether there is evidence incompetent as to one defendant and introducible against another which would prejudice the fact finder against the defendant against whom the evidence cannot be admitted; (4) a confession by one defendant that would prejudice the other(s); (5) one of the defendants who could give evidence against or for another defendant in a separate trial, but would not have to testify in a joint trial.

This case is noted to point out that the provision regarding severance in the Kansas code of procedure for municipal courts appears at K.S.A. §12-4506 (2001). It states, “Where two(2) or more persons are separately or jointly accused by a complaint of a violation of an ordinance arising out of the same general state of circumstances, such persons may be tried separately or jointly. Provided, That where an accused person, so requests, he or she shall be tried separately.” Therefore, there does not seem to be any discretion in municipal court cases if the accused requests a separate trial. However, if the defendant has not requested severance, but the prosecutor has, it would appear the municipal court would have discretion and should weigh the same factors listed in Winston.

POLICE CAN ENTER HOME WITHOUT A WARRANT UNDER EXIGENT CIRCUMSTANCES

Police responded at 3 a.m. to a call about a loud party. When they arrived they heard shouting inside the house. There were two juveniles drinking beer in the backyard. Entering the backyard they saw through a screen door and window an altercation in the kitchen between four adults and a juvenile, who punched one of the adults, causing him to spit blood in the sink. An officer opened the screened door and announced their presence. Unnoticed amid the turmoil, they entered the kitchen and again announced their presence. The altercation starting breaking up and the officers arrested Charles Stuart and others for contributing to the delinquency of a minor as well as other offenses.

The trial court suppressed all evidence obtained by the officers after entering the house on that ground that this warrantless entry violated the Fourth Amendment. The Utah Court of Appeals affirmed and held that the injury caused by the juvenile’s punch was insufficient to trigger the “emergency aid doctrine” because it did not give rise to an objectively reasonable belief that an unconscious, semicomatose, or missing person feared injured or dead was in the home. In addition, when the officers entered the house, they did not seek to assist the injured adult, but instead acted exclusively in a law enforcement capacity, investigating and charging criminal violations.

The United States Supreme Court agreed to take the case. In Brigham City, Utah v. Stuart, ___ S.Ct. ___ (May 22, 2006), the Court, in a unanimous opinion, reversed and held that the officers’ entry was plainly reasonable under the circumstances. “Nothing in the Fourth Amendment required them to wait until another blow rendered someone unconscious, semiconscious or worse before entering.” The manner in which they entered was also reasonable. It was at least equivalent to a “knock and announce.” “It would serve no purpose to make them stand dumbly at the door awaiting a response while those within brawled on, oblivious to their presence.”

The defendants had argued that the officers were more interested in making arrests than quelling violence and this, they argue, should be considered in assessing the reasonableness of the entry. The Supreme Court held that the subjective intent of law enforcement is irrelevant. The officers had an objectively reasonable basis for believing that the injured adult might need help and that the violence in the kitchen was just beginning. “The role of the police officer includes preventing violence and restoring order, not simply rendering first aid to casualties. An officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided.”
In an interesting concurring opinion, Justice Stevens calls this a “flyspeck” of a case with relatively minor charges that has been six years in the legal system, “with the Court’s unanimous opinion restating well-settled rules of federal law so clearly persuasive that it is hard to imagine the outcome was ever in doubt.” He proceeds to try and speculate why the case ever got so far and concludes that the Utah Supreme Court must have been interpreting the Utah Constitution, which may provide greater privacy in the home than the U.S. Constitution, and simply forgot to highlight it as an independent basis for the decision.

OFFICERS REASONABLE, BUT MISTAKEN, BELIEF THAT TRAFFIC INFRACTION WAS COMMITTED, DOES NOT REQUIRE SUPPRESSION OF EVIDENCE OBTAINED AFTER THE STOP

Sedgwick County Sheriff’s Department set up a DUI check lane on the east side of a bridge. A deputy was assigned to drive a “chase car.” He would chase vehicles that elude the checkpoint and stop them if they commit a traffic violation.

Jon Kotas drove up in a black Subaru. When it got to the middle of the bridge, he slowed down and made a U-turn across solid double yellow lines and headed back west on the same street. There were no vehicles approaching in the opposite direction when he made the turn. He was not exceeding the speed limit. There were no signs prohibiting U-turns on the bridge. The deputy stopped Kotas and wrote him a ticket for making a U-turn when it was not safe and clear in violation of K.S.A. §8-1546(a) (See, STO §51). He then developed probable cause and charged Kotas with DUI.

At the suppression hearing, the district court judge found that the U-turn was not illegal under the language of the statute because there was no evidence that it was “un-safe.” It found the officer’s belief that the law had been violated to be unreasonable, and suppressed the DUI evidence.

The State appealed and in State v. Kotas, ___ Kan.App.2d ___ (May 26, 2006), the Court of Appeals reversed. It found that the evidence was uncontroverted that several cars had to slow down to avoid colliding with Kotas; state law prohibits stopping, standing or parking on a bridge which leads credence to the argument that it is unsafe to stop and make a U-turn on a bridge; areas where motorists are not allowed to cross the center line are designated with double-yellow lines again giving credibility to the argument that crossing the double yellow line is unsafe; and it was dark out. Therefore, the deputy had a reasonable belief based on all the circumstances that a U-turn violation had been committed. The Fourth Amendment was not violated. The evidence after the stop comes in.

FRESH PURSUIT INCLUDES OBSERVING A VIOLATION WITHIN THE CITY WHILE LOCATED OUTSIDE THE CITY AND STOPPING OUTSIDE THE CITY (HUH?)

Newton Officer Hall was traveling on a highway outside of the city of Newton. However, he could see other portions of the highway which were within the city limits. He saw a vehicle within the city limits traveling 8 miles over the speed limit. By the time he stopped the vehicle, she was outside the city limits. He eventually found drugs in the car.

In State v. Hayes, ___ Kan.App.2d ___(April 28, 2006), the Court of Appeals held that although Officer Hall was outside the city limits when he observed the traffic violation, the driver was within the city limits when she committed it. Without unnecessary delay, Officer Hall briefly pursued and stopped her vehicle just outside the city limits. This is proper under the doctrine of “fresh pursuit” codified at K.S.A. 2005 Supp.§22-2401a(2)(b).

RETURN OF A DRIVER’S DOCUMENTATION DOES NOT ALWAYS MEAN THE ENCOUNTER HAS BECOME CONSENSUAL

In the same case, State v. Hayes, ___ Kan.App.2d ___(April 28, 2006), the officer stopped the driver and asked her a series of questions about where she had been, where she was going and who her passenger was. He then returned to his car and waited for a back-up officer to arrive and a computer check to be done. He then went back to the car and asked the driver to come back to the back of the car with him. He handed her the driver’s license and insurance paperwork and told her he was going to give her a warning and that if she was concerned they were done. He then asked her if he could ask her some more questions. He asked her numerous questions similar to the ones he had asked initially and asked if she had any drugs in the car. She said no, and he asked if she minded if he searched. She said yes, and the officer asked the passenger to step out of the vehicle. He found drugs and ultimately charged the passenger, Slone Hayes, with possession.

The Court found that Hayes, as a passenger in the car, had standing to challenge the search. It also found that returning the driver’s documentation does not always indicate that an encounter has become consensual. The Court must consider whether a reasonable person in the defendant’s position would feel free “to disregard the police and go about his business.”

In this case it was 2:25 a.m.. Two officers and patrol cars were at the scene. Emergency lights were flashing. When the officer returned her documentation, the driver was not in the vehicle. She was required to step out of her vehicle to get her “warning.” Although he said he was going to give her direc-
The Verdict

A Step Back in Time

"I hereby declare on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state or sovereignty of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and the laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I take this obligation freely without any mental reservation or purpose of evasion. So help me God."

Even though the question “If necessary, are you willing to take up arms in defense of this country?” appears on the application, it is not a statutory prerequisite to citizenship that the applicant answer in the affirmative. The Court pointed out that such religious scruples would not disqualify a person from becoming a member of Congress or holding other public office, the oaths being very similar. “There is not the slightest suggestion that Congress set a stricter standard for aliens seeking admission to citizenship than it did for officials who make and enforce the laws of the nation and administer its affairs. It is hard to believe that one need forsake his religious scruples to become a citizen, but not to sit in the high councils of state.” Id. at 65.

So, when Martin appealed the denial of his application to become a naturalized citizen to the district court in Barton County, he cited Girouard. His application was again denied. He appealed. In, Cohnstaedt v. Immigration and Naturalization Service, 167 Kan. 451 (1949) the Kansas Supreme Court held that Girouard stood for the proposition that citizenship could not be denied to someone who is willing to take the oath of allegiance and serve in the army as a noncombatant. But Martin, wasn’t even able to commit to serving as a noncombatant! The most he had agreed to was carrying the wounded from the battlefield. He is not entitled to citizenship. INS was correct to deny his application, opined the Kansas court.

With the help of the ACLU, Martin appealed his case to the United States Supreme Court. The Court issued a per curiam opinion, simply reversing the Kansas Supreme Court and citing Girouard. See, Cohnstaedt v. Immigration and Naturalization Service, 339 U.S. 901 (1950).

Postscript: Martin Ludgwig Cohnstaedt, therefore, became a naturalized U.S. citizen. He was never asked to remove any wounded from the battlefield in defense of his new country. However, he did leave Sterling College and was living in Wisconsin and completing a Ph.D by the time the decision was final. Eventually he became frustrated with American politics and by 1967 he had moved to Canada where he taught at the University of Regina. After 11 years on the faculty he sued the University when they tried to force him to retire.

ATTENTION:

DUI offenses occurring after July 1, 2006 can no longer be expunged.

Court Watch

The Verdict

(Continued from page 8)

In another case involving an unlawful detention, this one decided by the Kansas Supreme Court, the facts were as follows.

Three Wichita officers stopped Billy Anderson, a man well known to them as a serious bad guy involved in drugs and gang activity for speeding and crossing the center line. They also observed some slightly suspicious activity, which was clearly not enough to have stopped him. Anderson’s passenger was also a known bad guy. Neither had any outstanding warrants and Anderson’s driver’s license was valid. Anderson was on probation.

The officers radioed for backup and called in a dog to search the truck. About 35 minutes after the initial stop, two more officers arrived and a police captain. At this point, the officer who initiated the stop asked Anderson to step from the truck, patted him down for weapons, found nothing and then issued him a speeding ticket. He returned the identification to Anderson and his passenger. Anderson signed the citation and the officer asked Anderson whether he could search the truck. Anderson refused. The officer then advised Anderson that the drug dog was on its way and he was not free to leave. He was told to wait outside his truck. When the passenger exited the vehicle, the officers saw a plastic baggie of marijuana sticking out of his shoe. The dog arrived and one of the officers said it alerted to the truck, but the search that followed uncovered no contraband. Anderson was kept 30-40 feet away during the search.

The officers then roused a special enforcement officer with the department of corrections from sleep by phone and told him that Anderson was a gang member, found with a known gang member who was in possession of marijuana. The agent gave the officers oral permission to arrest Anderson (pursuant to K.S.A. 2005 Supp. §75-5217) based on this information and then he left a written arrest and detain order dated the following day in his door for the officers to pick up.

The officers attempted to arrest Anderson. He ran. He was caught and lots of drugs were found.

In State v. Anderson, ___ Kan. ___ (June 9, 2006), the Kansas Supreme Court held that Anderson’s detention became unreasonable and thus unlawful when they asked him to step from the truck, searched the truck, and found nothing. Any reasonable suspicion the officers had at that point regarding drug activity was dispelled. They were required to let him go on his way and anything obtained after this point must be suppressed. The officers knew this. That’s why they then tried to pursue the route of getting a warrant through the department of corrections. The “oral” arrest and detain order that they received from the probation officer was insufficient under the statute and violation of conditional release is not a crime under the criminal code to justify arrest pursuant to K.S.A. 2005 Supp. §22-2401. Therefore, Anderson’s conviction was reversed.

RETURN OF A DRIVER’S DOCUMENTATION DOES NOT ALWAYS MEAN THE ENCOUNTER HAS BECOME CONSENSUAL - PART TROIX; COURT EXPRESSES DISAVOWAL WITH THE COLUMBO APPROACH

Dennis Thompson was stopped by police in McPherson for a faulty headlight. The officer asked Thompson for his license and insurance documentation. He determined there were no warrants or warrants for Thompson. The officer called for a back-up and told the back-up that he intended to ask Thompson for consent to search his vehicle. The back-up arrived. The officer gave Thompson back the identification documentation, issued a verbal warning, and told Thompson to have a good day. The defendant said “thank you.” The officer then asked Thompson if he could ask him such additional questions which ultimately resulted in Thompson’s consent to search the vehicle and his later written permission to search his garage. Thompson was charged with several drug charges as well as manufacture of methamphetamine.

Thompson challenged the search as exceeding the scope and duration of the stop.

The State conceded that the officer had no reasonable and articulable suspicion that Thompson was engaged in illegal activity prior to the search. Therefore, the sole issue is whether or not the search was consensual. In State v. Thompson, ___ Kan.App.2d ___ (July 24, 2006), the Kansas Court of Appeals found that the encounter was not consensual. It cited the following factors that weigh against the consensual nature of the encounter:

1. The officer expressed a pre-stop desire to seek consent to his back-up officer;

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2. There was no disengagement of the officer after returning the documentation (driver’s license, etc.) (this was its paramount finding according to the Court);
3. The emergency lights of the patrol vehicle continued to be activated at the time consent was requested; and
4. The defendant testified he did not feel free to leave.

The Court suppressed all the evidence found in the car and the garage and concluded by stating:

"We recognize that the suppression of the evidence here may deal the prosecution a near fatal blow in this case, but...Our court has experienced ever-increasing appeals with nearly identical fact patterns, indicating that there may be a perception in the field that a “bright line rule” merely requires the return of documentation to cleanse additional questioning. This has given rise to what has been characterized as “the Lieutenant Columbo gambit,” or the “by the way, can I ask you just one more question?” When evaluating such action under Fourth Amendment jurisprudence and Kansas statutes, the State has the burden to demonstrate that the driver has an objective reason to believe that he or she was free to simply terminate the encounter and drive away. Often the balance is between vindicating the officer’s hunch and actualizing the liberty interest under the Fourth Amendment; in close cases, the preferred choice between such interests is clearly in favor of the Fourth Amendment rights of the driver."

USE OF INTERPRETER DURING QUESTIONING

Ngan Pham was questioned by police as part of a murder investigation. Prior to conducting the formal interview, the detective asked Pham if he understood English. Pham replied he did. When the detective asked him if he wanted an interpreter, he replied he did not need one. Pham had lived in the United States for 25 years. His primary language was Vietnamese. The detective gave Pham the Miranda warnings by having Pham read them aloud from the card to the detective.

On appeal from his conviction, Pham argues, among other things, that pursuant to K.S.A. §75-4351(e) he should have been provided an interpreter. And since he was not, his confession must be suppressed. K.S.A. §75-4351(e) states that a qualified interpreter shall be appointed for persons whose primary language is one other than English “prior to any attempt to interrogate or take a statement from a person who is arrested for an alleged violation of a criminal law of the state or any city ordinance.”

In State v. Pham, ___ Kan. ___ (June 16, 2006), the Kansas Supreme Court reiterated its prior holdings by finding that this statute is not a rule of evidence. The statute does not contain any sanctions for a violation thereof. On the contrary, the purpose of K.S.A. §75-4351(e) is to provide the machinery for the selection, appointment and compensation of interpreters under various circumstances. Whether or not an interpreter is appointed and is present at the taking of a statement, the trial court must still determine whether an incustody statement was freely, voluntarily and knowingly given, with knowledge of the Miranda rights. Such a determination is based on the totality of the circumstances. The court will examine, as in any confession analysis, the duration and manner of interrogation, the ability of the accused on request to communicate with the outside world; the accused’s age, intellect, and background; and the fairness of officers conducting the investigation. The accused’s understanding of the English language is an additional consideration. However, the absence of an interpreter is not dispositive of a confession’s admissibility. The totality of the circumstances must be considered. In this case, the Court found the confession was knowingly and voluntarily given.

UNITED STATES SUPREME COURT UPHOLDS KANSAS DEATH PENALTY STATUTE

On June 26, 2006, the United States Supreme Court upheld the Kansas death penalty statute.

The provision in question, K.S.A. §21-4624(c), states in pertinent part:

“If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625...exist and, further that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist...the defendant shall be sentenced to death...” (Emphasis added).

The Kansas Supreme Court found that this requires that in the case of a tie (also referred to as when the balancing factors are “equipoise”), the penalty must be death. However, the Kansas Supreme Court held that fundamental fairness re-
The United States Supreme Court disagreed. In Kansas v. Marsh, ___S.Ct. ___ (2006) the high court found that the Kansas Supreme Court’s decision was not supported by adequate and independent state grounds and that the statute does not violate the Eighth Amendment. The Court held that as long as the defendant has the right to present mitigating factors to the sentencer and the sentencer is required to consider the same, the specific method for balancing mitigating and aggravating factors is up to the legislature. The Kansas statute rationally narrows the class of death-eligible defendants consistent with the Eighth Amendment to those convicted of capital murder for whom the State seeks a separate sentencing hearing. The State must then prove, beyond a reasonable doubt, the existence of one or more statutorily enumerated aggravating circumstances. The jury must consider each mitigating factor presented by the defense. The State then has the additional burden to prove beyond a reasonable doubt that the mitigating factors do not outweigh the aggravating factors. The Court characterized the argument that a jury’s determination that aggravators and mitigators are in equipoise is a decision for death as implausible. It found that a finding that they are in equipoise is not a decision at all.

“Weighing is not an end; it is merely a means to reaching a decision. The decision the jury must reach is whether life or death is the appropriate punishment...

“The dissent’s general criticisms against the death penalty are ultimately a call for resolving all legal disputes in capital cases by adopting the outcome that makes the death penalty more difficult to impose. While such a bright-line rule may be easily applied, it has no basis in law. Indeed, the logical consequence of the dissent’s argument is that the death penalty can only be just in a system that does not permit error. Because the criminal justice system does not operate perfectly, abolition of the death penalty is the only answer to the moral dilemma the dissent poses. This Court, however, does not sit as a moral authority. Our precedents do not prohibit the States from authorizing the death penalty, even in our imperfect system. And those precedents do not empower this Court to chip away at the States’ prerogatives to do so on the grounds the dissent invokes today.”

This case is very interesting reading, but not for the majority opinion. The concurring opinion by Justice Scalia and the dissenting opinion by Justice Souter are both very interesting and leave no doubt which side each justice falls on when it comes to the issue of the death penalty. Interested judges would gain a lot of insight by reading the entire set of opinions in the case.

ATTORNEY’S FAILURE TO INVESTIGATE DOES NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL WHEN THE DEFENDANT WITHHELD INFORMATION FROM THE ATTORNEY WHICH WOULD HAVE TRIGGERED SAID INVESTIGATION

Alderson and Harris fired several shots at a car that was driven by Goodwin. Goodwin was killed by one of those shots. Throughout trial preparation and trial, the theory of Alderson’s defense was that his shot was not the one that killed Goodwin. The fatal shot came from a 9mm handgun. Alderson claimed throughout that he fired a 38mm handgun. Although several witness linked Alderson to the 9mm, there was evidence tying Harris to the 9mm. Before he died, Goodwin told his wife and the police that a black man shot him. Harris was black. Alderson was white. The State did not request an aiding and abetting instruction. It was relying on the fact that Alderson fired the fatal shot.

However, toward the end of trial, during his own testimony, Alderson, for the first time, said he only shot at Goodwin’s car when it started coming toward him, thus opening up the possibility of a self-defense argument. In the appeal of his conviction, Alderson argues that his attorney was ineffective because she did not ask for an emergency continuance to pursue the self-defense strategy. In Alderson v. State, ___Can.App.2d ___ (June 30, 2006), the Kansas Court of Appeals held that in determining whether a defendant has been afforded effective assistance of counsel, the adequacy or reasonableness of the attorney’s action is conditioned on the defendant’s own action or inaction. An attorney can’t be charged with failure to investigate when the client withheld information that would have triggered said investigation. Defense counsel is justified in relying on the truthfulness of a defendant’s statements when deciding the particular defense strategy to pursue. In this case, the defendant was able to present his defense to the jury through his own testimony. He was not denied his right to a fair trial. His convictions stands.

FOR PBT RESULTS TO BE ADMISSIBLE, MUST BE ON A DEVISE APPROVED BY KDHE

K.S.A. §65-1,107(d) (2002) states that the Kansas Department of Health and Environment (KHDE) may adopt criteria for the use of PBT devises for law enforcement purposes and subsection e of the same statute provides that KDHE may establish a list of PBT devises which are approved for testing breath for law enforcement purposes. The regulations adopted by KDHE are contained at K.A.R. 28-32-6 and the list of approved devises is at K.A.R. 28-32-7(a). Pursuant to the regulations, other devises can be used if they are evaluated by KDHE and meet the requirements of K.A.R. 28-32-6. K.S.A. §65,1,109 (2002) makes it a class C misdemeanor to test human breath for law enforcement purposes unless the testing device is approved by KDHE.
Court Watch

(Continued from page 12)

James Leffel was stopped for crossing the centerline. The officer smelled the odor of alcohol and Leffel admitted drinking. Field tests were not possible due to a leg disability. Leffel agreed to take a PBT. The Alco-Sensor IV was used and the results showed a breath alcohol concentration above the legal limit of .08. At his administrative hearing on his driver’s license suspension, Leffel argued that the officer lacked probable cause to arrest him. He lost and on the appeal from his suspension, he argues that the PBT results should not have been considered because the Alco-Sensor IV is not a listed approved devise under K.A.R. 28-32-7 and there was no evidence that it had evaluated by KDHE as required by the regulations.

The Kansas Court of Appeals agreed. Although it turns out that the Alco-IV is on an “updated” list of KDHE approved devises, that information was not before the trial court and can’t be considered on appeal. However, the Court went on to uphold the suspension based on sufficient evidence of probable cause. See, Leffel v. Kansas Department of Revenue, ___Kan.App. 2d ___(July 21, 2006).

ORDER OF RESTITUTION MUST HAVE CAUSAL CONNECTION TO CRIME

Brent Chambers had a fetish that he satisfied by burglarizing houses in order to steal used women’s undergarments. After conviction in two separate cases of burglary and theft, he was ordered to pay a total of $1,225 in restitution, which included the cost of the security system installed by one of the victim families.

In State v. Chambers, ___Kan.App.2d ___ (July 24, 2006), the Kansas Court of Appeals set aside the $350 of the restitution that was for the security system. “No doubt the purchase of the security system was prompted by concern that Chambers, a neighbor of the victim, would re-offend, but his purchase was an example of ‘tangential costs incurred as a result of a crime’, not a cost caused by the crime.”

Also included in the restitution order, was reimbursement for the replacement costs of the lingerie stolen. The defendant objected to “replacement costs”, since the court usually looks at “fair market value” in determining restitution amount, not replacement cost. However, since there is no readily ascertainable market value for used lingerie, the Court opined that “when measuring damages to personal property where the item damaged has no market value, other relevant factors must be considered such as the cost of repair; the original value, the loss of use, any special value to the owner, the lost of expected profits, and the cost of replacement.” Therefore, in this case replacement costs were properly assessed against the defendant. (You couldn’t make this stuff up! 😎)

EXAMINATION OF ECONOMIC BENEFIT NECESSARY TO SUSTAIN AN IDENTITY THEFT CONVICTION

Robin asked her friend Sandra for $200 to pay her cell phone bill. Sandra gave Robin her social security number and credit card information over the phone. Sandra did not give Robin permission to use her personal information for any other reason. Robin later called Sandra and told her that the cell phone bill was more than she expected and she had charged over $1,000 to Sandra’s credit card. Sandra told Robin the amount was “way too much.” Robin agreed to cancel the transaction within 3 business days. Sandra trusted her to do so and did not try to cancel it herself. The following month, Sandra received her credit card statement and discovered that Robin had not cancelled the transaction, which actually totaled $1,374. Sandra contacted the cell phone company and found out that Robin had opened a new cellular phone account and obtained two new cell phone numbers using Sandra’s name and social security number. The bill was being sent to Robin’s address. It appears Robin placed it in her own name sometime after the first billing cycle. Sandra confronted Robin, who told her she did not think Sandra would mind. When Sandra asked for her money back, Robin told her to wait in line like everyone else.

Robin was charged with identity theft. She challenges her conviction on the basis that there was insufficient evidence to show that she acted with “intent to defraud Sanders for economic benefit” as required by the law. The State had relied on the fact that Robin opened the cell phone account using Sandra’s information. Robin argues that the State did not prove that she did so with the intent to defraud for economic benefit. She received no economic benefit from opening the account and Sandra provided Robin with the information voluntarily. The Kansas Court of Appeals disagreed. See, State v. Oswald, ___Kan.App.2d___ (July 14, 2006). Robin clearly opened the account without permission. She testified that she used Sandra’s information because she was unable to establish an account on her own due to her poor credit. Therefore, she did receive the economic benefit of a cell phone account, that she would not otherwise be entitled to. It should be noted that the term “economic” no longer precedes “benefit” in the statute.

CHARGING DOCUMENT IS THE JURISDICTIONAL INSTRUMENT

Peter Chaffee was charged with attempted first-degree murder and aggravated kidnapping (to wit: kidnapping with the intent to facilitate the crime of murder). He was found not guilty by a jury of attempted first-degree murder and its lesser included offenses of attempted second-degree murder and attempted voluntary manslaughter. He was, however, convicted of aggravated kidnapping. The jury instruction used stated the elements of aggravated kidnapping as 1) taking or confining Susan Rowe by force; 2) with the intent to hold her to facilitate the commission of any crime; and 3) bodily harm was inflicted on Susan Rowe. During delibera-
Question: Recently there has been a lot in the newspaper about the policy of Kansas City, Missouri prosecutors amending traffic tickets to “defective equipment.” The Kansas City Star cited a case out of Iowa where a lawyer was disbarred for amending a charge to something that could not be supported by the evidence. Is this true? Could a lawyer be disbarred for amending a speeding ticket to illegal parking or defective equipment when there is no evidence to support either of the latter charges?

Answer: Maybe, if the Kansas courts follow the logic in the Iowa Court’s opinion.

The first Iowa case to cause concern for prosecutorial amendment practices was Iowa Supreme Court Attorney Disciplinary Board v. Howe, 705 N.W. 2d 360 (2005). The Iowa Supreme Court found that the practice of Howe, a part-time city attorney, of amending misdemeanor traffic citations to charge violations of the cowl lamp statute (which required that motor vehicles could be equipped with no more than two side cowl lamps) so that defendants could enter guilty pleas to the amended charges and avoid adverse impacts on their license and insurance, violated the professional rule stating that a prosecutor could not institute criminal charges knowing that the charges were not supported by probable cause. Motor vehicles had not been equipped with cowl lamps for years. The Court found that the fact that the magistrate accepted such pleas, and the police officer agreed, was not a defense. The Court found that even if this plea bargaining practice was commonplace, such fact would not be a mitigating circumstance in determining disciplinary sanctions. There is no exception to the disciplinary rules based on how commonplace the violation is.

The Court found that the following disciplinary rules had been violated:

1. DR 7-102(S)(2), (5), (6), and (7), which state a lawyer shall not knowingly advance a claim that is unwarranted, knowingly make a false statement of law or fact, participate in the creation of evidence that the lawyer knows to be false, or counsel or assist a client in conduct that the lawyer knows to be illegal or fraudulent.

2. DR 7-103(A) which states a public prosecutor “shall not institute or cause to be instituted criminal charges when the lawyer knows or it is obvious that the charges are not supported by probable cause” and

3. DR 1-102(A)(1), (4) and (5), which states a lawyer shall not violate a disciplinary rule, engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, or engage in conduct that is prejudicial to the administration of justice.

Granted, Howe was charged with a long list of disciplinary violations, the amendment issue being just one of many. However, even though the Grievance Commission recommended public reprimand on some counts and private admonition on others, on this particular allegation, the Commission recommended it be dismissed. The Supreme Court disagreed and found that suspension was warranted.

One month later, the issue came up again in Iowa Supreme Court Attorney Disciplinary Board v. Zenor, 707 N.W. 2d 176 (2005). Like Howe, Zenor was charged with several disciplinary violations, one being that as full-time county attorney he amended traffic violations to cowl-lamp violations. He also allowed his assistants to amend traffic offenses to cowl-lamp violations. Again, the Commission had recommended that this charge be dismissed. The Supreme Court cited and followed Howe to the letter and found this to be a disciplinary violation worthy of suspension.

After the articles concerning their policy of amending traffic tickets to defective equipment, the Kansas City Missouri prosecutors did obtain an informal advisory opinion from an advisory committee overseeing the professional conduct of Missouri lawyers which stated that prosecutors did not violate Missouri ethical rules by granting defective-equipment pleas in Municipal Court. However, the Iowa cases stand as clear warnings to prosecutors and judges that amending tickets to charges that cannot be supported by the evidence may present ethical problems in Kansas to both lawyers and judges who knowingly accept said pleas.

It should be noted that another item of contention in the Kansas City Star articles was the prosecution policy of not entering plea negotiations with pro se defendants. The articles argued that this violated a defendant’s right to self-representation and the City Attorney’s office elected to stop the practice of limiting plea bargains to those represented by counsel rather than face further criticism or legal chal-
The Verdict

Court Review

(Continued from page 13)

In Chaffee, the jury asked if the term "any crime" included crimes for which the defendant was not charged. The judge told the jury to read the instructions.

Chaffee argued that he could not be convicted of aggravated kidnapping if he was acquitted of the predicate crime and all of its lesser included offenses. Even though the jury instruction referred to "any crime," the charging document read: "aggravated kidnapping with the intent to facilitate the commission of a crime, to wit: murder in the second degree." The Court agreed and reversed Chaffee’s conviction and remanded it for a new trial on the aggravated kidnapping charge. See State v. Chaffee, ___ Kan.App.2d ___ (July 14, 2006).

It found that even though the State is not required to charge a defendant with the predicate crime to prove kidnapping with the intent to commit murder, it cannot charge him or her with aggravated kidnapping to facilitate murder and then convict him or her for kidnapping to facilitate a crime different from that which is identified in the information. The charging document is the jurisdictional instrument which gives the district court authority to convict a defendant of crimes charged in the complaint or any lesser included crimes thereof. Conversely, if a crime is not specifically stated in the information or not a lesser included offense of the crime charged, the district court lacks jurisdiction to convict a defendant of the crime, regardless of the evidence presented.

DUI MUST BE THE PROXIMATE CAUSE OF VICTIM’S DEATH TO SUSTAIN A CONVICTION FOR IN VOLUNTARY MANSLAUGHTER WHILE DUI

Brian Collins and his passenger left a bar at 2:00 a.m. in his pickup truck. He was intoxicated. He was following his friends who were on a motorcycle. He lost sight of the motorcycle and sped up to find it. The motorcycle had stopped around a curve, in the middle of the roadway, so one of the passengers could urinate. Collins attempted to stop, but hit the motorcycle and killed the cyclist. He was charged with involuntary manslaughter while DUI. During trial, an accident reconstructionist testified that the accident would have occurred even if Collins had not been intoxicated. The judge had instructed the jury that in order to find Collins guilty of the manslaughter charge they would have to find that the proximate cause of death was Collin’s operation of the vehicle while under the influence. The jury found Collins guilty of the lesser included offense of DUI. The State appealed arguing that the “proximate cause” instruction changed the elements of the crime. It argues that manslaughter while DUI is a strict liability crime. The Court of Appeals agreed with the district court and found that there must be evidence that the conduct of the defendant was the cause of the victim’s death. See State v. Collins, ___ Kan.App.2d ___ (July 28, 2006).
dent to a lawful arrest. On appeal, the Kansas Court of Appeals disagreed. In *State v. Vandevelde*, ___Kan.App.2d ___ (July 24, 2006), the Court held that there was sufficient basis to stop the defendant and to charge him with “interference.” However, the Court found that in order to search the truck, pursuant to K.S.A. §22-2501 (search incident to an arrest), the State must prove that the search was necessary to protect the officer from attack; prevent the defendant from escaping, or discover the fruits, instrumentalities or evidence of the crime (that being “interference”). Since Vandevelde was handcuffed in another patrol car away from the truck and the search of his person turned up nothing, the officers had no fear of attack. Vandevelde certainly couldn’t escape and they had no reason to search for evidence of the interference charge. The search was illegal.

But, the State argues, even if the search was invalid as “incident to an arrest” there was probable cause to believe Vandevelde possessed drugs and thus exigent circumstances to search the truck. The probable cause, it argued, was based on Vandevelde frequenting an area where drugs are known to be purchased, reaching down when stopped as if to conceal something and not immediately responding to the officers’ commands. The Court disagreed. It found that there was no evidence that the defendant entered any apartment where drug activity was taking place. There was no evidence that the officers ever saw the defendant in possession of anything suspicious. When he was arrested, no drugs or contraband were found on his person. Therefore, the Court concluded that there was no probable cause to search the trunk.

Finally, the State argues that the contraband would have been discovered inevitably during an inventory search of the vehicle. That argument also fails. An inventory search is not valid unless police have lawful possession of the car. The police must have lawful custody of the vehicle. Here, the defendant’s car was lawfully parked and he told the officer’s his father could pick up the vehicle. Absent some other lawful basis for impounding the vehicle, which there was none in this case, the inevitable discovery rule does not apply. The defendant’s motion to suppress should have been granted and the defendant’s conviction for possession of cocaine was reversed.

**Editor’s Note:** K.S.A. §22-2501 was amended by the 2006 Legislature to allow a search incident to arrest to discover the fruits, instrumentalities or evidence of any crime. Therefore, the result of this case would probably be different today.

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**AN AGREEMENT BETWEEN THE PARTIES THAT A DEFENDANT CAN APPEAL A CERTAIN ISSUE, DOES NOT VEST THE APPELLATE COURT WITH JURISDICTION TO HEAR THE APPEAL**

Defendant pled no contest to reduced charges of attempted manufacture of methamphetamine. At the time he entered the plea, the prosecutor, defense counsel, and the district court agreed, and also stated in the plea agreement, that the defendant could preserve an issue for appeal the fact that the officer wrote the wrong date on the search warrant in his case. However, they all apparently forgot to read the statute, which states: “No appeal shall be taken by the defendant from a judgment of conviction before a district judge upon a plea of guilty or nolo contendere, except that jurisdictional or other grounds going to the legality of the proceedings may be raised by the defendant as provided in K.S.A. §60-1507 and amendments thereto.”

In *State v. Tryon*, ___Kan.App.2d ___(July 28, 2006) the Court of Appeals held that parties cannot create jurisdiction in the appellate court. The parties could not give Tryon the right to appeal where no such right exists. Since everyone told the defendant bad information, he Court did go on to state that even if it had jurisdiction to consider the issue, the mere “technicality” of putting the wrong date on an otherwise valid warrant was insufficient error to overturn the search. (“No search warrant shall be quashed or evidence suppressed because of technical irregularities not affecting the substantial rights of the accused.” K.S.A. §22-2511).

**DUI; ADMISSIBILITY OF INSUFFICIENT SAMPLES; EVIDENCE NECESSARY TO ESTABLISH VENUE; FAILURE OF PROSECUTION TO PROVIDE DOCUMENTS PERTAINING TO THE BREATH TEST MACHINE; STATEMENTS SANS MIRANDA; CIRCUMSTANTIAL EVIDENCE OF OPERATION**

Officer Justice was called to a residence concerning a trespassing complaint. Upon arrival, he saw a Jeep parked on the street. He saw the defendant get out of the Jeep, stumble and walk unsteadily toward the residence. He yelled at the defendant to stop, but the defendant did not respond. The defendant proceeded toward the house and knocked on the door. He finally turned around and walked toward the officer. While speaking with the defendant, the officer noticed the strong odor of alcohol emanating from him. He admitted drinking. He would not tell the officer why he got out of the Jeep. The officer saw alcoholic beverages in cup holders in the Jeep. He also saw a brown paper bag with a ½ empty bottle of whiskey in it. The defendant admitted that he had driven to the residence. The officer tried to administer field sobriety tests to the defendant, but he was not cooperative. The officer placed the defendant under arrest and took him to the station. At the station, the defendant agreed to take the breath test but refused to blow into the machine. He eventually blew, but failed to blow hard.

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(Continued on page 17)
enough for a full sample. The breath testing machine registered a “deficient sample” with a .205 alcohol concentration. Defendant was charged with and convicted of DUI. He appealed his conviction on a variety of basis.

In State v. Stevens, ___ Kan.App.2d ___ (July 28, 2006), the Court held that since the defendant was charged with subsection (a)(3) “operating a vehicle under the influence of alcohol to a degree that renders him incapable of safely operating a vehicle” the partial breath test is admissible. Second, it found that the prosecution’s failure to provide the Intoxilyzer 5000 maintenance records even though the same were requested by the defense, did not require either a continuance or suppression of the test results. The defendant’s attorney stated he was prejudiced because he would have discovered before the day of trial that the officer had failed to record the insufficient sample in the log book and could have provided a rebuttal witness regarding the requirement that even insufficient samples be logged into the log book. However, the Court held that the custodian of the records for the Intoxilyzer 500 testified on cross-examination that insufficient samples are supposed to be logged in and this one was not. Therefore, the defendant was able to make his point with the jury.

Next, the Court found that although the location of the crime is an element establishing the jurisdiction of the Court, it is not necessary to prove jurisdictional facts by specific question and answers that the offense occurred in a particular county (or city in the case of a municipal court). It may be established by other competent evidence. Therefore, if testimony is submitted concerning the address of the offense, that is sufficient evidence of jurisdiction. Or if evidence is submitted that a particular law enforcement agency responded, that too would be competent evidence to establish that it occurred within the jurisdiction of said agency.

The Court further found that even though the officer never saw Stevens drive the car, there was sufficient circumstantial evidence to establish both that the defendant operated the vehicle while intoxicated and that he attempted to operate the vehicle while intoxicated. Stevens admitted driving and the officer arrived minutes after the call came in and saw Stevens get out of the driver’s side. It should be noted that the dissenting opinion analyzes this issue in more detail and finds that there is sufficient evidence to show “operation” but not sufficient evidence to show “attempted operation.” Finally, the Court also found that Steven’s statements to police officers were admissible sans Miranda because he was not being subjected to custodial interrogation when he admitted driving.

Wynona Bennett had been on a one year probation for possession of cocaine for two months when a random UA she took tested positive for cocaine. She admitted using and was told by her probation officer “to wait in the lobby” while the officer discussed it with the judge. She did not wait. A warrant was issued for her arrest. It was not served on her for over two years. Claiming that the State had failed to conduct a reasonable investigation into her whereabouts and had failed to timely execute the warrant, Bennett filed a motion to quash the warrant and terminate the probation (since its term had already passed).

The Kansas Court of Appeals agreed with Bennett. See, State v. Bennett, ___ Kan.App.2d ___ (August 4, 2006). The evidence showed that the no effort was made to serve the warrant for the first 4 months after its issuance. At that time an officer did some research on Bennett’s address, but no effort was made to find her. It was another 7 months before Bennett was featured on “felon of the day” on a local television newscast. A tip was received a few weeks later providing a time and place where the State could find Bennett. It is unknown whether anyone followed up the tip. Two months later another tip came in, police went to the address. Bennett answered the door, claimed to be the babysitter, and the police left. The Court found that these facts show that the State did not conduct a reasonable investigation to find Bennett. Although there was some evidence that Bennett had attempted to conceal herself, the Court found that such evidence does not negate the State’s failure to conduct a reasonable investigation. “If no one is looking for you, you cannot be said to be concealing yourself.” The Court found that the State had waived the probation violation and the Court lost jurisdiction to revoke Bennett’s probation. She was not required to prove that she was prejudiced by the delay.

SCOPE OF COMMUNITY CARETAKING STOP

KHP Trooper Brockman saw a car go by him that had a rear tire that was bouncing around a little. He stated he was concerned about the driver’s safety given this observation and he stopped the vehicle. These types of stops are often called “public safety” stops or “community caretaking” stops.

Once a vehicle is stopped pursuant to the officer’s community caretaking function, the actions of police must be scrutinized carefully so the protections of the Fourth Amendment are not emasculated. The scope of the detention cannot exceed the justification for the stop.

In State v. Gonzales, ___ Kan.App.2d ___ (August 25, 2006), the Kansas Court of Appeals held that a public safety stop is not for investigative purposes. Asking for information about the ownership of the vehicle and asking
Two of the following documents must be presented. One document must be from List A and the second document must be from List A, C or D. All documents presented must be the original or a certified copy; no photocopies will be accepted. In addition the applicant must present:

- A social security number or a sworn statement stating that the applicant does not have a social security number.
- If a valid photo driver’s license issued by another state is used, a second document from list A, B, C or D will be required.
- An applicant presenting foreign documents must provide proof of lawful presence from list B, and a second document from list C or D.

<table>
<thead>
<tr>
<th>List A</th>
<th>List B</th>
<th>List C</th>
<th>List D</th>
</tr>
</thead>
<tbody>
<tr>
<td>Documentation for American Citizens or persons born in the United States</td>
<td>Documentation for any other person</td>
<td>Proof of name</td>
<td>Additional Documentation to apply for a replacement Kansas DL or ID card</td>
</tr>
<tr>
<td>Certified birth certificate (federal, state, county, Dept. of Justice and Bureau of Indian Affairs)</td>
<td>Valid foreign passport with I-94 or valid “Processed for I-551” stamp</td>
<td>Certified marriage certificate, U.S., city, county, state, or foreign issued (translation may be required); no church documents allowed</td>
<td>Valid motor vehicle registration with signature</td>
</tr>
<tr>
<td>Hospital birth certificate for instruction or farm permit only when accompanied by a parent or legal guardian</td>
<td>I-94 with refugee status (passport not required)</td>
<td>Certified divorce decree, U.S. or foreign, with official signature (translation may be required)</td>
<td>Parole documents</td>
</tr>
<tr>
<td>U.S. Passport</td>
<td>Valid I-551 INS Resident Alien/Permanent resident card, NO Border Crosser cards</td>
<td>Certified court order of name change, U.S. or foreign, with official signature (translation may be required)</td>
<td>Medical records</td>
</tr>
<tr>
<td>U.S. Military ID (active duty, dependent, retired, reserve or National Guard)</td>
<td>Valid I-688 (Photo Temporary Resident) and I-688A, I-688B and I-766 (photo Employment Authorization)</td>
<td>Common Law certificate signed by both parties and notarized</td>
<td>Kansas voter registration card</td>
</tr>
<tr>
<td>DD 214</td>
<td>Valid U.S. Military ID (dependent)</td>
<td>Valid U.S. Military ID (active duty, dependent, retired, reserve and National Guard)</td>
<td>Church marriage certificate (not accepted to name change)</td>
</tr>
<tr>
<td>Bureau of Indian Affairs Tribal Identification Card</td>
<td>Bureau of Indian Affairs Tribal ID card</td>
<td>Diploma</td>
<td>Photo DL issued by a U.S. state (if expired over 5 years requires additional documentation)</td>
</tr>
<tr>
<td>Certified Order of Adoption</td>
<td>Certified court order of adoption</td>
<td>Vehicle title</td>
<td>Professional license</td>
</tr>
<tr>
<td>Certificate of Naturalization with intact photo</td>
<td>Photo DL or ID card issued by a U.S. state (if expired requires additional documentation)</td>
<td>Kansas welfare card with photo and signature</td>
<td>Foreign birth certificate (certified translation may be required)</td>
</tr>
<tr>
<td>Photo DL issued by a U.S. state (if expired over 5 years requires additional documentation)</td>
<td></td>
<td>May recite recent driving history to satisfaction of Examiner</td>
<td></td>
</tr>
<tr>
<td>Photo ID issued by a U.S. state (if expired requires additional documentation)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Additional Documentation to apply for a replacement Kansas DL or ID card**

- Parole documents
- Baptismal certificate
- Selective Service Card with signature
- Medical records
- Kansas voter registration card
- Church marriage certificate (not accepted to name change)
- Diploma
- Photo DL issued by a U.S. state (if expired over 5 years requires additional documentation)
- Professional license
- Foreign birth certificate (certified translation may be required)
If you have never been licensed or if you have an out-of-state license that has been expired for over 1 year you must:

♦ Present acceptable proof of identity (see reverse side of this page)
♦ Not be canceled, suspended, or revoked in any state
♦ Pass a vision examination
♦ Pass all applicable written examinations
♦ Pass driving examination (vehicle provided by you)
♦ Pay

If you have a valid out-of-state license you must:

♦ Present acceptable proof of identity (see reverse side of this page)
♦ Not be canceled, suspended, or revoked in any state
♦ Pass a vision examination
♦ Pay

If you have an out-of-state license (expired 1 year or less) you must:

♦ Present acceptable proof of identity (see reverse side of this page)
♦ Not be canceled, suspended, or revoked in any state
♦ Pass a vision examination
♦ Pass all applicable written examinations
♦ Pay

Cost of driver's license if applicant is over 21 years old: $25

Length of Driver's License

❖ Applicants under age 21, receive a license that expires on 21st birthday
❖ Applicants over age 65 receive a 4-year license
❖ All other applicants receive a 6-year license

Residence Requirements and Change of Address

► Change of address required in writing within 10 days of moving (can be done on-line)

► Required to have a Kansas driver's license if you have resided in Kansas 90 days.

A person shall be deemed a resident of the state of Kansas if he or she owns, rents or leases real estate in Kansas as his or her residence, engages in a trade, business or profession within Kansas, registers to vote in Kansas, enrolls such person's child in school in Kansas or purchases registration for a motor vehicle in Kansas.

International Driver’s License

An international driver’s license is only valid when accompanied by a valid driver’s license for the driver’s resident country. Warning: No licenses purchased on the Internet are legal driving permits in Kansas.
court review

(continued from page 17)

for the driver’s license exceeds the justification for the stop. In this case, Trooper Brockman was required to simply examine the tire and alert the driver to its condition, period. Unless he observed something that would give him a reasonable articulable suspicion of criminal activity he was required to go on his way and allow the driver to proceed.

In Gonzales, Trooper Brockman eventually asked for consent to search the car and eventually found marijuana in the tire. So does the consent remove the taint of the illegal seizure (detention beyond the scope of the stop)? Not in this case, opined the Court. The Court had, as part of the trial court record in the case, the entire video of the encounter captured on Trooper Brockman’s in-car video. It found that a reasonable person would not have felt free to leave and there was no sufficient intervening time between the stop and the consent to purge the taint. “No matter how the State wishes to whitewash this, it will not gleam in the sunlight.” Gonzales’ conviction was reversed.

no jail time credit for time in the adult day reporting center as a condition of probation

K.S.A. §21-4614a allows that time spent in a residential facility while on probation can be counted toward a defendant’s under lying sentence. However, according to State v. Black, ___ Kan.App.2d ___ (September 15, 2006), the same does not hold true for an Adult Day Reporting Center. “Residential facility” means “inpatient” facility. Since participants were allowed to go home to sleep at night, the ADRC does not qualify and no jail time credit is to be given.

the reason why an officer stops a person is irrelevant in the administrative hearing to suspend the person’s driver’s license

Following an administrative hearing, Thomas Martin’s license was suspended for failing the breath test. He appealed to the district court. He stipulated that he was intoxicated, but argued that the officer had no basis to stop him. The officer stopped him based on a mistaken belief that he had violated the law. The district court dismissed the suspension order and found that the officer had no reasonable basis to stop Martin. The Kansas Department of Revenue appealed to the Court of Appeals.

In Martin v. Kansas Dept. of Revenue, ___ Kan.App.2d ___ (September 15, 2006), the Court of Appeals found that the reason why an officer stops a person is irrelevant in the administrative hearing to suspend the person’s driver’s license and reinstated the suspension. K.S.A. §8-1002(h)(2) states (Continued on page 21)
that if the officer certifies that the person failed a breath test, the scope of the hearing shall be limited to whether: the law enforcement officer had reasonable grounds to believe that the person was operating a vehicle, while under the influence of alcohol or drugs, the person was in custody or arrested for DUI; the officer gave the implied consent advisories; the testing equipment and the person operating it were certified by KDHE; KDHE testing procedures were followed; the test result was .08 or more and the person was operating or attempting to operate a vehicle. The Court pointed out that this language is clear and unambiguous. Nowhere does it indicate that a driver may challenge a suspension based on the lack of reasonable and articulable suspicion for the original stop. Had the legislature intended this, it would have said it. Martin’s license is suspended.

**REFUSAL TO TAKE THE PBT IS NOT ADMISSIBLE TO PROVE THE CRIME OF DUI**

K.S.A. 2005 Supp. §8-1001 makes it clear that PBT results are not admissible except when the validity of the arrest or the validity of the request to take the PBT is challenged. But what about a refusal to take the PBT? Is that admissible to show that the defendant is guilty of DUI? No, according to the Kansas Court of Appeals. *State v. Wahweotten,* ___ Kan.App.2d ___ (September 15, 2006). It is admissible to prove the traffic infraction of refusing the PBT. Therefore, in a jury trial where there is both a refusal to take the PBT and a DUI, the Court should give a limiting instruction. However, in this case the Court found that the failure to give one was not reversible error.

**A DEFENDANT’S REFUSAL TO TAKE THE BREATH TEST DOES NOT IMPLICATE THE PRIVILEGE AGAINST SELF INCORPORATION UNDER THE FIFTH AMENDMENT, EVEN AFTER CRAWFORD; DOCTRINE OF UNCONSTITUTIONAL CONDITIONS**

In the same case, Mr. Wahweotten argued that introduction into evidence of his refusal to take the PBT and his refusal to take the evidentiary breath test violated his constitutional privilege against self-incorporation. He was forced to choose between waiving his Fifth Amendment privilege or waiving his Fourth Amendment right to be free from searches. This violates, he argues, the doctrine of unconstitutional conditions. He would have to give up a constitutional right to get a constitutional right. This doctrine holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether. Adherence to this doctrine is commonly witnessed in the case where a defendant is allowed to testify at his suppression hearing, without giving up his privilege against self-incorporation in the full trial.

The Court held that both Kansas and U.S. Supreme Court caselaw is clear that the privilege against self-incorporation is not implicated in requests to take breath tests or refusals of breath tests. The *Crawford v. Washington,* 541 U.S. 36 (2004) case does not change that caselaw. *Crawford* dealt with the Sixth Amendment confrontation clause and related to witness testimony, not the defendant’s own testimony. Granted, the breath tests do implicate the Fourth Amendment, but since the Fifth Amendment doesn’t apply there is not a unconstitutional conditions doctrine problem.

**ODOR OF MARIJUANA COMING FROM CAR = PROBABLE CAUSE**

Officer Huntley was parked in the median of I-35. He saw an approaching northbound car with a front headlight burned out. As it got closer, he realized the headlight was working, but was very dim. He also noticed that the car windows were tinted too darkly. He stopped the car. As the officer spoke to the driver, he noticed an “overwhelming” odor of marijuana and alcohol coming from inside the car. A search of the car turned up drugs.

In *State v. Delgado,* ___ Kan.App.2d ___ (September 22, 2006), the Kansas Court of Appeals held that there was probable cause to stop the vehicle. Once stopped, the strong odor of marijuana established probable cause to search the car for drugs. It distinguished the case from *State v. Huff,* 278 Kan. 214 (2004) as the difference between the odor coming from a car (Delgado) v. a house (Huff).

**LANGUAGE OF STATUTE, NOT NUMBER OF PERSONS INJURED CONTROLS CHARGING; RULE OF LENITY**

Aaron Gomez drove Jose Gauna to a pre-arranged fight with Justin Kutilek in a parking lot in Wichita. Kutilek drove to the fight with Julie Swiler. Julie was Gauna’s ex-girlfriend. Kutilek’s roommate, Josh Morrison, arrived separately. Upon arrival, Kutilek confronted Gauna. Gomez drew a handgun and pointed it at Kutilek. Kutilek drove away. Gomez fired seven shots at the vehicle, striking it several times. One shot grazed Kutilek’s scalp, causing hospitalization. Julie was not struck, but she felt a bullet pass below her legs and heard another one strike the dash. Gomez then approached Morrison, pointed the pistol in his face, and asked him if he wanted “any shit.” Morrison replied in the negative, drove away and called the police.

Gomez was charged with two counts of discharge of a firearm into an occupied vehicle on the basis that there were two people in the car. The Kansas Court of Appeals found the charges to be multiplicitous and in violation of the double jeopardy clause of the Fifth Amendment to the U.S. Constitution. See, *State v. Gomez,* ___ Kan.App.2d ___ (September...
The number of person’s occupying a vehicle or building at the time of the firearm’s discharge is not determinative of the unit of prosecution. It is the language of the statute, not the number of persons injured, which controls the number of charges. The presence of a person inside the target may increase the severity level (from a level 8 if unoccupied to a level 7 if occupied), but the presence of more than one person neither increases the severity level or somehow transforms one target into multiple targets for purposes of prosecution. Likewise, any injury suffered affects the severity level (level 7 if uninjured, level 5 if target injured), not the number of injuries that occurred.

The Court indicated that it was following the “rule of lenity.” The unit of prosecution is evaluated with “a rule of lenity.” For example, in *Bell v. United States*, 349 U.S. 81 (1955), which analyzed whether the Mann Act was violated once or twice by the transportation of two women across state lines for immoral purposes, the U.S. Supreme Court held there was only one violation because Congress had failed “clearly and without ambiguity” to “provide for...two convictions for the act.” “When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.” See, *State v. Schoonover*, 281 Kan. 453 (2006).

**RESTITUTION**

The proper measure of restitution in a theft case is the fair market value of the property at the time of its taking, rather than the replacement cost, whenever the fair market value can be ascertained. However, when there is no readily ascertainable fair market value for personal property taken in a theft, the court may consider other factors in determining restitution, including the purchase price, condition, age, and replacement cost of the property, as long as the valuation is based on reliable evidence which yields a defensible restitution figure. *State v. Maloney*, ___ Kan.App.2d ___ (October 6, 2006).

**WHEN ISSUE IS WHETHER OR NOT CALLS WERE RECEIVED, POLICE SHOULD CONFIRM SAME BY VIEWING CALLER ID OR LISTENING TO MESSAGES**

Shelby Murdock obtained a protection from abuse order against Larry Curls specifying that he have no contact with her. Murdock called police to her house one day when she had started receiving phone calls from Curls approximately every half hour beginning in the early morning the day before and continuing until she called the police the following day. She indicated that he left messages each time. Shelby said she knew it was Curls because she recognized his voice and he talked about their children by name. She also said she recognized his number on her caller identification device as origin-
The phone rings, you pick it up, and the caller identifies himself as an officer of the court. He says you failed to report for jury duty and that a warrant is out for your arrest. You say you never received a notice. To clear it up, the caller says he’ll need some information for “verification purposes”—your birth date, social security number, maybe even a credit card number.

This is when you should hang up the phone. It’s a scam. Jury scams have been around for years, but have seen a resurgence in recent months. Communities in more than a dozen states have issued public warnings about cold calls from people claiming to be court officials seeking personal information. As a rule, court officers never ask for confidential information over the phone; they generally correspond with prospective jurors via mail.

The scam’s bold simplicity may be what makes it so effective. Facing the unexpected threat of arrest, victims are caught off guard and may be quick to part with some information to defuse the situation.

“They get you scared first,” says a special agent in the Minneapolis field office who has heard the complaints. “They get people saying, ‘Oh my gosh! I’m not a criminal. What’s going on?’” That’s when the scammer dangles a solution—a fine, payable by credit card, that will clear up the problem.

With enough information, scammers can assume your identity and empty your bank accounts.

“It seems like a very simple scam,” the agent adds. The trick is putting people on the defensive, then reeling them back in with the promise of a clean slate. “It’s kind of ingenious. It’s social engineering.”

In recent months, communities in Florida, New York, Minnesota, Illinois, Colorado, Oregon, California, Virginia, Oklahoma, Arizona, and New Hampshire reported scams or posted warnings or press releases on their local websites. In August, the federal court system issued a warning on the scam and urged people to call their local District Court office if they receive suspicious calls. In September, the FBI issued a press release about jury scams and suggested victims also contact their local FBI field office.

In March, FirstGov.gov, the federal government’s information website, posted details about jury scams in their Frequently Asked Questions area. The site reported scores of queries on the subject from website visitors and callers seeking information.

The jury scam is a simple variation of the identity-theft ploys that have proliferated in recent years as personal information and good credit have become thieves’ preferred prey, particularly on the Internet. Scammers might tap your information to make a purchase on your credit card, but could just as easily sell your information to the highest bidder on the Internet’s black market.

Protecting yourself is the key: Never give out personal information when you receive an unsolicited phone call.

The Topeka City Council voted unanimously on July 24, 2006 to repeal its Standard Traffic Ordinance provisions regarding driving while suspended and habitual violator. All future charges of these offenses will be referred by the Police Department on a long form complaint to the District Attorney’s Office for filing there under state law.

The general consensus among council members was a feeling that a city should not have to support unfunded mandates from the Kansas Legislature—especially in situations where a city is facing expenditures of $2 to $4 million housing convicted 3rd+ suspended/habitual offenders.

According to an August 3, 2006 article in the Topeka Capitol-Journal, District Attorney Robert Hecht was forced to add $250,000 to his 2007 budget request to handle the increased number of prosecutions for driving while suspended necessitated by the city’s decision to drop those cases. “In a letter to the three Shawnee County commissioners, Hecht said the “conservative” $250,000 request would fund two prosecutors and three support staff members and pay for office space outside the Shawnee County Courthouse, furnishings, equipment and supplies.” In addition, the county will have to pick up the costs of housing the offenders.

Although the DA has charged that the City is “cherry picking”—prosecuting the cases that make the City money, such as speeding, but abandoning those that would cost the City money, it was the DA who engaged in “cherry picking” in 2001 when he announced his office would no longer prosecute several categories of misdemeanors, forcing the city to take on the responsibility.
AND THE GENERAL SAYS:

The following contains a summary of recent opinions from the office of Kansas Attorney General Phill Kline that may be of interest to municipal judges. The full text of all AG opinions can be accessed through www.accesskansas.org.

AG OPINION NO. 2006-16
AUGUST 3, 2006
JAIL FEES

K.S.A. 2005 Supp. §19-1930 permits a county to adopt a resolution authorizing assessment of a per diem fee charged to inmates of the county jail. This statute does not permit charging such costs to persons who are never convicted of a crime in this state, but permits recoupment of pre and post conviction costs from those who are convicted of a crime in this state, and establishes priorities for payments.

AG OPINION NO. 2006-18
AUGUST 3, 2006
FERAL SWINE

The Legislature acted consistently, harmoniously and sensibly by authorizing a government sponsored feral swine control and eradication program along with a ban on hunting these animals except for property owners and other legal occupants, their employees and designees. The prohibition against killing feral swine “for sport, pleasure, amusement or production of a trophy” does no preclude the Kansas Animal Health Department from providing for the control and eradication of feral swine by aerial gunning, trapping, snaring or through a bounty program. Which of these or other methods would be more efficient and cost effective is left to the sound discretion of the Department. Cited: K.S.A. 2005 Supp. §47-1809(a), as amended by L. 2006, Ch. 114, §1(a); L 2006, Ch. 216 §53.

AG OPINION NO. 2006-21
AUGUST 17, 2006
VETERAN’S PREFERENCE

The veteran’s preference statute, K.S.A. §73-201 is applicable to all state, county and city positions. The statute states in pertinent part, that veterans “shall be preferred for appointments and employed to fill positions in every public department and upon all public works of the state of Kansas, and of the counties and cities of this state, if competent to perform such services:...when any such ex-soldier, sailor, airman or marine shall apply for appointment to any such position, place, or employment, the officer, board or person whose duty it is or may be to appoint a person to fill such place shall, if the applicant be a man or woman of good reputation, and can perform the duties of the position applied for by him, or her, appoint said ex-soldier, sailor, airman or marine to such position, place, or employment.”

"'Competent,' when used to indicate the qualifications which a public officer should possess, must necessarily include every qualification essential to the prompt, efficient and honest performance of the duties pertaining to the office to be filled.” State v. Addison, 76 Kan. 699, 707 (1907).

According to the Attorney General, “[r]ead literally, we agree that K.S.A. 73-201 requires almost carte blanche hiring of a veteran over a non-veteran for jobs in every division of State and local government. The Kansas Supreme Court, however, repeatedly has construed the law as giving hiring authorities significant discretion to determine the competency of candidates for public positions, thereby rendering the statute more subjective than objective. Furthermore, the Court repeatedly has declined to second guess or substitute its judgment for that of a hiring authority, as long as the hiring authority has acted in good faith. See, e.g., Dever v. Humphrey, 68 Kan. 759 (1904); State v. McNeill, 83 Kan. 234 (1910); and Owens v. City of Coffeyville, 151 Kan. 263 (1940). Essentially, case law unfortunately has rendered the veterans' preference statute as having very limited enforceability."

The opinion goes on to differentiate the veteran’s preference statute with the state civil service system statutes and finds that they are compatible and not incongruent.

AG OPINION NO. 2006-23
SEPTEMBER 1, 2006
ALCOHOL AND DRUG TREATMENT LICENSURE

The offering of alcohol treatment creates a treatment facility which must be licensed to operate by SRS. The fact that the person offering such services is licensed as a psychologist, clinical social worker, professional counselor, psychotherapist, marriage and family therapist, or registered alcohol and drug abuse counselor does not excuse such person, i.e. the facility, from this requirement. Therefore, dual licensure is necessary (BSRB and SRS).
A Nevada Family Court judge allegedly shot by a millionaire businessman angered over the handling of his divorce says judges need more protection at the courthouse.

"In family courts, there's more raw emotion than a lot of other things," Judge Chuck Weller said to "Good Morning America" anchor Charles Gibson in an exclusive interview. "I think every Family Court judge — perhaps every judge in America — has a list of people in their mind they fear could become violent. And that's an issue about judges right now because we have had the family of a judge in Chicago [killed]. We had a judge in Atlanta shot."

The suspect, Darren Mack, is in jail and awaiting trial, charged with murder in the June 12 slaying of his wife, Charla, and attempted murder in Weller's shooting that day. Police say Mack, a 45-year-old father of three, used a high-powered rifle to shoot Weller, who had presided over the couple's bitter divorce case for more than a year. The couple were fighting over the custody of their 8-year-old daughter.

Weller was shot as he stood in front of a window on the third floor of the courthouse in Reno, Nev. He was struck in the chest by a single bullet shot from a parking garage or apartment building about 300 yards away, police say. Weller's administrative assistant, who was also in the room, was hit by shrapnel.

"I threw myself to the ground," Weller said. "You do a quick inventory when you are down there and think to yourself, 'I suspect I'm alive.' I took myself out of the room as quickly as I could with the help of a bailiff. I had my family called right away to make sure they were out of my home."

At a news conference on Tuesday, Weller said that he had concerns he was being harassed before the shooting.

Disturbing comments about him had been posted on a blog, his dogs had been barking at strange noises around his house, and someone had listed his home address as the location of a motorcycle auction in a local newspaper ad.

Weller's shooting came more than a year after two high-profile attacks on judges.

In February 2005, Federal Judge Joan Humphrey Lefkow in Chicago found the bodies of her husband and mother in her basement.

The person responsible for the slayings killed himself and left a note confessing the slayings and indicating that Lefkow had ruled against him in a civil case.

Judge Rowland Barnes was killed in an Atlanta courthouse in March 2005 when a suspect stole a deputy's gun and shot him.

Weller said there was a problem with the United States' democracy if judges were intimidated and harmed.

Courts, he said, need to hire better bailiffs to protect the judges and purchase bulletproof windows for courthouses. I understand the Senate passed a bill on protecting judicial officers," Weller said.

Weller kept his family in hiding while the alleged shooter Darren Mack was on the run.

Mack eluded authorities for 11 days before turning himself in to Mexican authorities on June 22.

Before Mack's surrender, a family member begged him to stop running and his case aired on "America's Most Wanted."

"He was aware, if you will, things were tightening around him that led him to contacting his attorneys, them contacting us," said Reno police Chief Michael Poehlman.

Mack's cousin, Jeff Donner, said that Mack had called him while on the run.

"If anything happens to me, don't forget your promise," Donner said of his conversation with Mack. "Put out to the press the word on Weller. The rest of the world has to know just how oppressive he [Weller] is."

If convicted of murder, Mack could face the death penalty.

Before assuming the bench more than a year ago, Weller worked as a Reno attorney for 27 years. He was shot in 1978 when he was a bystander in a Washington, D.C. bank robbery.
When courts make decisions, about half the persons involved will be disappointed, or perhaps even angry, because they lost or did not win as much as they had hoped. In high-profile cases, some of the public may share that anger or disappointment. Protecting parties—and the public—from such disappointment is not the role of the courts, however, as in every dispute a court must decide, someone inevitably will be unhappy with the decision. So how are courts—and their judges—held accountable?

Federal judges are appointed for life; they are accountable to the law and to what the U.S. Constitution calls “good behavior.” All Missouri state judges, by contrast, face the voters periodically in elections. Missouri judges are accountable, therefore, both to the law and to the people.

Most of Missouri’s judges—those who serve in the trial courts in all but four of Missouri’s counties and the city of St. Louis—are elected directly by the people. Judges in St. Louis, certain urban counties, and the appellate courts serve under the Missouri Nonpartisan Court Plan. Although the governor initially appoints these judges from a panel of applicants selected by a non partisan commission of citizens, attorneys, and a judge, they are subject to a retention vote after serving one year in office and periodically afterward, ranging from six to 12 years. So, even those judges who are appointed remain accountable to the people through elections.

One of the hallmarks of the American judicial system—and of any good judicial system—is judicial accountability. Accountability prevents corruption and abuses of power; it also helps to ensure that governmental policy reflects the community’s values and interests in ensuring everyone a day in court, in protecting individual rights and, perhaps most importantly, in providing a stable rule of law that is free from undue influence by politicians and special interests.

Judges are accountable to uphold the rule of law through their decisions. This means that, just as juries are asked to set aside their personal beliefs and decide a case based only on the law and the evidence, judges also must set aside their personal feelings, beliefs, and attitudes and decide each case according to the facts and law in that case.

Accountability to the law sometimes comes at a high price—a judge must follow the law even when doing so would be extremely unpopular. A good example of this is Judge James Horton, of Athens, Alabama, who presided over the second trial of Haywood Patterson, one of the nine young black men known as the Scottsboro Boys who were accused of raping two white women on an Alabama train in 1931.

From the beginning, the Scottsboro Boys’ trials were overshadowed by racial prejudice. The National Guard had to be summoned to prevent the Scottsboro Boys from being lynched before the trial even could be held. Patterson’s first trial yielded a quick guilty verdict and death sentence. The United States Supreme Court threw out his conviction, however, because he had not received effective counsel.

Patterson’s second trial was held in Judge Horton’s court in 1933. As in the first trial, the physical evidence and the eyewitness testimony did not support the testimony of the first alleged victim, Victoria Price. The second alleged victim, Ruby Bates, testified that she was not raped by any of the boys and that the two women, who apparently had crossed state lines for illicit purposes, had made up the charges when the train was stopped so they would not get in trouble. Despite all of the inconsistencies and evidence supporting Patterson’s defense, the jury again found Patterson guilty and sentenced him to death.

After hearing the evidence and inconsistencies in Victoria Price’s story, Judge Horton became convinced that—under the law—Patterson could not be found guilty. Judicial doctrine requires that any verdict that is contrary to the evidence must be set aside. So when the defense filed a motion for a new trial, Judge Horton knew what he must do. He announced that he was setting aside the jury verdict and granting Patterson a new trial in accordance with judicial doctrine.

Because of the popular support for convicting the Scottsboro Boys regardless of what the evidence showed, Judge Horton also knew that this likely would be the end of his career as a judge in Alabama, and maybe even as a lawyer.

When told he should not set aside the verdict because it would be political suicide, Judge Horton is said to have responded, “What does that have to do with the case?” In granting young Patterson a new trial, Judge Horton said that he had tried to live by his family motto: “Let justice be done through the Heavens may fall,” a quote thought to have originated with the 18th century English jurist, Lord Mansfield.

The heavens did not fall, but Judge Horton lost his bid for re-election in 1934 even though in his previous election in 1928 no one had run against him. Judge Horton later said that, despite the personal costs, setting aside the Patterson verdict was the right thing to do.
Missouri Judges

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Judge Horton was a product of his time—he believed that racial segregation was proper. But he also knew that Haywood Paterson was innocent and believed he should not be convicted on legally insufficient evidence simply because of his race.

He also knew—although this evidence never was presented to a jury—that medical evidence proved the women had not been raped by anyone. Judge Horton had been sought out by Dr. John Lynch, who had examined the two women shortly after they got off the train and who strongly believed they were lying. His examination indicated that neither of the women had been raped. When Dr. Lynch had told the women so, they laughed. Although Judge Horton encouraged him to testify, Dr. Lynch was afraid to do so; he was a young doctor and knew that if he testified for Patterson, he would have a slim chance of continuing his career in Alabama.

Judge Horton was less afraid of public sentiment, and he rightly chose to be accountable to the law. He could have bowed easily to public pressure and preserved his career by allowing the verdict to stand, hoping that the United States Supreme Court again would step in and reverse the sentence. Given the choice between doing what was politically expedient and what was right, however, Judge Horton chose to do what was right.

Each day, Missouri judges make decisions based on the law. Few are as costly or unpopular as Judge Horton’s. Sometimes decisions courts make are criticized in the media and by politicians. Despite their personal feelings, and whichever way the political winds are blowing, these judges remember that they are accountable—to the law above all else—and to the people’s interest in preserving the rule of law. Judges following this duty are not necessarily popular, but they make our society better.

ABOUT THE AUTHOR

Judge Michael A. Wolff served on the faculty of St. Louis University School of Law for 23 years before being appointed to the Missouri Supreme Court in August 1998. He graduated from Dartmouth College in 1967 and the University of Minnesota Law School in 1970. He was a federal court law clerk and Legal Services lawyer prior to joining the St. Louis University faculty in 1975. He is co-author of Federal Jury Practice and Instructions, was active in trial practice in St. Louis, and served as chief counsel (1993-94) and special counsel (1994-1998) to the governor.

NEW IDIGENT TABLES

ADOPTED

Effective June 2, 2006 the State Board of Indigent Defense Services adopted the 2006 Federal Poverty Guidelines. The new income guidelines for appointment of counsel are:

<table>
<thead>
<tr>
<th>Size of Family Unit</th>
<th>Amount Allowed</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>$9,800</td>
</tr>
<tr>
<td>2</td>
<td>$13,200</td>
</tr>
<tr>
<td>3</td>
<td>$16,600</td>
</tr>
<tr>
<td>4</td>
<td>$20,000</td>
</tr>
<tr>
<td>5</td>
<td>$23,400</td>
</tr>
<tr>
<td>Add $3,400 for each additional family member</td>
<td></td>
</tr>
</tbody>
</table>

(1) Total Liquid Assets*
(2) Amount from Table Above
(3) Cost of Legal Representation

Add lines 2 and 3. If amount is greater than line 1, defendant should be appointed counsel.

DETERMINATION OF ELIGIBILITY-K.A.R. 105-4-1(B):
“An eligible indigent defendant is a person whose combined household income* and liquid assets** equal less than the sum of the defendant’s reasonable and necessary living expenses plus the anticipated cost of private legal representation.”

*Household income is defined as: Defendant's income and the income of all other persons related by birth, marriage or adoption who reside with the defendant. Income shall be calculated before taxes and shall include income from all sources.

**Liquid assets are defined as:
- Cash in hand
- Stocks and bonds
- Accounts at financial institutions
- Real property or homestead with net value greater than $50,000
- Any property readily converted to cash except:
  - Car, clothing and household furnishings
  - Jewelry having net value less than $500
  - Burial plot or crypt
  - Books or tools of trade less than $500
  - Federal pensions

All tables and regulations can now be found on the web at www.ksbids.state.ks.us

Federal Poverty Guidelines can be found at: http://aspe.hhs.gov/poverty/06fedreg.htm
Malisa Nave pled no contest to a second time driving while suspended in Topeka Municipal Court. The city prosecutor dismissed a tag charge, among others as part of the plea agreement. She was sentenced appropriately. A few days later she appeared before a pro tem judge who set aside her plea to DWS and convicted her of the tag charge, which had been dismissed on the prosecutor’s motion at the prior setting. The City was not given notice of this action.

Several weeks later the city prosecutor learned of the DWS dismissal. Several months later the prosecutor refiled the DWS charge, but let the tag conviction stand. Prior to the trial on the refiled charge, Nave moved to dismiss the charge based on double jeopardy. The motion was denied and she was found guilty of DWS. She appealed her conviction to the district court. In district court she again filed a motion to dismiss the charges based on double jeopardy. The district judge granted Nave’s motion to dismiss, but reinstated Nave’s original plea, subject to Nave filing a proper motion to withdraw the plea. Nave appealed to the Kansas Court of Appeals and the City cross-appealed.

In an unpublished decision, the Kansas Court of Appeals agreed with the district court. City of Topeka v. Nave, Slip Copy, 2006 WL 1816396 (Kan. App. unpublished, decided June 30, 2006) Once the municipal judge took the no contest plea, jeopardy attached. Therefore, the City was prohibited from refiling the charges. Since Nave’s motion to dismiss the refiled charge was based on double jeopardy, it was proper for the court to examine the circumstances under which the original charge was dismissed.

The municipal court’s ruling to set aside Nave’s original plea was invalid under the circumstances. There was no evidence that she had actually moved to set aside her plea, either orally or by written motion. The City Attorney was given no notice of the action. The Court does not have the authority to set aside a no contest pleas, sua sponte (on it’s own motion), absent some fraud upon the court in the entry or acceptance of the plea. Therefore, Nave is returned to the same position she occupied before her plea was improperly set aside in municipal court. If she wants her plea set aside, she must file an appropriate motion in municipal court and give the City a chance to respond.

APPELLATE COURT WILL NOT RETRY THE CASE ON APPEAL

Joe Bird was convicted in municipal court of domestic battery. He appealed to district court and was again convicted.

The facts were fairly straight forward. An argument broke out between Bird and his former housemate at the home of a mutual friend. She attempted to leave, but he blocked the kitchen doorway. When she tried to push her way through the door, Bird pushed her back with his chest, causing her to fall into a window and cut her elbow. She then called 911.

On appeal he argues that the evidence was insufficient to support his conviction. He attacked his former housemate’s credibility and contends that she ran into him, bounced off, and then slipped on the kitchen’s slick linoleum floor causing her to fall into the window.

The Court of Appeals found that even though there may have been evidence adduced at trial which would have supported a different finding, the evidence presented by the prosecution was sufficient to support the charge. The trial court resolved the disputed factual issues, and it is not the responsibility of the appellate court to retry the case on appeal. City of Garden City v. Bird, Slip Copy, 2006 WL 1816407 (Kan. App. unpublished, decided June 30, 2006).

COURT CAN’T DISMISS CHARGES FOR INSUFFICIENT EVIDENCE WITHOUT HEARING ALL THE EVIDENCE

Emery Goad was a process server appointed by the Sedgwick County District Court to evict Sylvester Thompson from his rented apartment. A disturbance erupted in his attempts to evict Thompson. The police were called to investigate a “disturbance involving a man with a gun.” Goad refused several attempts by the officer to get him to leave Thompson alone. According to the officer, Goad pushed Thompson several times in the chest and grabbed his arm. It wasn’t until after the physical confrontation that the officer was able to read the writ that Goad was trying to serve. Goad was charged with battery and obstruction of justice. He was apparently convicted in mu-

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In district court, Goad moved to dismiss the charges claiming that he was cloaked with judicial immunity when acting as a process server, the complaint failed to allege a crime, and the charges were multiplicitous. At a hearing on the motion, the Court took testimony from the police officer, after which it dismissed the charges for insufficient evidence to support either charge. It found that Goad was acting within the scope of his authority as a special process server in attempting to remove Thompson from a common area of the apartment complex; he used reasonable force to evict Thompson; he properly identified himself to the officer, explained an eviction was in process and gave the officer the writ to review; and the police officer had no power to prevent lawful execution of the writ. The City appealed the dismissal to the Kansas Court of Appeals.

The Court found that the district court did not have legal authority to dismiss the charges against Goad without a full evidentiary record of all the facts and circumstances. Taking testimony from one witness and then ruling on a basis that was not even alleged by the defendant was error. *City of Wichita v. Goad*, Slip Copy, 2006 WL 1816309 (unpublished, Kan. App. Decided June 30, 2006).

**Pursuing a DUI Suspect into His Garage**

Officer Williams observed Larry Pratt commit several traffic infractions, including driving on the wrong side of the road. He followed him and Pratt drove into his garage, attempted to enter his house and close the garage door. Officer Williams situated his vehicle with the hood extending under the garage door. He ordered Pratt to come to him. Instead, Pratt activated his remote control and the garage door came down and struck the hood of the patrol car. When the door started to rise, Pratt did it again, again striking the hood of the patrol car. Pratt headed for the interior door that lead from his garage into the house. As he opened the door, Officer Williams grabbed his arm and told him to stop. As he struggled to get away, Officer Williams noticed a strong odor of alcohol on Pratt’s breath. His speech was slurred and laced with profanity. His eyes were bloodshot, glazed and watery. He had difficulty maintaining his balance. He refused to perform any field sobriety tests or the preliminary breath test. Pratt was arrested for felony DUI (his fourth) and was convicted by a jury.

He appealed to the Kansas Court of Appeals arguing that the evidence should have been suppressed due to the warrantless entry by the officer into his home. The Court of Appeals upheld the conviction and found that the Fourth Amendment prohibits law enforcement officers from making warrantless and nonconsensual entries into a home in order to make a routine felony arrest absent exigent circumstances. However, hot pursuit is an exigent circumstance that has been widely recognized. This was hot pursuit, creating an exigent circumstance justifying the warrantless entry into Pratt’s garage.

The Court quipped “Being able to outrun the cops may be an effective strategy in a ‘Dukes of Hazzard’ episode, but not in Kansas.”


**A Blanket Detention of All Party Guests to Investigate Underage Drinking Is Unreasonable Under the Fourth Amendment**

Sgt. Lathrop was dispatched to a loud house party. Complaints had come in involving noise, parking and possible underage drinking. Two of the individuals that lived at the residence were employees of a local country club. The police were aware that there had been a recent burglary at the country club in which a large amount of beer and liquor had been stolen. Approximately nine officers descended on the house at 12:21 a.m. Both sides of the street were lined with cars, a large number of people were around and loud noise was coming from the residence. Two roommates who lived at the residence were contacted and came outside to speak with Lathrop. He told them why he was there. One of the

(Continued on page 30)
roommates consented to the search of the premises to look for evidence from the burglary.

Once inside, the officers observed a large number of alcoholic beverage containers and plastic cups. About 75 people were at the party. Once the officers satisfied themselves that there was no connection between the party participants and the burglary, the began investigating the reported underage drinking, which had been confirmed by one of the guests.

The officers did not know who had been drinking or not, nor who was underage and who was not, although there were some adults present. They told the guests in the basement to remain there until they could be questioned. Some guests waited as long as an hour before the officers questioned them. They spoke with each guest individually to determine their age. If they were over 21, they were free to go. If they were under 21 and there was any indication they had been drinking, they were immediately given a Miranda warning.

About 25 minutes after the officer’s arrived, they called Derek Flesher upstairs from the basement for questioning. He was under 21, and he waived his Miranda rights and agreed to speak with Lathrop. Lathrop detected a strong odor of alcohol on Flesher’s breath. He was swaying while standing; his eyes were bloodshot; his speech was slurred and he admitted drinking. He agreed to take a PBT, which registered .14. He was issued a citation for consumption by a minor and told he was free to leave.

Flesher moved to suppress the evidence against him on the basis that the officers had no reasonable suspicion to detain him to investigate possible underage drinking. The Kansas Court of Appeals agreed in State v. Flesher, 134 P.3d 36, unpublished opinion, May 19, 2006.

It held that a blanket detention of all party guests for up to an hour was not reasonable under the Fourth Amendment. In order to detain Flesher in the basement, the officers needed more than an inchoate and unpolarized suspicion. At the time they detained him, the officer’s did not suspect him of being underage or of drinking, in fact they did not even notice him the basement. They could not point to any particular suspicions regarding Flesher at the time he was initially detained (told to stay in the basement until officer’s could question him).

The Court held that this clearly did not involve a concern for safety on the roadways, as a checkpoint DUI stop, because in this case if a person was under the influence, he or she was simply written a ticket and released. There was no indication that officers followed up to determine if persons like Flesher got behind the wheel of an automobile and drove after being released from the party.

“We are not unsympathetic to the logistical nightmare that can confront officers during an investigation such as this.

The alternatives that have been suggested at oral argument are tantamount to simply letting everyone go. This, according to the defendant, must reverse Flesher’s conviction.”

This was a 2-1 decision, with Justice Pierron dissenting. He stated that he would have found the search to be reasonable. He opined:

“The facts of this case do not provide a reasonable basis for the establishment of a keg-party exception to the duty of police to make reasonable efforts to ascertain if underage persons are engaged in drinking alcohol when that is reported to them and the report appears to be credible. Of course, every Fourth Amendment question depends largely on the facts of the individual case. Detaining 1,000 people for 15 hours to find a few underage drinkers would not be reasonable. However, the actions of the police here, under these facts, were reasonable. The best way to analyze the situation would be to ask what the police were to do. Something very close to what was done here would appear to be the appropriate action. The alternatives that have been suggested at oral argument are tantamount to simply letting everyone go. This, according to the defendant, must be done as to do otherwise requires the defendant to be questioned briefly before it is ascertainable that he has done anything wrong. Although it is not a crime to be in the wrong place at the
Unpublished Opinions

(Continued from page 30)

wrong time, something all of us have experienced, it may cause some slight inconvenience to us, notwithstanding that we have done nothing wrong. That is part of the price we pay for living in at least a somewhat ordered society. This was not a pleasant wedding reception with a few mischievous youngsters sipping champagne. This was a major beer bust in a residential area causing a public disturbance. If a minister and Aunt Ethel had been involved, well, shame on them.

If the officers had been informed that a stabbing had just taken place in the basement with the assailant being unknown, one would hope that the majority would not insist that all persons in the basement be immediately allowed to run for the hills because there would be no individualized, particularized suspicion as to the assailant. However, the majority decision would apparently require it. That, of course, would involve a more serious crime than we have here. But since the delay of the defendant here was relatively brief, the actions of the officers appear to have been reasonable and, therefore, constitutional.”

WAIVER OF COUNSEL FORM MUST SHOW WAIVER OF BOTH RETAINED AND APPOINTED COUNSEL, NOT JUST WAIVER OF APPOINTED COUNSEL TO BE VALID

Defendant Slick was convicted in district court of felony DUI. At sentencing he argues that his two prior municipal court DUI convictions should not be used for enhancement purposes because they were uncounseled.

In 1992 the defendant had entered diversion on a DUI. In 1993 he was convicted as a second time offender and sentenced appropriately. The Court of Appeals held that based on State v. Delacruz, 258 Kan. 129, 135 (1995), even an uncounseled diversion can be used for enhancement purposes because no incarceration is involved. So the Court held that the 1992 diversion counted for enhancement purposes.

In the 1993 case, the defendant signed the following waiver:

“I have been informed by the Municipal Court of the charges against me, of the nature of the proceedings before the Court and of the possible penalties I face including a fine and jail sentence.

“I understand that I have a right to have an attorney represent me in my defense in this case and if I cannot afford one and am found to be indigent, one will be appointed for me.

“I do not wish to have an attorney appointed by the Court but wish to retain an attorney on my own or to present my own defense and arguments to the Court. I waive my rights to have a court appointed attorney repre-

sent me.

“The Court of appeals found that the 1993 conviction “invalid” because the waiver of counsel was ineffective. The Court found that in this waiver the defendant only waived his right to court-appointed counsel. It cites Scott v. Illinois, 440 U.S. 367 (1980) in support of this argument. The Court refers to the suggested “waiver form” contained in In re Habeas Corpus Application of Gilchrist, 238 Kan. 202, 208 (1985) as being a proper waiver form. The waiver suggest in the Gilchrist case states, in part, that the defendant “does not desire to have counsel, either retained or appointed, to represent him or her before the Court, and wishes to proceed without counsel.” (emphasis added) 238 Kan. at 212. The 1993 conviction cannot be used to enhance Slick’s sentence. He must be sentenced as a second-time offender. See, State v. Slick, unpublished opinion, Slip Copy, 2006 WL 1976757 (decided July 14, 2006).

Editor’s Note: The waiver of counsel form contained in the Municipal Judges Manual on page 13-22, would appear to satisfy the waiver requirements of Gilchrist, et. al.

FAILURE TO CONDUCT PROPER OBSERVATION PERIOD PRIOR TO ADMINISTERING THE PBT REQUIRES SUPPRESSION

Shawn Ellis was stopped by the Concordia police department for failing to stop at a stop sign. The officer testified that he gave the defendant the PBT and that the manual for the PBT requires a 15 minute waiting or observation period. The officer waited only 14 minutes before giving the test. The Court found that the results of the test must be suppressed. See, City of Concordia v. Ellis, unpublished opinion, Slip Copy, 2006 WL 2043865 (July 21, 2006).

Editor’s Note: Remember, the PBT tests are only admissible if the defendant is challenging the validity of the arrest or the validity of the request to take the test. Otherwise, PBT test results won’t come into evidence in the first place. See, K.S.A. 2005 Supp. §8-1012.
FILING MOTION FOR NEW TRIAL DOES NOT STAY APPEAL TIME

Defendant was convicted in district court of domestic battery. He was sentenced on March 11. He filed a Motion for New Trial which was not heard until May 3. On May 13, after the motion was denied, he appealed. The Kansas Court of Appeals found that it did not have jurisdiction over the appeal because it was filed more than 10 days after the sentencing. City of Garden City v. Bird, 139 P.3d 152, unpublished, (Kan. App. decided August 4, 2006).

The defendant was required to file his notice of appeal within 10 days of his sentencing. The filing of a motion for new trial does not change that requirement. If a defendant wants to file a motion for new trial, he can do that as well. The district court retains jurisdiction until the appeal is docketed, so he could have both on file at the same time.

OFFICER MUST HAVE REASONABLE AND ARTICULATABLE SUSPICION OF CRIMINAL ACTIVITY

At 2:30 p.m. on Sunday afternoon, Officer Pryor drove by a residence owned by a fellow police officer. He observed a vehicle in the driveway. The door of the car was open and the male driver was standing in the yard near the porch. There was a female passenger and a child in the backseat. Officer Pryor drove around the block and contacted the officer who lived at the residence. She told Officer Pryor that she had not given anyone consent to be on her property. She asked Officer Pryor to check it out. He drove back around to the residence and observed the vehicle backing out of the driveway. He turned on emergency lights and stopped the vehicle. It turns out the couple was looking at the house because it had a “for sale” sign in the yard. However, the driver had a suspended driver’s license and Officer Pryor issued a citation for driving on a suspended driver’s license.

The driver argues that Officer Pryor had no basis to stop him. The officer argues that the driver was at the least trespassing and could have been burglarizing the house.

The Court of Appeals agreed with the driver and remanded the case with orders to set aside the conviction. City of Ross-ville v. Zimmerman, Slip Copy, 2006 WL 2595340 (Kan. App.), unpublished, decided September 8, 2006. The Court held that to be guilty of trespassing the premises would have to be posted against entry or the driver would have had to decline the owner’s request to leave. On the contrary, the premises was posted “for sale” which would be an invitation for people to stop and examine the premises. There was absolutely no specific facts cited by the officer to support a suspicion that the driver was burglarizing the house. The stop was unlawful because the officer could not articulated particularized and objective facts sufficient to constitute a reasonable suspicion that a crime had been or was being committed.

PROBABLE CAUSE TO ARREST FOR DUI

In City of Concordia v. Jones, Slip Copy, 2006 WL 2595300 (Kan. App.), unpublished, decided September 8, 2006, the Court found the following facts sufficient to support a DUI arrest.

Jason went to the home of his estranged wife, Deena, in spite of a restraining order issued against him. His eyes were “hazed over and glossy,” and his speech was slurred. He reeked of alcohol. Deena called the police for assistance. The officer arrived and saw Jason’s truck parked the wrong way on the street with the headlights on. He saw Jason exit the truck and the headlights go off, indicating the car had been running and had been turned off before his exit. Deena told the officer Jason was drunk and that he had started the truck right before the officer arrived. She further told the officer that she knew he was drunk because she had lived with him for seven years. Jason failed two field sobriety tests and the preliminary breath test read .175.

Nuts and Bolts

Postscript: After pressure was exerted by the local defense bar, on September 7, 2006, the Kansas City, Missouri City Council voted to reverse the changes made by the City Attorney and return to the prior system of “deceptive, irresponsible plea bargains” in the words of the Kansas City Star. Apparently cases had become extremely backlogged with attorneys demanding trials, and the City was losing significant revenue.

Kansas City Star Editorial Cartoon, September 9, 2006
In *State v. Curls*, ___Kan.App.2d___ (filed May 5, 2006, but not published until October 10, 2006), the Court upheld his conviction in spite of the lack of corroboration on the basis that it was not the Court’s role to reweigh the evidence, pass on the credibility of witnesses, or resolve conflicts in the evidence. However the Court did have the following comment about the police work in this case:

“Curl’s argument might have been precluded by the officers taking the time to listen to the messages recorded on Murdock’s phone in order to corroborate her testimony. For the officers to decline Murdock’s invitation to do so can only be deemed curious police work; clearly the better practice dictates that investigating officers confirm any recorded call messages when given the opportunity to do so.”

**COURT COSTS MAY ONLY BE ASSESSED FOR THE CHARGES FOR WHICH THE DEFENDANT WAS CONVICTED**

James Lopez was charged with second degree murder of Clint Johnson and aggravated battery of Jason Penka, as well as intimidating two different witnesses. He was acquitted of murder, but convicted of the remaining charges.

The trial took seven days and included testimony from 33 witnesses. At the conclusion of the case, the district court awarded costs and expenses against the defendant. This included (1) $1,108.12 for court costs including preliminary hearing witness fees and mileage, jury trial witness fees, and docket fees; and (2) $2,108.32 for a portion of the travel expenses for several trial witnesses, including flight tickets, lodging, and mileage.

On appeal, Lopez argued that a significant portion of these costs and expenses were not related to his convictions, but rather were incurred in connection with the murder charge, for which he had been acquitted.

K.S.A. §22-3801(a) governs the liability for court costs: “if the defendant in a criminal case is convicted, the court costs shall be taxed against the defendant.” K.S.A. 2005 Supp. §28-172a allows for “additional costs” as approved by the court, including but not limited to “witness fees.”

In *State v. Lopez*, ___Kan.App.2d___ (October 13, 2006) the Court held that the Court can only assess those costs associated with conviction and if it is impossible to separate the costs, then some sort of pro rata apportionment is necessary among all charges.

**Editor’s Note:** K.S.A. §12-4411, regarding municipal courts, states only that “[f]ees and mileage of witnesses shall be $2.50 per day or any part thereof for an appearance and 10¢ per mile actually driven over 10 miles.” The expense is borne by the party calling the witness, and if the defendant is acquitted it is borne by the city.
The Verdict

Fall 2006
Issue 37

C/O Overland Park Municipal Court
12400 Foster
Overland Park, KS 66213
(913) 327-6852  Fax-(913) 327-5701
karen.arnold-burger@opkansas.org

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There’s room for lots of correspondents!!  Please vol-
unteer by sending in an article or idea.

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