



If you would like to submit an article or would like to see a topic addressed, please send it to Judge Arnold-Burger.



Court Watch

The following are cases that have been decided since our last issue that may be of interest to municipal judges. Only the portion of the case that may relate to issues that arise in municipal court are discussed. Members are encouraged to read the whole opinion.

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REASONABLE DELAY IN EXECUTING ARREST WARRANT TOLLS STATUTE OF LIMITATIONS

Butler County issued a warrant for defendant's arrest in April 2003 for crimes she allegedly committed in February 2003. The crimes had a two year statute of limitations.

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Kathleen Ryan, 17, was a senior at Eureka High School in 1926. In order to graduate, she had to pass American History. The final exam was held the day before commencement. Prior to the examination, the following rule had been read to the students, including Kathleen:

1. *There must not be any books or papers in possession of any one during the examination.*
2. *Anyone known to give or receive help in any way will themselves receive a zero on the examination.*

While the examination was in progress, her teacher, Miss Walker, discovered a paper in Kathleen's possession containing notes on American History. Miss Walker told Kathleen she need not proceed further and gave her a "0" on the exam.

Miss Walker ordered Kathleen to report to the principal. She sent the notes to the principal as well. The principal considered the matter too serious for him to decide alone, so he called in the whole faculty. Evidence was presented to the faculty.

Kathleen's version of the events was as follows: She made some notes on American History on a full-size sheet of theme paper and went to school expecting to use the notes for review before the examination commenced. However, once she got there the examination started at once and stu-

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SPOTLIGHT ON: KEITH DRILL

Keith Drill, *Mission*, grew up in Irvington, New York, just north of New York City. His mother was a science teacher in the New York public schools and his father was an engineer who fought in World War II as a Merchant Marine. He has an older sister, Beth Drill Nay, who graduated from KU law school in 1984. His father moved the family to Kansas when he accepted an offer from Farmland Industries. His mother continued her teaching with the North Kansas City School District. When she passed away a few years ago, the family established an endowment in her

name at Pembroke Hill School in Kansas City to allow science teachers to receive quality training.

After graduating from Colgate University in upstate New York, Keith decided to join the family in Kansas and follow in his sister's footsteps. However, he chose Washburn instead of KU Law. Since graduating law school, Keith has worked with the firm Wyrsh, Hobbs & Mirakian in Kansas City. He has been a shareholder in the firm since 1995. He focuses his practice on civil and criminal litigation. On Oc-

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Spotlight on: Keith Drill

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tober 2008, his days as a life long bachelor finally came to an end with his marriage to the beautiful Alexandra. The couple honeymooned on the Mexican Riviera.

While going to high school and college, Keith volunteered as a firefighter and an EMS technician. It is a bug he has never been able to get out of his system. He has continued to volunteer for over 20 years for the Consolidated Fire District No 2 of Northeast Johnson County. He often refers to the bond among firefighters as a motivating force in continuing to volunteer. He carries a pager that alerts him to the various types of calls. He keeps his firefighting gear in his car so he can go directly to the scene of the alarm, where he meets the paid firefighters. Each month he is required to attend training sessions and perform a minimum of 8 hours of "ride-out" time. They are also expected to respond to at least 25% of structure fire alarms received.

Keith was appointed municipal judge in Mission in 2003. He also serves as permanent pro-tem judge in Overland Park. Mission Municipal Court meets about eleven times per month.

"Judicial work is a nice adjunct to any trial practice. As a trial lawyer, my ability to deal with clients and cases has improved as a result of seeing the view from the bench. As many have said before, the overwhelming majority of the public will have their only interaction with the courts in a municipal court and what we say or do can make an impact on what they do or do not do in the future. It is really justice in its most direct form."

When asked about the value of the Kansas Municipal Judges Association, Keith could not say enough about the value of the annual meetings.

"It is extremely helpful to have access to people at the state level such as Marcy Ralston with Driver Control. Actually, I do not see how a municipal judge could function effectively without going to the annual conference. In addition, the interaction with other judges and the rich discussions about common issues are wonderful. I learn a lot more from that conference than most of the garden variety CLE's I attend."



Updates from O.J.A.

ANNOUNCING NEW JUDGES!!

September 1, 1995.

Since our Summer 2008 issue, the following new municipal judges have been appointed or elected:

- Steve Deiter Sabetha Seneca Centralia
- Michelle DeCicco Roeland Park
- Lloyd Swartz Topeka
- Robert Scott Marysville
- Aaron Roberts Kansas City

▲ ▲ ▲ ▲ CONFERENCE REMINDERS

Municipal Court Clerks' Spring Conference
April 3, 2009
Manhattan, KS

Municipal Judges' Annual Conference
April 27-28, 2009
Wichita, KS

District Judges' Spring Conference
June 18-19, 2009
Overland Park, KS

Annual Judicial Conference
October 19-20, 2009
Wichita, KS

▲ ▲ ▲ ▲ CHIEF JUSTICE KAY MCFARLAND TO RETIRE JANUARY, 2009

Chief Justice Kay McFarland will retire January, 2009. Justice Robert Davis will become Chief Justice.

Kay McFarland became the first woman chief justice of the Kansas Supreme Court on

Kay McFarland is a lifetime resident of Kansas. Chief Justice McFarland was born in Coffeyville. She moved to Topeka at age six and has been a resident of that city ever since. Her late father, Dr. Kenneth McFarland, was the former superintendent of Coffeyville and Topeka schools and was a nationally known lecturer and public speaker. She graduated magna cum laude from Washburn University with dual majors in English and History-Political Science. She is a 1964 graduate of Washburn University School of Law and was admitted to the Kansas Bar the same year.

She was in the private practice of law until January 1971 when she became Judge of the Probate and Juvenile Courts in Shawnee County, Kansas. Judge McFarland was the first woman to be elected to a judgeship in Shawnee County.

In January 1973, Judge McFarland became judge of the newly created Fifth Division of the District court of Kansas, in Topeka—thereby becoming the first woman to be district judge in the history of Kansas. Her election to this high office came after her victories over opponents in both the primary and general elections. She was appointed by the Governor to the Supreme Court in 1977, the first woman to hold such office and became Chief Justice in 1995.

Judicial Ethics Opinions

JE-164
September 25, 2008

A judge asks whether the judge can ethically hear cases involving a County Attorney’s office in the judge’s district if the judge’s spouse is employed as a non-lawyer support staff member of that office.

Canon 3E(1) applies to this issue and provides impertinent part, as follows:

“A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned...” (2007 Kan.Ct.R.Annot. 628).

Under these circumstances we are of the opinion that the judge’s spouse, solely by virtue of his or her employment in the County Attorney’s office, would have no reason of any kind to have any interest in the outcome of cases before the judge involving the County Attorney’s Office.

Accordingly, the judge is not required to disqualify himself or herself in cases involving the County Attorney’s office for the sole reason that his or her spouse is employed by the County Attorney’s office.

JE-165
September 30, 2008

A well-known drug has been prescribed for a judge. The judge is, therefore, a member of the class in one or more class action lawsuits that have been filed in Kansas and across the country against the drug’s manufacturer alleging concealment of material facts and manipulation of data about the effectiveness and safety of the drug.

The Kansas Counsel for the class has asked if the judge would be willing to join the class as a named plaintiff.

The judge asks if he or she may join the class as a named plaintiff with the understanding that there would be no mention of the fact that he or she is a judge in the pleadings but such fact could surface during discovery.

Canon 2B provides in pertinent part that “...a judge shall not lend the prestige of judicial office to advance the private interests of the judge or others...” (2007 Kan.Ct.R.Annot 622). The judge admits that there is no specific need for the judge to be a named plaintiff, and the judge offers no reason for the judge to be a named plaintiff. Therefore, the only

effect of having the judge a named plaintiff would be to lend the prestige of judicial office to other members of the class and class counsel.

We are, therefore, of the opinion that it would be a violation of Canon 2B for the judge to be a named plaintiff in the class action.

JE-166
October 14, 2008

The child of a judge was delivered about six weeks prematurely by c-section. This child was extremely ill at birth. Despite great efforts to save the child’s life, the child died when she was about a month old. The night before the child’s funeral, the child’s mother developed symptoms of heart problems and was taken to a hospital where she suffered a major heart attack that necessitated open-heart surgery. The heart did not recover and she was transferred to a metropolitan city to be placed in line for a heart transplant but she is required to wait for some time to be placed on the transplant list. She will need to remain in the city for as long as a year and must have a family member with her as long as she is there. Her medication expense will be about \$5,400.00 per month for two years, and insurance will pay only half of this expense. Apartment rent in the city is expected to be more than \$1,000.00 per month, and there will be travel costs or family members going to visit. Her antibodies are such that finding a heart that her body will accept may take considerably longer than for others awaiting a heart transplant. Finally, to be placed on the transplant list, a person must show the financial means to adequately take care of the expenses involved.

A fund has been or will be established with a local bank for the benefit of the judge’s spouse which will apparently qualify donors to deduct contributions for income tax purpose as charitable contributions.

The request for this opinion comes from another judge asking two questions:

1. Are other judge ethically permitted to ask fellow judges to contribute to this cause?

Canon 4C(4)(b) (2007 Kan.Ct.R.Annot. 633) states:

“(b) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of office for that purpose, but a judge may be listed as an officer, director, or trustee of such an organization, so long as the listing is not used for fund-raising purposes. A judge should not be a speaker or the guest of honor at an organization’s fund-raising events, but may attend such events ...”

There are no exceptions to this prohibition by judges for the
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Judicial Ethics

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solicitation of funds, and a judge may not ethically ask a fellow judge to contribute to this cause.

This does not mean that a judge is prohibited from contributing to the fund for the benefit of a fellow judge's family that is experiencing a medical emergency.

Because the organization or fund that is set up with the local bank will be utilized only for fund-raising activities, a judge may not be an officer, director or trustee of such an organization. It would not be improper for court personnel, lawyers who are not judges, or any other community members to join together to solicit support for the medical benefit of the judge's spouse.

2. Is it proper for the fund which has been established for the benefit of the judge's spouse to accept contributions from lawyers who may appear before the judge in the future?

Canon 4D(5)(b) (2007 Kan. Ct. R. Annot. 635-636) states:

“(5) A judge shall not accept, and shall urge members of the judge's family residing the judge's household, not to accept, a gift, bequest, favor or loan from anyone except for:

...

(b) a gift, aware or benefit incident to the business, profession or other separate activity of a spouse or other family member of a judge residing in the judge's household, including gifts, awards and benefits for the use of both the spouse or other family member and the judge (as spouse or family member), provided the gift, award or benefit could not reasonably be perceived as intended to influence the judge in the performance of judicial duties and is reported if its value exceeds \$150; ...”

We believe this exception applies to the judge and would allow the fund established for the spouse's benefits to accept contributions from lawyers who may appear before the judge in the future. It is not improper for the funds to be utilized for expenses that the judge might be legally responsible for as family necessities.

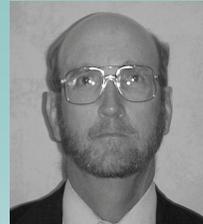
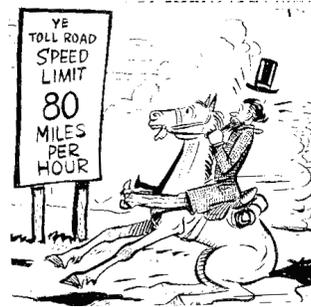
If the value of the contribution to the fund exceeds \$150.00, the judge must report it in the same manner as the judge reports a gift.

The Verdict

It Happened in Kansas

The “*It Happened in Kansas*” cartoon was originated and drawn by the late Frank Arlo Cooper, Kansas artist and cartoonist, and was published in Kansas newspapers for many years. A series of books have been published compiling his many works. Here's one example:

TOLL ROADS ARE NOT NEW IN THE STATE—**KANSAS** WAS ONLY 5-YEARS OLD WHEN THE FIRST TOLL ROAD WAS BUILT—IT RAN FROM **ELWOOD** (JUST ACROSS THE **MISSOURI RIVER** FROM **ST. JOSEPH, MO**) TO **WATHENA** 4 MILES TO THE WEST—25¢ TOLL WAS CHARGED FOR ONE HORSE AND RIDER.



CONGRATS to *Kansas City, Kansas Municipal Judge Wes Griffin* who was recently appointed to the District Court in Wyandotte County.

Aaron Roberts has been chosen to replace him and *Moe Ryan* will become Administrative Judge over the court.



CONGRATS to *Topeka Municipal Judge Cheryl Rios-Kingfisher* who was recently appointed to the District Court in Shawnee County.



Lloyd Swartz, currently judge in Junction City, will take her place.

Court Watch

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After the charges were filed and the arrest warrant issued, officers alerted detectives to be on the look out for the defendant in the area of Douglass, Kansas where she had family. It wasn't until February 2004 that police entered the warrant in the NCIC system. Six days later, the defendant was stopped by Wichita police on a traffic matter. She gave her sister's name and the warrant was not served. The following month, Butler County officers sent a memo to Sedgwick County asking for its assistance in locating and arresting the defendant. They advised Sedgwick County of various hotels in which she may be living. They also notified Douglass officers that she may appear in the summer for her sister's baby shower. There was some evidence that she may have been stopped one other time and alluded arrest. The State was able to show that there were 45 inquires in NCIC either for the defendant or her sister between the date of the crime and May 2005, when she was finally arrested.

In *State v. Watkins*, ___ Kan.App.2d ___ (October 5, 2007, published August 12, 2008), the defendant argued that the delay in executing the warrant was unreasonable and therefore the statute of limitations had run on the offense and the charges should be dismissed. The Court reasoned that the key to analyzing the reasonableness of the delay is to look at what the State did do, not what it didn't do. Each case must be determined on its own facts. Two rules can stop the running of the statute of limitations. First, an unreasonable delay in the execution of the warrant and second, any period during which the accused is concealed within the state so that process cannot be served. In this case, the Court found the delay was not unreasonable. The State took substantial and ongoing efforts to locate the defendant.

Editor's note: *This case revolves around the language of K.S.A. §21-3106, which provides that a prosecution is commenced when the criminal complaint is filed and an arrest warrant delivered to law enforcement. Delivery of the warrant tolls the statute of limitations as long as it is served without unreasonable delay. Under the Kansas code of procedure for municipal courts, a prosecution is commenced by the filing of the complaint with the court. K.S.A. §12-4201. K.S.A. §12-4203 requires that the complaint be served together with a notice to appear prior to filing. However, service can be by delivering a copy to the accused personally, leaving it at the dwelling house of the accused with someone of suitable age, or by mailing it to the accused's last known address. There is no indication that this needs to be anything other than regular mail delivery. Therefore, in the typical case filed in municipal courts in Kansas, there is no significant delay between service and filing. In fact, with one limited exception, service must be effectuated by one of the listed means before filing. Since a bench warrant is generally issued only after the defendant fails to appear following one of the listed forms of service, it is unclear what application the "unreasonable delay" concept and the tolling of the statute of limitations would have in mu-*

nicipal court cases. However, this issue is yet to be addressed by any appellate court in Kansas.

See, supra, page 20 for an unpublished case that seems to make a distinction in those cases where the person has notice but fails to appear (the typical bench warrant situation), as opposed to an arrest warrant where there is no "notice" until the warrant is executed. Once the defendant has notice of a court appearance and fails to appear, the delay in service is due to the defendant's failure to present himself to the court, therefore it appears that delay in service would not be an issue. Again, this issue has not been directly addressed yet in Kansas.

SUPREMES FIND REASONABLE SUSPICION FOR DUI WHERE COURT OF APPEALS FOUND NONE

Defendant and his wife were traveling on separate motorcycles. Defendant's wife failed to use her turn signal. The officer stopped her. The defendant also stopped. The officer asked the defendant to move along or go wait in a nearby parking lot, but defendant refused. The officer called for a backup to deal with the defendant. The backup officer smelled alcohol on the defendant's breath and the defendant admitted drinking. The original officer eventually gave the defendant's wife a warning on the traffic infraction and told her she was free to go. He then approached the defendant to talk to him "about obstruction and future charges if he were ever in that situation again."

He asked for the defendant's driver's license, which he kept. The defendant told him he had a few beers. The officer did not smell any odor, did not observe bloodshot eyes, slurred speech, or any unsteady footing. He admitted the only evidence he had was the defendant's admission to drinking. He asked the defendant to submit to a PBT. The results showed .11 alcohol concentration. He then put the defendant through the field sobriety tests and arrested him. The defendant blew .10 at the police station.

In *State v. Pollman*, Slip Copy, unpublished, 2007 WL 1239251 (Kan.App. April 27, 2007), the Court found that the officer had no reasonable suspicion to detain the defendant at the time the officer took his license and prevented him from leaving. The Court found that the district court should have suppressed the breath test results. The Supreme Court disagreed.

In *State v. Pollman*, ___ Kan. ___ (August 8, 2008), the Court found that the officer did have the reasonable suspicion necessary to detain and later test the defendant. It faulted the Court of Appeals in three key areas. First, the Court expressed its concern that the appellate panel had not given any weight to the fact that the defendant had failed to follow lawful orders and whether or not this indicated that his judgment was impaired due to intoxication.

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Court Watch

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Second, the Court found that the Court of Appeals unnecessarily discounted the testimony that Pollman had a few beers on the theory that the officer did not know when it had been consumed, nor how much had been consumed.

“Contrary to the panel’s analysis, this lack of knowledge does not negate reasonable suspicion. In fact, information about the time and quantity of consumption would rarely be known by an officer who initiated a vehicle stop until after the investigation was under way and those questions were asked. If these facts became known during the investigation, the circumstances would factor into a probable cause determination.”

And finally, the fact that the odor of consumed alcohol that the officer smelled was not strong does not erase reasonable suspicion.

“We conclude the totality of the circumstances—including criminal obstruction of official duty, admission to drinking, and smell of alcohol—provided reasonable suspicion sufficient to justify an investigation into whether Pollman, who was observed driving, was operating his motorcycle while under the influence of alcohol. In other words, there existed a minimum level of objective justification sufficient for the investigative detention of Pollman.”

The Court remanded the case to the Court of Appeals to address other issues raised by the defendant that it had not addressed due to its erroneous holding on suppression of the breath test results.

JUDGE CANNOT SEEK *EX PARTE* LAY OPINIONS REGARDING THE COMPREHENSIBILITY OF A PROPOSED JURY INSTRUCTION

When reviewing instructions for a murder trial, the trial judge listened to arguments from counsel concerning whether a certain sentence should be included in the jury instruction. He took the issue under advisement to review the case law. The next day he ruled that the proposed sentence would not be included in the jury instruction. He said that he “ran that language by a couple of lay people not connected with the case” to see what they believed the disputed sentence meant. Because they did not understand the sentence, he found it should be deleted.

In *State v. Tyler*, ___ Kan. ___ (September 5, 2008), the Supreme Court found that the judge’s actions were clearly improper. *“A judge shall not initiate, permit or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding.”* 2007

Kan.Ct.R. Annot. 625.

Although the Court ultimately found the conduct to be harmless as it related to the outcome of the case, in writing for the majority, Justice Johnson wrote:

“The State makes a half-hearted, unpersuasive attempt to justify the district court’s ex parte communications as appropriate to obtain a lay opinion on the clarity of the jury instructions. We disagree. Perhaps the PIK Committee could benefit from controlled focus group studies on the clarity and comprehensibility of jury instructions. However, it was inappropriate for the district court do conduct an impromptu, ex parte experiment for use in making a substantive ruling in an ongoing prosecution.”

FAILURE TO PAY DOCKET FEE DOES NOT DEPRIVE COURT OF JURISDICTION TO CONSIDER APPEAL

In *Wilson v. State*, ___ Kan. App.2d ___ (August 22, 2008), the Court of Appeals held that failure to pay a docket fee or file a civil cover sheet are not jurisdictional defects, merely a procedural deficiency and do not deprive the Court of jurisdiction to hear the appeal. Payment of a docket fee or filing a civil cover sheet does not effect the adverse party at all; there can be no prejudice shown. A district court clerk cannot reject a filing on this basis.

FELONY OBSTRUCTION OF OFFICIAL DUTY V. MISDEMEANOR OBSTRUCTION OF OFFICIAL DUTY DEPENDS ON REASON OFFICER APPROACHED DEFENDANT

K.S.A. §21-3808 defines obstructing legal process or official duty as knowingly and intentionally obstructing, resisting or opposing any person authorized by law to serve process...in the discharge of any official duty. It goes on to state that obstructing in a felony arrest is a felony, obstructing in a misdemeanor arrest is a misdemeanor. In *State v. Johnson*, ___ Kan.App.2d ___ (August 29, 2008), the Court of Appeals found that whether a misdemeanor or felony is charged depends on the reason the officer approached the defendant, not the actual status of the defendant. In *Johnson*, the defendant was acquitted of the underlying felonies that “supported” the obstruction charge, therefore he argued that the obstruction charge had to also be dismissed. The Court disagreed and found that the officers were clearly investigating a felony when the obstruction occurred and in further support, they charged him with a felony. The fact that he was later acquitted of that felony is irrelevant.

IDENTITY THEFT MUST INCLUDE EVIDENCE OF INTENT TO DEFRAUD

Also in *In State v. Johnson*, ___ Kan.App.2d ___ (August 29, 2008), the Court of Appeals was asked to determine

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Court Watch

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whether the fact that Johnson had his brother's identification (which he state he planned to use in case he encountered police seeking to serve a warrant on him) constituted identity theft. The Court found that the State had the burden to prove that Johnson possessed his brother's personal information with the intent to "defraud for economic benefit" as required by the statute (K.S.A. 2003 Supp. §21-4018). Since there was no such evidence, his conviction of identity theft as it related to his brother's identification documents was based on insufficient evidence and had to be reversed.

EXTENDING THE SCOPE OF TRAFFIC STOP BY INQUIRY REGARDING TRAVEL PLANS

Defendant was stopped for a routine traffic violation (failure to signal when changing lanes on the highway). The officer asked him to step from the car and started asking him, and ultimately his passenger, questions about where he was traveling from, how long he had been there, why he went there, why he flew there but was driving back, etc. He asked to see the rental car documents. The officer walked around the vehicle and noticed four bags in the cargo area. He thought this was unusual given the short stated length of stay. He asked for both the driver's and the passenger's identification and ran warrant checks on both. Both returning negative, he wrote the driver a warning citation for the traffic violation, returned the driver's licenses, started to walk away and then performed the typical "Columbo" move. He asked the driver if he minded if he asked him a few more questions and asked if he could search the car. The driver agreed and the officer found 113 pounds of marijuana.

The issue in *State v. Morlock*, ___ Kan.App.2d ___ (August 29, 2008), was whether the officer had exceeded the permissible scope of the stop by asking so many questions about the defendant and his origin and destination. The Court found no problem with the officer asking the driver to step from the car on a routine traffic stop. It found no problem with the officer asking limited questions about the driver's travel plans, to wit: place of departure or destination and to see rental documents. However, the Court found that the questions must be reasonably related to the scope of the traffic stop and must not unreasonably alter the nature or the duration of the stop. In this case, the Court found that the officer's continued questioning of both the driver and the passenger about why they were in Phoenix and how long they had been there crossed the line. It was nothing more than a fishing expedition into the driver's personal business in the hope of uncovering suspicious activity.

"Such an intrusion cannot be justified by reasoning that the motorist is not legally obligated to answer the questions. This analysis blurs the distinction between a voluntary en-

counter and a traffic stop, which is an investigatory detention. In a voluntary encounter, a law enforcement officer may approach an individual and ask questions without constituting a seizure provided the individual is free to leave, but the officer cannot force the individual to answer...However, a traffic stop constitutes a seizure, and the motorist is not free to leave while he or she is being temporarily detained and questioned. The motorist is not allowed to pick and choose which questions must be answered. Until the law enforcement officer conveys to the motorist that he or she is free to refuse the requests or otherwise end the encounter, the motorist is expected to cooperate with the investigation and to answer all questions posed by the law enforcement officer. This is why it is essential that law enforcement questioning during a traffic stop be reasonably related in scope to the circumstances which justified the initial interference."

It also found that based on *State v. Damm*, 246 Kan. 220 (1990), the officer (Cocking) had no basis to run a warrant check on the passenger (O'Kelly), which further prolonged the stop.

"Basically, Cocking had a rental van from Arizona with a nervous 16-year-old driver. Cocking may have had a hunch that Morlock and O'Kelly were up to something, which later proved to be correct, but there was simply no particularized and objective evidence to support a reasonable suspicion of criminal activity. Although Cocking's narcotics-detection dog was in the back of his patrol vehicle, Cocking's suspicion never reached the point that Cocking employed the trained animal to sniff for the presence of drugs. Instead, Cocking ultimately asked Morlock for his consent to search the van."

And finally, the consent to search was not separated enough in time to purge the taint of the illegal search. The defendant's conviction was therefore reversed.

Judge Leben wrote a very lengthy dissent to virtually every stage of the majority's analysis, which is very interesting reading for those so inclined.

NO PROBABLE CAUSE TO SEARCH BASED PRIMARILY ON LARGE SUM OF CASH FOUND ON DEFENDANT FOLLOWING A TRAFFIC STOP

Defendant was pulled over after running stop sign. He was alone in his girlfriend's truck. His license was suspended. When he was stopped, he immediately called his girlfriend to come to the scene and pick up the truck (apparently realizing that he would not be able to drive on since he knew he was suspended). He was placed under arrest for the DWS and patted down. He had \$2,673 in cash in his pockets. He said he made \$10 an hour detailing cars and the cash was to pay his rent and bills. The officer searched the car and found methamphetamine, digital scales and several small plastic bags. The girlfriend arrived. She asked if she could drive

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the truck away. She was told she could not until a more thorough search was performed. The officer asked if she would consent to the search of the truck and she agreed. The second search found no additional evidence, but the defendant did make some incriminating statements to a second officer who arrived on the scene.

The issue in *State v. Fitzgerald*, ___ Kan. ___ (September 12, 2008), was whether or not the police had probable cause to search the vehicle and if not, did the girlfriend’s consent purge the taint and if not, would the items have been discovered inevitably regardless of the illegal search.

The Kansas Supreme Court determined, based on the agreement of the parties, the only possible basis for the initial search was probable cause and exigent circumstances. (There is no discussion of this being a “search incident to an arrest” since the defendant was arrested for the misdemeanor of driving on a suspended license). It found that under a totality of the circumstances there was not probable cause to support the search.

The State had relied on the officer’s training and experience that large sums of money are usually associated with drug dealing, the traffic violations, the defendant’s quick telephone call to the girlfriend, the large amount of money found in his pocket and his relative modest income as supporting probable cause. The Court found that the only factor that pointed to probable cause was the amount of cash the defendant had on his person, and this factor was weak. It found that the amount of cash was low compared to that found in other cases. The arrangement of the bills was unremarkable (no special packaging).

It also found that the State’s argument that the girlfriend’s later voluntary consent made the discovery of drugs inevitable was not supported by the evidence. The Court could not find that the girlfriend’s consent was inevitable had the drugs not already been found in the car. Although her consent may have been voluntary, its inevitability was not proven.

Therefore, the evidence found must be suppressed. This overruled an unpublished decision by the Court of Appeals allowing the evidence to be considered.

BIDS APPLICATION FEE CONSTITUTIONAL

In *State v. Casady*, ___ Kan.App.2d ___ (September 12, 2008), the Kansas Court of Appeals held that the \$100 Board of Indigent Defense Services (BIDS) application fee was constitutional.

K.S.A §22-4529 imposes a mandatory \$100 application fee

on all defendants that seek court appointed counsel. Relying on the analysis of recoupment statutes contained in *Olson v. James*, 603 F.2d 150 (10th Cir. 1979) the court found the following guidelines must be met for the statute to be constitutional:

1. A requirement of repayment can be imposed only upon conviction
2. A court should not order the defendant to pay unless he is able to pay now or in the future.
3. The defendant can petition the court at any time for remission of payment in whole or in part. The court has the power of remittitur if payment will impose manifest hardship on the defendant or his immediate family.
4. If the defendant’s failure to pay is not due to an intentional failure or refusal to pay or failure to make a good faith effort to pay, the defendant cannot be held in contempt for failure to pay.

The Court found the statute met this criteria, therefore it was constitutional.

Editor’s Note: Although K.S.A. §22-4529 has no application to municipal courts, municipal judges may want to keep in mind the above criteria with regards to any city court recoupment statutes that they may have jurisdiction over.

HIRING OF “ASSOCIATE COUNSEL” BY VICTIM’S FAMILY IN A CRIMINAL PROSECUTION WHO ALSO REPRESENTS FAMILY IN CIVIL ACTION

K.S.A. §19-717 states that a prosecuting witness in a criminal case may, at his own expense, employ an attorney to assist the county attorney to perform his duties in any criminal action and said attorney shall be recognized by the county attorney and the court as associate counsel in such action. K.S.A. §19-705 states that a county attorney cannot serve as civil counsel for any party other than the state or county in any civil action that is based upon the same set of facts upon which the county attorney has criminally prosecuted one of the parties.

Tod Pabst was charged with killing his fiancée. Her family employed an attorney to assist the county prosecutor pursuant to K.S.A §19-717. He actively participated in the criminal trial, under the direction and supervision of the county attorney. At the time, he was also employed to assist with civil litigation against Pabst on behalf of the victim’s family (in a termination of parental rights and adoption case involving Pabst’s child with the victim and two cases filed to resolve certain property disputes), which would be impacted by the outcome of the trial. Pabst was convicted.

In *Pabst v. State*, ___ Kan. ___ (September 19,2008), Pabst argued in his *habeas corpus* action that his due process rights were denied by the “associate counsel’s” conflict of interest rendering his trial “fundamentally unfair.” In a detailed

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Court Watch

(Continued from page 8)

opinion authored by Justice Johnson, the Court held that the “associate counsel” does stand in the same position as the county attorney as it relates to the application of K.S.A. §19-705, *to wit*: the victim-retained attorney is precluded from representing a party in a civil action that depends on the same state of facts as the ongoing criminal prosecution in which the attorney is assisting the public prosecutor. So the next question the Court addressed was whether this conflict-of-interest was a “structural error.”

“Structural errors” are those errors that are so intrinsically harmful as to require automatic reversal (*i.e.*, “affect substantial rights”) without regard to their effect on the outcome of the case. Therefore, if the conflict is a “structural error” it is not subject to a harmless error analysis. Examples of “structural errors” cited by the Court included complete denial of counsel, defective reasonable doubt instruction, and racial discrimination in the selection of a grand jury. However, the vast majority of constitutional errors, the Court opined, are not considered “structural errors.”

It found that Pabst had been unable to identify any substantial rights which had been unequivocally violated. Therefore, the conflict rule in K.S.A. §19-705 was subject to the harmless error rule. It went on to rule that there was no evidence that the conflict that existed with the associate counsel in any way impacted the outcome of the trial. His complaints all dealt with collateral matters, such as the attorney’s argument that Pabst should not be allowed to send mail to his child and that the family objected to Pabst’s motion to interview the child (which was ultimately allowed by the trial court over the associate attorney’s objection). None of these collateral matters impacted the fairness of the trial itself.

USE OF SHACKLES DURING JURY TRIAL

Phillip Anderson was being tried for criminal threat and possession of drugs. Prior to his arrest, when he was told that SRS had taken emergency custody of his girlfriend’s children, he yelled, cursed and threatened to bomb SRS, kill an SRS employee and kill whoever they assigned to care for the children. On the day of trial, he was brought to court in shackles. His defense attorney asked that the shackles be removed for the trial so as not to prejudice the jury. The judge denied the request and said it was his policy to leave that decision to the jailer who had requested that they be left on. No further explanation was given and when defense counsel asked if his client was a flight risk, the judge answered in the negative and said that the jailer had simply said that he preferred to keep the shackles on. Anderson was convicted.

In *State v. Anderson*, ___ Kan.App.2d ___ (September 26,

2008), the Kansas Court of Appeals reversed the conviction. It found that a court cannot defer the decision as to whether to restrain a defendant during trial to the jailer. The use of shackles is inherently prejudicial. The judge must weigh several factors in determining if shackles are necessary including (1) the background of the defendant; (2) the nature of the charges; (3) prior conduct of the defendant, particularly involving dangerous incidents; (4) the nature of the restraints sought to be used; (5) any objection to use of the restraint and/or the defendant’s election whether to testify; (6) the physical characteristics of the individuals and of the courtroom; (7) the presence or absence of victims, family, or spectators; and (8) any other relevant factors. In this case, the judge deferred to the jailer and let the jailer decide. Since no other justification was given or analysis performed, it was a clear abuse of the judge’s discretion. The Court could not find that the error was harmless.

JURY MUST BE UNANIMOUS ON WHICH SECTION OF DUI LAW VIOLATED WHEN DEFENDANT CHARGED IN ALTERNATIVE; MULTIPLE ACTS V. ALTERNATIVE MEANS

Nels Baatrup was charged, in the alternative, with operating a motor vehicle under the influence of alcohol to the extent that he could not safely operate the vehicle or operating a motor vehicle at a time when his alcohol concentration was .08 or more as measured within two hours of operating. After the jury trial, the court instructed the jury that the alternate charges constitute one crime. However, the court gave one verdict form for finding the defendant guilty of operating unsafely and one verdict form for the per se .08 violation. The jury signed both verdict forms.

The State objected to the use of two verdict forms. It argued that the jury is not required to unanimously find one alternative or the other. It must simply unanimously find the defendant guilty of the crime of DUI. If two people felt he was guilty of only the per se violation and 10 people felt he was guilty of the safe operation alternative, but not the per se violation, it would still be a unanimous verdict for DUI. It relied on *State v. Stevens*, 285 Kan. 307 (2007), which involved an allegation of “operating” or “attempting to operate” a motor vehicle while under the influence of alcohol.

In *State v. Baatrup*, ___ Kan.App.2d ___ (October 3, 2008), the Kansas Court of Appeals distinguished *Stevens* and compared “multiple acts” cases to “alternative means” cases. In a multiple acts case, several acts are alleged and any one of them could constitute the crime charged. The court looks to whether the defendant’s conduct is part of one act or represents multiple acts which are separate and distinct from each other. In a multiple acts case, the jury must unanimously agree on the specific criminal act or incident that constitutes the crime. On the other hand, an alternative means case only requires jury unanimity on guilt for the crime charged, not the means by which it was committed so long as substantial

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A Step Back in Time

(Continued from page 1)

dents were directed to deposit their books in a designated place. Kathleen folded the sheet, placed it in her history text, and deposited the book as directed. Later, she went to the book for her blotter.* The sheet fell out, and she folded it in the blotter, took it to her desk and placed it under her ink bottle where it remained until Miss Walker took possession of it.

Miss Walker testified to finding the paper inside the blotter on top of Kathleen's desk. She said her attention was directed to the desk by the fact that Kathleen had a piece of half-closed paper in her lap, and had her eyes directed downward peering at it. The rule forbade possession, and Kathleen was guilty of possession.

There was no evidence presented regarding whether or not Kathleen did in fact derive any help from the paper.

The faculty voted 14-1 to support Miss Walker in giving Kathleen a "0" on the examination. But that was not all. They voted to deprive her of all credit in American History for the entire year. Since she needed it to graduate, she was denied a diploma. Miss Walker was the sole vote in opposition to depriving Kathleen of the whole year of credit. Kathleen appealed the decision to the superintendent of the schools.

The meeting (and graduation ceremony) was set for the next day. As the day began, one of the teachers was leading the graduating class through the program for that evening. When Kathleen showed up to practice and insisted on taking part, the teacher walked out.

After hearing all the evidence, the superintendent testified that it was not clear in his mind that Kathleen had cheated. Since mere possession of the paper had no stated punishment, and there was not definitive evidence that she received any help from the paper, which was the only thing punishable under the rule, he found that the grade of "0" for the examination was not authorized, nor was the further punishment of depriving her of all credit for the class. He directed Miss Walker to give Kathleen another examination. She passed, although the principal directed that her grade not be recorded. The faculty found out Kathleen had been given another test. They called an emergency meeting and sent the following memo to the school board:

"We, the undersigned, protest against the action of the superintendent in overruling the decision of the faculty in the Ryan controversy. We feel that this type of administration is not conducive to an orderly school system. We ask that the action taken by the faculty this morning be upheld by the board of education, and Kathleen Ryan not be permitted to appear with the graduating class tonight."

Graduation was set to commence at 8:00 p.m. At 6:30 p.m. an emergency school board meeting was held. Under threats from the faculty that they would all resign if the Board did not support their decision and deny Kathleen Ryan her diploma:

"When the members of the senior class assembled, in the midst of flowers and to strains of music, for the greatest event in their lives up to that time, and receive their diplomas in the presence of an audience composed of proud parent and admiring friends, Kathleen Ryan was denied hers."

Kathleen sued the Board of Education. During the trial, to show Kathleen's propensity to cheat, evidence was presented that Kathleen had cheated in the past. While her Latin class was reading Cicero, Kathleen borrowed a book and notes from a girl in class who had translated the text in advance of the day's assignment. Kathleen used the girl's translation and got a zero for the day. On another day during an examination Kathleen's eyes were caught wondering to the desk of another student.

The district court found that Kathleen was entitled to a passing grade in American History and a diploma. The Board appealed to the Kansas Supreme Court.

In *Ryan v. Board of Education of City of Eureka, et al*, 124 Kan. 89 (1927), the Court affirmed the district court finding. The opinion sharply condemns the faculty for their histrionics:

"Children as a class do not develop uniformly in body, mind, or moral apprehension. Self-mastery is seldom fully attained at high school age. Some are a long time putting away childish things. But their peccadilloes and delinquencies are not crimes, and the method of dealing with them is to cultivate in them a wider view, not to apply the branding iron to their foreheads and banish them as outlaws, while they still think and speak and understand children. Superintendent Phillips evidently understands youth, sympathizes with it, and has that faith in its ultimately reaching sound maturity which must sustain all educational endeavor, or the effort is misspent. When asked why he gave Kathleen permission to take another examination, he said 'She was an adolescent girl, and deserved recognition.'

All the board of education did was to overrule the head of the schools, at the behest of a mutinous faculty, who had imposed an outrageous ex post fact penalty upon a student who had not violated the only rule read to her providing a penalty. This was done without a hearing, without consideration of her guilt or innocence of fault, and without knowing whether she had completed the course. It is not necessary to debate the legality of such action."



*A blotter is a piece of paper used to absorb excess ink or protect a desk top from excess ink. The paper was gently placed on top of the writing to help it dry. Ink wells, fountain pens and blotters were in common use prior to the widespread use of the ball point pen in the 1950's. The blotter paper often contained advertisements. The blotter on the left is from the 1920's.

BLACK HAWK HELICOPTER PARENTS

By Hon. Karen Arnold-Burger, Overland Park

Several months ago an article was reprinted in *The Verdict* about helicopter parents. These are parents who are so named because they hover around their children, rarely out of reach whether they need them or not. In Scandinavia, this phenomenon is known as “curling” parenthood—describing parents who sweep all obstacles off ahead of their children. They pay very close attention to everything their children do. They rush to prevent any harm or failure from befalling them or letting them learn from their own mistakes, sometimes even contrary to the child’s own wishes. These parents intervene regarding grades with college professors. Recently, employment recruiters have learned that they often negotiate salaries and jobs for their children after they have graduated. An extension of the term, “Black Hawks,” has been coined for those who cross the line. Their zeal extends to unethical behavior, like writing college essays for their children. I recently had the most amazing example of this behavior I have ever witnessed, so I thought I would share it with you. First a little background:



Defendant is 22 years-old and received a DUI in Overland Park. The officer was behind her when she crossed the double yellow line into oncoming traffic, barely missing a head-on collision with another vehicle. He immediately pulled her over. She failed all FSTs and blew .157 (twice the legal limit) on the intoxilyzer. She was granted diversion as a first time offender and approximately 6 months later she got another DUI, as well as driving on a suspended license, in a neighboring city. It was an icy, snowy night and she came up behind the officer at what the officer estimated to be about 65 mph in a 45 mph zone. She passed the officer, and seemingly realizing what she had done, she slowed down to 15 mph, the speed at which she continued until the officer finally stopped her. She failed FSTs and blew a .152 on the intoxilyzer. Her diversion was terminated in Overland Park and she was before me for sentencing. Three days prior to sentencing I received the following letter from her mother (all names and identifying information have been changed). I promise I did not make this up!

Dear Judge Arnold-Burger,

I am writing on behalf of Jane Doe, who is to appear in your courtroom on Thursday, June 19, for sentencing for a DUI. I write as a driver with a personal interest in, as well as with full appreciation for the legitimate state interests in, the safety of our roadways. However, I also write with an understanding that true justice necessitates that the punishment fit the crime and that the law provides you discretion in the enforcement of it.

Therefore, without in any way suggesting that Jane is not responsible for her actions, I do write to plead on her behalf for any leniency you may be able to extend to her, given the circumstances of her situation. Jane’s incidents are the product of poor choices from which she has learned and will not repeat, rather than any problem with alcohol, a reckless disregard for others on the road or a conscious flaunting of the law.

Living at home for the past year, we are almost always well aware of her whereabouts and alcohol consumption. She simply does not have a drinking problem. Unfortunately, she simply succumbed to the social need to be with some peers for a short time, nothing that most of the population doesn’t do from time to time. BAC levels with her indicate how little she eats, rather than how much she drinks. Nevertheless, she has already completed much of the requirements to attend AA meetings and counseling despite the fact that they are unnecessary to her situation since she is not an alcoholic or in danger of becoming one. She has already suffered humiliation far beyond the extent of her crime.

The state’s records will show that Jane has had an excellent driving record for many, many years and her driving on the nights related to her stops was not a true threat to the safety of herself or others. Indeed, the most recent stop was related to her driving very cautiously for the road conditions: the one in Overland Park related simply to the wind conditions—neither related to unsafe driving, influenced or not.

Not that it is any excuse for her behavior at all, but she witnesses countless of her peers who do have problems with alcohol and do have a reckless disregard for others on the road and/or flaunt the law, driving in violation of suspensions and restrictions, leaving establishments well over the legal limit, etc., yet receive no consequences for same. Nevertheless, except for December 23, 2007, she spent her time on diversion and with a suspended/restricted license following the terms of those conditions to the letter in total respect for her agreement and the law. While it is tempting to assume that having been stopped twice, statistically her incidents of drinking and driving would be multiple times that, is simply not so. Recognizing that even one occurrence presents a risk of harm, I still question whether it serves the criminal justice system overall for the generally law-abiding person to be harshly consequenced (sic) while seeing the generally non-law abiding escape consequences simply as a result of a coincidence.

We are fully aware of the significance of the charge and would do anything to help make up for the imposition on this court. We would offer to have her volunteer for your office or the Overland Park police department for an appropriate number of hours to compensate for your time and in punishment for her actions. I would also extend the same offer of my time. I would actually like to assist police departments in expanding alcohol awareness programs to help kids (and parents) understand how broad the consequences of DUI are. I would be willing to do that on behalf of Jane in lieu of her serving confinement.

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NUTS and BOLTS

Question: *Are Mexican DL's valid in Kansas?*

Answer: **Yes, under certain circumstances.**

Non-resident foreign drivers in the State of Kansas

If the driver is a **non-resident** of the state of Kansas he is authorized to drive in Kansas if he has a valid operator's license from his home country for the type of vehicle he is driving. *See*, K.S.A. §8-236. The statute does not provide a time limit on how long the foreign driver enjoys this privilege. The time frame is contingent on the validity of the foreign driver's license. It does not matter if the person is in the country legally or illegally. If the driver does not meet the definition of a "resident", *see below*, he is authorized to drive in Kansas as long as he has a valid Mexican driver's license.

Federal law strongly encourages foreign drivers secure an international driver's permit (IDP) to accompany the foreign driver's license if they intend to drive while visiting the United States. **However, this is not required.** Generally, an IDP is valid for one year. An IDP **by itself** does not authorize driving by a non-resident. It must be accompanied by a valid license from the country of the driver's residence. *See, The Verdict*, Fall 2005, p. 7 for discussion of IDP's.

Residents of the State of Kansas

If the driver meets the definition of a Kansas "resident" she must obtain a driver's license within 90 days of becoming a resident. A foreign driver's license would no longer be valid for such a "resident." A person is considered a "resident" of Kansas if she owns, rents or leases real estate in Kansas as her residence; **and**

1. Engages in a trade, business or profession within in Kansas; **or**
2. Registers to vote in Kansas; **or**
3. Enrolls her children in a school in Kansas; **or**
4. Purchases Kansas registration for a motor vehicle.

The statute does contain an exception for active-duty military personnel and their families. *See*, K.S.A. 2007 Supp. §8-234a (2).

K.S.A. 2007 Supp. 8-240 (i) provides that no license may be issued to anyone "whose presence in the United States is in violation of federal immigration laws." *See also*, K.S.A. 2007 Supp. 8-240(b)(2). "The division shall not issue any driver's license or instruction permit to any person who fails to pro-

vide proof that the person is lawfully present in the United States."

Therefore, if a person meets the definition of "resident" and she is not in this country lawfully, she will not be able to obtain a driver's license and she will not be able to drive in Kansas on her valid foreign license.

If a person is a Kansas resident and is here legally on a temporary basis (for example under a temporary visa), K.S.A. 2007 Supp. §8-240(b)(3) does allow her to obtain a temporary Kansas driver's license for the period of her stay (or one year if there is no definite time-frame on the visa). These licenses must state clearly that they are temporary and the date of expiration. They can be renewed under the same conditions.

Commercial drivers

There is a special classification for commercial driver's licenses issued by Mexico and Canada. Starting in 1988, the United States authorized CDL's from Mexico and Canada for operation in the United States. This was all part of the NAFTA agreement and its predecessor.

K.S.A. §8-2,148 does allow a foreign non-resident driver who is in Kansas with specific permission to work, has both a passport and a social security number, and has passed all testing to receive a "non-resident" commercial driver's license. This was a special provision written into the law for the purpose of facilitating custom cutters who travel through the State every year to assist with the wheat harvest.

Question: *How does a judge determine if the complaint filed in a case is legally sufficient?*

Answer: **The Court must determine whether the complaint adequately advises the accused of the charges against him.**

K.S.A. §12-4202 of the Code of Procedure for Municipal Courts states that "A complaint shall be in writing and shall be signed by the complainant. More than one violation may be charged in the same complaint. A complaint shall be deemed sufficient if in substantially ...the following form." The statute then reproduces a copy of an acceptable complaint which includes "skeletal language" as follows: "

The undersigned complains that on or about the ___ day of ___, 29__ in the City of ___, County of ___, and State of Kansas, (name of accused), did then and there unlawfully (insert violation description) in violation of (insert ordinance violated). (Signature of complainant).

If the complaint is made by a law enforcement officer, the officer's signature is sufficient. If made by someone other than an officer, it must be sworn. *See, Verdict*, Summer 2008, p. 23 for discussion of what is meant by "sworn."

Nuts and Bolts

(Continued from page 12)

K.S.A. §12-4205a (also part of the Code of Procedure for Municipal Courts) states that “*In all cases a complaint and notice to appear in municipal court may be made in the form of the complaint and notice to appear which shall be deemed sufficient if it contains the information required by subsection (b) of K.S.A. §8-2106 and amendments thereto.*”

K.S.A. §8-2106 states, with regards to traffic citations:

“(b) *The citation shall contain a notice to appear in court, the name and address of the person, the type of vehicle the person was driving, whether hazardous materials were being transported, whether an accident occurred, the state registration number of the person’s vehicle, if any, a statement whether the vehicle is a commercial vehicle, whether the person is licensed to drive a commercial motor vehicle, the offense or offenses charged, the time and place when and where the person shall appear in court, the signature of the law enforcement officer, and any other pertinent information.*”

In *State v. Boyle*, 21 Kan.App.2d 944 (1996), the Kansas Court of Appeals held that based on a review of these statutes, simply charging “DUI” was sufficient to put the defendant on notice of the charges against him. It was not necessary to list a statement of facts constituting the crime, nor designate which alternative was being relied upon in the complaint. The Court continued to follow this reasoning in *State v. Piper*, 185 P.3d 972, unpublished, 2008 WL 2510435 (Kan. App. June 20, 2008). See also, AG Opinion 97-48.

Although in *City of Kansas City v. Carlock*, 12 Kan.App.2d 41 (1987) and *State v. Shofler*, 9 Kan.App.2d 696 (1984) the Court found that simply charging “27-41.2A & 27.41.3F: 21—29 cars” and “obstructing legal process” respectively were not sufficient since they involved non-traffic offenses, in *Boyle* the Court pointed out that since those cases were decided the code of procedure for municipal courts has changed to allow such abbreviated charging on all municipal offenses, traffic or misdemeanor. See, K.S.A. §12-4205a (above). The Court found that K.S.A. §22-3201, which was relied on by defendants, has no application in municipal court or traffic cases.

The key to complaint sufficiency is whether the defendant is adequately informed of the charges against him in order to prepare his defense. The *Boyle* Court did concede that it could foresee of some abbreviations which are so obscure they could not be used to inform an accused of the charges against him, however “DUI” was not one of them. The Court reasoned that the defendant is always free to ask for a bill of particulars if he wants more detail about the charge, and the prosecution is allowed to amend a complaint to provide more detail anytime before trial or during trial if no different offense is charged or if substantial rights of the defendant are not prejudiced. See, K.S.A. §12-4505.

Question: *Is there any significance to a complaint that charges possession of marijuana v. possession of tetrahydrocannabinol?*

Answer: **Probably not, they are both illegal. The evidence recovered must simply be consistent with the crime charged.** The POC does not contain a marijuana provision, so this answer will rely on the language in the state statute and assume your ordinance uses the same language.

K.S.A. §65-4162 (a)(3) states in part, “*it shall be unlawful for any persons to possess or have under such person’s control any hallucinogenic drug designated in subsection (d) of K.S.A. §65-4105...*” K.S.A. §65-4105(d)(24) lists tetrahydrocannabinol as a prohibited hallucinogenic. Tetrahydrocannabinols are defined as “*synthetic equivalents of the substances contained in the plant, or in the resinous extractives of Cannabis...*”

It also lists marijuana as a prohibited hallucinogenic. K.S.A. §65-4105(d)(16) Marijuana is defined at 2007 Supp. §65-4101 as “*all parts of the plant Cannabis whether growing or not, the seeds thereof, the resin extracted from any part of the plant and every compound, manufacture, salt, derivative, mixture or preparation of the plant, its seeds or resin. It does not include the mature stalks of the plant, fiber produced from the stalks, oil or cake made from the seeds of the plant, any other compound, manufacture, salt, derivative, mixture or preparation of the mature stalks, except the resin extracted therefrom, fiber, oil, or cake or the sterilized seed of the plant which is incapable of germination.*”

The major active biological chemical compound in marijuana or Cannabis is tetrahydrocannabinol. *State v. Geddes*, 17 Kan.App.2d 588 (1992).

In *State v. Luginbill*, 223 Kan. 15 (1977) the Kansas Supreme Court held that the definition of marijuana includes those parts of marijuana which contain chemical tetrahydrocannabinols and excludes those parts which do not. The law outlaws all plants popularly known as marijuana to the extent they contain tetrahydrocannabinol.

Question: *Is there a minimum amount of marijuana or tetrahydrocannabinol that must be recovered before a possession charge will stand? Isn’t it hard to find that a person knowingly possessed the substance when its presence is not readily visible to the naked eye (to wit: scraping a pipe for residue)?*

Answer: **No, any amount is sufficient, even if it is not visible to the naked eye, measurable or usable.** See, *State v. Brown*, 245 Kan. 604 (1989) (involving cocaine residue in a syringe).

See also, Veilleux, Danny R., “*Minimum quantity of drug required to support claim that defendant is guilty of criminal “possession” of drug under state law*”, 4 A.L.R.5th 1 (1992).

***Kansas Appoints
Traffic Safety
Resource
Prosecutor***



**By David Marshall, TRCC Program Manager
Reprinted from KCJIS News, Vol. 10, Issue 3**

In an effort to educate and support Kansas law enforcement agencies in the prosecution of DUI cases, the National Highway Traffic Safety Administration has partnered with the Kansas Department of Transportation and has named Karen C. Wittman as the state of Kansas' first Traffic Safety Resource Prosecutor (TSRP). The purpose for establishing a TSRP in each state is to help ensure all prosecutors and law enforcement have immediate access to information and resources needed to help overcome obstacles in traffic and DUI prosecutions.

As the TSRP attorney, Wittman is an expert in Kansas traffic and DUI related laws. She will provide support to enhance the capability of the State's prosecutors and law enforcement, to investigate and effectively prosecute traffic safety violations; specifically DUI and DUI fatality cases. She will serve as a liaison between prosecutor and law enforcement officers; conducting training for prosecutors and cross training with law enforcement.

Wittman has been deemed an expert in the field of forensic chemistry in the state and federal courts in Florida. She has evaluated and charged out thousands of DUI cases and participated in over 50 jury trials on DUI. In order to effectively prosecute a case, Wittman has a policy of attending fatality crash scenes in her district to observe first hand the collision. She has experience in preparing search warrants for forensic autopsies on vehicles, and in some instances, has observed the execution of the warrant to get first hand look at the evidence. She has trained with accident reconstruction officers, and participated in wet workshop training of officers for field sobriety testing. She is certified by the manufacturer of the Intoxilyzer 8000 to perform analysis and instruct others in its operation. She has observed active DUI check lanes and successfully defended its constitutionality. Wittman has provided training on current case law for law enforcement officers and prosecutors.

You may contact her at (785)230-1106 or ktsrpr@gmail.com

CITY COURT COST SURVEY

CITY	City Court Costs
Wichita	\$36.50 court, \$4.00 pub def fee, \$1.00 court technology fee
Kansas City, KS	\$30 if TTP or continuance request, \$40 if trial and guilty.
Overland Park	\$1.50 (victim fee)
Olathe	\$7.50
Lawrence	\$22.50
Topeka	\$38 gen traffic, \$105 misd
Shawnee	\$25
Mission	\$10.50
District Courts	\$75 (all to state)
Leawood	NONE
Lenexa	\$10.50
Merriam	\$10.50
Salina	\$50.50 crim, \$30.50 other
Hutchinson	\$49.50
Prairie Village	\$10
Manhattan	\$53.50/\$110.50
Roeland Park	\$10
Mission Hills	\$10
Fairway	\$25
Gardner	NONE
Westwood	NONE
DeSoto	\$20.50
Mission Woods	NONE
Spring Hill	\$20.50
Lake Quivira	\$15.50
Westwood Hills	NONE
Edgerton	\$20

NOTE: In order to assess city court costs, your city must adopt a charter ordinance chartering out of K.S.A. §12-4112 and adopting substitute provisions.

AND THE GENERAL SAYS.....



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

AG Opinion 2008-20 September 2, 2008

K.S.A. §65-501 requires persons and entities who operate a maternity center or child care facility to be licensed by the Kansas Department of Health and Environment (KDHE). Operating such a facility without a license is a misdemeanor. K.S.A. §65-515 provides that:

*“The county attorney of each county in this state is hereby authorized **and required**, upon compliant of any authorized agent of the secretary of [KDHE] to file complaint and prosecute to the final determination all actions or proceedings against any person under the provisions of this act.”*

The term “complaint” is not defined in the statute, so the Attorney General was asked to interpret what is meant by the term. He opined that a “complaint” is a written statement by an agent under oath setting forth the essential facts that constitute a misdemeanor violation of the act. This is also the document that the county attorney would use to initiate prosecution. If the county prosecutor receives a complaint from the Secretary of the KDHE, he or she still has discretion to initiate a prosecution or decline prosecution, notwithstanding the “required” language in the statute.

AG Opinion 2008-21 September 18, 2008

When a defendant has been incarcerated on multiple cases or counts pending disposition and receives consecutive sentences on the same day, jail credit earned while awaiting disposition is subtracted from the aggregate sentence. Jail credit is not applied to each sentence.

Calculation of a defendant’s sentence for misdemeanor charges is the responsibility of both the district court and the sheriff. The responsibility of recording and calculating a defendant’s time in jail lies with the sheriff. Based upon the sheriff’s information, the court must make the appropriate jail credit calculations in order to determine a “sentence-begins” date.

The Verdict

Treasurer’s Report

Prepared by Kay Ross, K.M.J.A. Treasurer

INCOME:

Balance as of 04/21/08.....	\$16,373.84
Income from dues.....	\$ 600.00
Bank interest.....	\$ 35.01
K.M.J.A. Spouse Fees.....	\$ 440.00
Total Income 04/2108 to 07/25/08.....	\$ 1,075.01

TOTAL INCOME TO DATE \$17,448.85

EXPENSES:

Puffy’s Steakhouse.....	\$ 592.63
Band for Outing	\$1,200.00
Dues Report Printing Expenses.....	\$ 58.58
CNA Surety Bond, Treasurer.....	\$ 100.00
Hospitality Room expense.....	\$ 757.14
Verdict Printing.....	\$ 780.00
Trivia Prizes.....	\$ 528.00

TOTAL EXPENSES TO DATE.....\$ 4,016.35

BALANCE ON HAND 07/25/08..... \$13,432.50



JUDICIAL PERFORMANCE EVALUATIONS

Evaluations for Kansas judges facing a retention vote in the November 4th election have been posted online to help voters decide whether to keep them on the bench. Only the evaluations for non-elected magistrates and judges will be provided. Evaluations for elected judges are kept confidential. Go to:

<http://kansasjudicialperformance.org>

2008 FINE SURVEY*

CITY	Unsafe Speed for Conditions	10 miles over limit	15 miles over limit	20 miles over limit	Moving violation (stop sign, red light, etc.)	Non-Moving Violation (exp. tags, equipment, etc.)	Up charge for school or construction zone [#]
Wichita	\$96	\$106	\$131	\$156	\$86	\$81	None
Overland Park	\$120	\$100	\$130	\$155	\$120	\$90	Both = \$50
Kansas City	\$70	\$70	\$100	\$126	\$95	\$70	School = \$25 Construction = double
Topeka	\$136	\$86	\$96	\$111	\$116	\$136	School = triple Construction = double
Olathe	\$100	\$80	\$110	\$160	\$100	\$65	Both = double
Lawrence	\$129	\$99	\$129	\$159	\$129	\$129	Both = double
Shawnee	\$110	\$102	\$127	\$157	\$110	\$95	Both = double
Mission	\$100	\$110	\$135	\$160	\$100	\$80	School = \$50 Construction = double
District Courts	\$135	\$105	\$135	\$165	\$135	\$105	Construction = double
Leawood	\$100	\$75	\$115	\$150	\$100	\$75	School = \$50 Construction = double
Lenexa	\$120	\$135	\$160	\$215	\$120	\$95	School = \$50 Construction = double
Merriam	\$125	\$145	\$170	\$195	\$125	\$150	None
Salina	\$100	\$80	\$90	\$100	\$100	\$75	School = \$20 Construction = double
Hutchinson	Court required	\$90	\$100	\$110	\$95	\$90	School = \$10 Construction = double
Prairie Village	\$110	\$114.50	\$174.50	\$249.50	\$239.50	\$89.50	School = \$30
Manhattan	\$105	\$71.50	\$101.50	\$131.50	\$113.50	\$73.50	School = \$10 Construction = double
Roeland Park	\$110	\$80.50	\$100.50	\$129.50	\$79.50	\$79.50	Both = double
Fairway	\$100	\$100	\$125	\$155	\$175	\$100	School = \$25 Construction = double
Gardner	\$95	\$85	\$115	\$145	\$95	\$110	School = \$20 Construction = double
Westwood	\$110	\$100	\$125	\$150	\$100	\$100	Both = \$50
DeSoto	\$100	\$70	\$100	\$130	\$100	\$90	None
Spring Hill	\$110	\$95	\$130	\$160	\$115	\$140	Both = double
Lake Quivira	\$75	\$70	\$90	\$110	\$75	\$65	None
Edgerton	\$89.50	\$69.50	\$99.50	\$129.50	\$89.50	\$89.50	School = double

* The amounts listed include court costs. The question posed to each jurisdiction was "What is the total amount of money an offender would have to pay if he or she pled guilty to the offense?"

When the up charge is listed as "double" it does not mean the fine is double the amount listed on this survey, since the survey is inclusive of court costs. It is a doubling of the fine only. For example, a general moving violation in the district court is \$135, the construction zone fine and costs would be \$195, because the underlying fine is only \$60.

MAZE OF INJUSTICE

In late 2007, Amnesty International published the results of a two year study on sexual violence among native American women in the United States. The report, entitled "*Maze of Injustice: the failure to protect Indigenous women from sexual violence in the USA*" paints a grim picture of the way the justice system handles this important issue.

There are more than 550 federally recognized American Indian and Alaska Native tribes in the U.S. They are considered sovereign nations under U.S. law, having jurisdiction over the citizens and land within their reservation boundaries. Data gathered by the U.S. Department of Justice indicates that Native American and Alaska Native women are more than 2.5 times more likely to be raped or sexually assaulted than women in the U.S. in general. More than one in three will be raped during her lifetime. Again according to statistics gathered by DOJ, at least 86% of reported cases of rape or sexual assault against American Indian and Alaska Native women are perpetrated by non-Native men. In contrast, in the non-native population most sexual violence is committed within an individual's own race. For example, in 2004 perpetrators in 65.1% of rapes of white victims were white, and 89.8% of perpetrators in rapes of African American victims were African American. Although rape is always an act of violence, 50% of American Indian and Alaska Native women reported that they suffered physical injuries in addition to the rape, compared to 30% of the rape victims in the general U.S. population.

At the heart of this problem are two main issues, confusion regarding jurisdiction over the crime and the perpetrator and lack of resources on Indian reservations.

Three factors come into play in determining where jurisdictional authority lies in these cases: whether the victim is a member of a federally recognized tribe, whether the accused is a member of a federally recognized tribe and whether the alleged offense took place on tribal land. Tribal police and prosecutors can investigate and prosecute all crimes committed by Indians in areas including, but not limited to, Indian Country. However, the maximum penalty that can be im-

"To a sexual predator, the failure to prosecute sex crimes against American Indian women is an invitation to prey with impunity."

Dr. David Lisak, Associate Professor of Psychology,
University of Massachusetts
September 29, 2003

"[N]on-Native perpetrators often seek out a reservation place because they know they can inflict violence without much happening to them."

Andrea Smith, University of Michigan, Assistant
Professor of Native Studies

The Verdict

posed is up to one year in jail and up to \$5,000 in fines. Federal prosecutors (the U.S. Attorney's Office) and police have concurrent jurisdiction over major crimes committed by Indians on tribal land (to wit: rape, murder, etc.). They have a much larger arsenal of penalties available. However, based on the U.S. Supreme Court holding in *Oliphant v. Suquamish*, 435 U.S. 191 (1978), tribal courts have no criminal jurisdiction over non-Indians on tribal land. Only the federal government has jurisdiction over crimes committed by non-Indians on tribal land.

This bifurcated system of jurisdiction causes many cases to "fall through the cracks." The report indicates that federal prosecutions are rare.

Police resources are extremely limited on most reservations, depending on the wealth of the tribe. Very few police officers patrol hundreds of miles of land.

In the vast and harsh expanses of Alaska, some of which are accessible only by airplane, law enforcement is non-existent. Reports can only be taken over the phone. So even if the U.S. Attorneys office was willing to prosecute the case (which Amnesty International reports is sporadic depending on the caseload of the particular office), evidence gathering is woefully lacking. Many villages do not have any personnel trained to prepare rape kits. As a result, rape and sexual assault of native women by non-

native men on tribal land largely goes unpunished. In other words, the tribe has no jurisdiction (and even if it could, it is limited to one year in jail and \$5,000 in fines) and the U.S. Attorney cannot take the case due to lack of physical evidence.

The American Bar Association, Judicial Division, National Conference of Special Court Judges highlighted the report at its annual meeting in New York in August of this year. A panel discussion was sponsored which included an Assistant U.S. Attorney, a judge from the Cherokee tribe, a native American defense attorney, and a victim advocate from a tribal community. The presentation was very powerful and gives one pause to try to comprehend how this can be happening in the USA. The full report can be obtained from Amnesty International USA; National Officer; 5 Penn Plaza, New York, New York 10001 or downloaded directly from its website at www.amnestyusa.org. In addition, "*Sharing our Stories of Survival: Native Women Surviving Violence*," published in 2008 by the Tribal Law and Policy Institute is a beautiful and insightful compilation of essays and poetry written by survivors. It can be ordered online through the Tribal Court Clearinghouse at:

<http://www.tribal-institute.org>

Sen. Emler: Kansas' Own Terrorism Expert

By Richard Shank - Community columnist

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On Sept. 26, Lindsborg's Sen. Jay Emler will walk across a stage to accept a diploma for a master's degree in Homeland Security, and in doing so will become the Kansas Legislature's foremost expert on terrorism and security-related issues.

The McPherson County Republican was elected to the Kansas Senate in 2000 and quickly rose to a position in leadership. Currently, he serves as chairman of the Senate Utilities Committee, a natural fit for Emler, an attorney who is a former executive for a telecommunications company.

Eight months after taking the oath of office, the East Coast was struck by terrorists in a plot forever immortalized as 9/11.

As the 2002 Legislature convened, legislators in both houses and from all political persuasions met to discuss the need for more security for the state's 2.4 million citizens, the Kansas Statehouse and our elected officials. The end result was the formation of the Joint Committee on Kansas Security.

With that accomplished, his peers looked down the table and asked Emler to act as the committee chairman on even numbered years.

I have known Jay for eight years and learned early in our association that when he accepts an assignment, he wastes little time learning all he can about the subject.

His research leads him to a master's degree program at the Naval Post Graduate School in Monterey, Calif. In March 2006, he was accepted to the program and joined 31 classmates from throughout the nation in a three-year graduate level curriculum on Homeland Security.

Every three months, Emler travels to Monterey for an intensive two weeks of classroom instruction followed by long nights and weekends of study. His classmates include a representative of the Federal Bureau of Investigation, and a battalion chief for the Boston Fire Department.

Last week, I sat down with Jay and posed the question of how rural Kansas, with its peaceful setting, could possibly be a site for terrorism acts.

"Kansas, with our wide open spaces, critical industries, agriculture and transportation facilities that lead to the eastern part of the country could be a target," Emler said.

"By disrupting the nation's bread basket, a terrorist group could disrupt the entire nation," Emler continued.

Emler, in the most sobering comments of the interview, in the most sobering comments of the interview, points out that the plot to blow up the federal building in Oklahoma City was hatched in his senatorial district. And the bomb used to carry out the plot was built on a lake east of McPherson.

As Emler prepares to write a thesis on state and local funding of Homeland Initiatives, a requirement for completing the course, it comes as no surprise that he has already put the coursework to practice.

Recently, while driving on a Kansas highway, he was passed by a man of Middle Eastern descent who was driving an older SUV with no license plate. He quickly reported the sighting to authorities.

Then, he received a tip that a group of foreign nationals were making stops at western Kansas financial institutions to wire transfer money overseas. Coincidentally, all of the transfers were for the same amount of money.

Emler quickly forwarded the information on to an appreciative FBI.

"The bottom line is that if you see something that doesn't look right, report it to authorities," Emler said. "It just might be the little piece in a puzzle that ties a case together."

A perception that government is trying to scare its citizens is inaccurate, according to Emler.

"Instead, the government is asking its citizens to keep their eyes open to anything out of the ordinary," Emler said.

And, how, I asked Emler, has this nation avoided a second attack in almost seven years since 9/11.

"We have avoided an attack as a result of luck, good intelligence, vigilance, and because we have spent the financial resources needed to beef up security," Emler said.

According to Emler, Al-Qaida incorrectly perceived our nation's response to 9/11, as the event galvanized Americans to work against our enemy.

"We didn't go to pieces as they had hoped," he continued. In fighting terrorism and the Al-Qaida, Emler drew a parallel of a starfish and a spider with Al-Qaida being the starfish.

"If you chop the leg off a starfish, you end up with two starfish," Emler said.

"If you chop the head off a spider, there are no more spiders," he continued.

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evidence supports each alternative means. The test used in determining whether a case is a multiple acts case or an alternative means case was set forth in *State v. Kesselring*, 279 Kan. 671 (2005). Incidents are factually separate (and thus “multiple acts”) when independent criminal acts have occurred at different times or when a later criminal act is motivated by a “fresh impulse.” *Stevens*, the Court of Appeals pointed out, was an “alternative means” case, because the same set of facts were used to determine either operation or attempted operation of a vehicle. It was one continuing course of conduct.

However, in this case, the Court opined, there were multiple acts. The act of operating unsafely and producing a BAC of .08 or more are separate and distinct, with different proof required for each. Therefore, it is a multiple acts case and the jury must unanimously agree on one (or both, as it did in this case) alternatives for a conviction to stand.

FAILING TO EXERCISE IDEAL SUPERVISION OF CHILD DOES NOT EQUATE TO RECKLESS ENDANGERMENT OF A CHILD

Monica Hernandez was inside her house cooking dinner. Her 20 month old son was out in the front yard of her house playing with some older children. She could see them from inside her home and was alternating between cooking and watching the children. She looked away for a moment and when she looked back the children were gone. She went looking for her son. He was eventually found a short walk

Jay Emler Fights Terrorism

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Three years of study on the issues at hand has led Emler to the conclusion that the war on terrorism is far from over.

"I wish that I could say that it will be short term, but it won't be," Emler said.

Jay will return to the Legislature in January with new ideas on how Kansas can protect itself from attack and will have a national network of former classmates who can assist.



away submerged, face up, in a retaining pond (which was the result of recent flooding in the area). She was charged with aggravated child endangerment for recklessly endangering her child. The district court dismissed the case after preliminary hearing finding that “this was nothing more than an accident and there was no reckless conduct on the part of the defendant.” The State appealed.

In *State v. Hernandez*, __ Kan.App.2d __ (October 10, 2008), the Court of Appeals agreed. Aggravated child endangerment is defined as “recklessly causing or permitting a child under the age of 18 years to be placed in a situation in which the child’s life, body or health is injured or endangered.” See, K.S.A. §22-3608a(a)(2). Reckless conduct is defined as “conduct done under circumstances that show a realization of the imminence of danger to the person of another and a conscious and unjustifiable disregard of that danger.” See, K.S.A. §21-3201(c).

The State argued that the defendant acted recklessly by leaving a child under the age of 2 in the front yard without adult supervision when the city was extremely flooded, thereby placing the child at serious and imminent risk. The Court found that although the defendant’s supervision of the child was less than ideal, the time frame the children were left unsupervised was not reckless conduct. There was no dispute that she just looked away momentarily. There was evidence that there had been flooding in the city, but there was no evidence that the defendant was aware of the flooding near their home and then consciously disregarded a dangerous condition.

PROVING UP PRIOR CONVICTIONS

In *State v. Loggins*, __ Kan.App.2d __ (October 17, 2008), the defendant challenged his criminal history score by challenging several prior convictions. The State has the burden of proving up the priors by a “preponderance of the evidence.” While a certified journal entry is the best evidence of a prior conviction, it is not the only permissible form of evidence to prove criminal history.

In this case, the State offered authenticated copies of computer printouts of court records. The printout included criminal case summary and identifying information. It included the specifics of the crime charged and the defendant’s plea and sentence. For at least one of the cases, a photograph of the defendant was included as well as his social security number. The Court found that this was sufficient to prove up his prior convictions. It also incorporated with approval several unpublished cases which supported the use of such items as docket notes, a copy of the criminal docket and a copy of a probation order as evidence sufficient to support the existence of prior convictions.

A WITNESS WHO REFUSES TO TESTIFY IS “UNAVAILABLE”

In *State v. Jefferson*, __ Kan. __ (October 17, 2008) the

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Kansas Supreme Court held that a witness who refuses to testify is an “unavailable witness” under K.S.A. 60-459(g). The list of situations in the statute in which a witness is unavailable is exemplary rather than exclusive. Therefore, in this case, the witness’s preliminary hearing testimony was allowed to be used at trial.

In so holding, the Court overruled *State v. Johnson-Howell*, 255 Kan. 928 (1994) because it is “analytically flawed; it fails to acknowledge the existence of contrary precedent; and its syllabus taken from discussion of a constitutional point has been misread as a statutory interpretation.”

AGGRAVATED ESCAPE FROM COMMUNITY CORRECTIONS FACILITY

Kristie Urban was granted a PR bond pending sentencing subject to the condition that she go to the Johnson County Community Corrections Residential Center pending her next court appearance. She failed to return while on a pass to visit her family. The issue in *State v. Urban*, ___ Kan. App.2d ___ (October 10, 2008) was whether this constituted aggravated escape. The Court went against the unpublished decisions of prior panels and found that the district court should not have dismissed the aggravated escape charges. Even though she had not been sentenced yet, Urban was still in custody as defined by K.S.A. §21-3809.

“TO CATCH A PREDATOR” TECHNIQUE

In an investigation right out of Chris Hansen’s playbook on Dateline’s “To Catch a Predator” series, John Risinger engaged in a series of online conversations with a detective who had identified herself as a 14-year-old girl named “Lexi.” In their last online conversation, Risinger agreed to meet with Lexi at her house to “make out, feel around, and/or have oral sex.” He then drove to the house, got out of the car, and knocked on the door. While knocking on the door he was arrested.

Risinger argued that he did not intend to commit sexual acts with “Lexi.” He pointed to his psychological evaluation which stated that his strong morality and religious background had kept him from acting out sexually in the past and the fact that he had pointed out to the detectives that he had sexual conversations with adult women on line in the past and had never engaged in sexual activity when he met them. He claimed the evidence was insufficient to prove “attempted” indecent liberties with a child. He argued that the act of knocking on the door did not make up an overt act (or first step, as required by law) to commit the crime.

The law requires that in order to be found guilty of “attempt” to commit a crime, the defendant must have performed an

overt act toward its commission. This overt act must be more than just mere preparation, but must at least be the first step in a direct movement toward completion of the offense.

In *State v. Risinger*, ___ Kan.App.2d ___ (October 24, 2008), the Court of Appeals found that the conversations Risinger had with “Lexi” over the internet clearly showed his intent and the act of arranging a meeting, leaving his keyboard behind, heading to her house and knocking on the door were the first steps toward commission of the intended crime of indecent liberties with a child. His convictions stands.

FELONY ELUDING: COMMITTING FIVE OR MORE MOVING VIOLATIONS IN THE COURSE OF FLEEING FROM POLICE

Police attempted to stop Dorian Richardson for failing to use a turn signal. Instead of stopping, he sped off. A chase ensued. Richardson turned off his headlights (it was dark out) and drove at speeds of up to 70 mph through residential neighborhoods. He failed to stop at five stop signs, failed to use his turn signal five times, and twice drove left of center. He was finally stopped after running over two sets of stop sticks set out by police. He jumped out and fled on foot. Officers took chase and eventually found him hiding in some bushes. His defense at trial was based on mistaken identity. Police found the wrong guy hiding in the bushes.

Richardson was charged with felony eluding. Misdemeanor eluding can be enhanced to felony eluding if the defendant committed five or more moving violations during the police pursuit. In instructing the jury, the district court did not specify the moving violations that resulted in the enhancement. It also did not specify that reckless and DWS could not be used in the calculation.

In *State v. Richardson*, ___ Kan.App.2d ___ (October 24, 2008) the Court of Appeals found that district court should identify and define in the jury instructions the moving violations relied on by the State and supported by evidence in the trial. Although the definition of some moving violations may be commonly understood by a jury, without a specific definition from the court, there are certain moving violations whose definition may be beyond the common knowledge of the average juror. However, in this case, the Court found the omission to be harmless. The moving violations in this case were that type that would be commonly understood by jurors to be moving violations.

Richardson also argued that the jury should have been instructed on the moving violations individually as lesser included offenses, since they had to exist in order for him to be found guilty of the “enhanced” eluding charge. The Court disagreed. They are not lesser included offenses because the elements of the moving violations are not identical to the elements of the eluding charge.

And finally, Richardson argued that the charging document

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was defective because it did not list the moving violations; it merely alleged that in the course of the police pursuit, he “committed five or more moving violations.” The Court held this was sufficient since it followed the language of the statute.

VOLUNTARY ENCOUNTER PRECEDING DUI ARREST

Officer received reports of a possible stolen Missouri tagged vehicle partially submerged in the river. While on route to the location, he observed a vehicle turning into a driveway that provided access to the river and is used for parking for people going fishing. The vehicle stopped along the driveway. It had a Missouri tag. The officer pulled several car lengths behind the vehicle, exited his patrol car and approached the driver on foot. The driver was out of the car on the banks of the water looking at the river in the direction of the location of the submerged stolen vehicle. As the officer walked past the car he saw a 12 pack of beer in the front seat. He approached the driver, said hello, and asked what he was doing. The driver said he was looking for a fishing spot and denied any knowledge of the submerged car. The officer smelled the odor of consumed alcoholic beverage and from there it eventually resulted in a felony DUI arrest.

The issue in *State v. McGinnis*, ___ Kan.App.2d ___ (October 24, 2008) was whether the DUI evidence should be suppressed due to the lack of any probable cause or reasonable and articulable suspicion to question McGinnis. The Court found that this was a voluntary encounter, therefore the Fourth Amendment was not implicated. There was no seizure. The officer was not blocking the defendant in. He did not use his emergency lights and he was not brandishing a weapon when he approached McGinnis on foot. He spoke in a normal voice and did not demand that McGinnis answer his questions. He did nothing to convey that McGinnis was detained against his will. The officer then developed probable cause to arrest through the defendant’s smell, bloodshot eyes, slurred speech, admission to drinking, and the beers in his car.

DELAY IN SERVING WARRANT WHILE DEFENDANT IN CUSTODY IN ANOTHER JURISDICTION

A bench warrant was issued in McPherson County for the defendant’s arrest on a probation violation. Unfortunately, the defendant had been incarcerated in Saline County a few weeks earlier. Over the next 6 years while the defendant was in DOC custody on the Saline County matter, he attempted to get McPherson County to transport him on the warrant, to no avail. He wrote several letters both to the McPherson County district attorney and to the district judge expressing

his frustration because the outstanding warrant was causing him to be ineligible for several programs in prison that he was required to complete before he could be released. The district judge did order transport at one point, but the order was never effectuated for some unknown reason. After he completed his prison term, he was arrested on the McPherson warrant and transported to McPherson County.

At the hearing to revoke his probation, the defendant moved for dismissal due to the delay in prosecution of the motion. The district court denied the motion on the basis that the State was not obligated to bring the defendant back from prison on a probation revocation. In *State v. Hall*, 38 Kan. App.2d 465 (2007), the Court of Appeals found Hall’s due process rights had been violated by the State’s failure to timely serve the warrant and discharged the defendant from liability for the probation violation. The delay, it held, was tantamount to a “waiver” of the probation violation. See also *The Verdict*, Fall 2007, pg. 10.

The Supreme Court reversed the Court of Appeals in *State v. Hall*, ___ Kan. ___ (October 31, 2008). It found that the State does not waive a probation violation if it lodges a detainer but does not execute a probation violation warrant while the alleged violator is imprisoned on a consecutive sentence. The Court conceded that that the issuance of an arrest warrant does not extend a court’s jurisdiction over a probationer indefinitely, and due process demands that the State act without unreasonable delay in the issuance and execution of an arrest warrant. However, relying on *Moody v. Daggett*, 429 U.S. 78 (1976) the Court found that no constitutional violation had resulted from the delay while the defendant was incarcerated somewhere else on some other crime.

The fact that the defendant may have suffered an adverse impact on his classification in prison or been deemed ineligible for various rehabilitation programs which, if completed, may have resulted in an earlier release did not result in any statutory or constitutional entitlement sufficient to invoke a due process violation.

“The world bursts at the seams with people ready to tell you you’re not good enough. On occasion, some may be correct. But do not do their work for them. Seek any job; ask anyone out; pursue any goal. Don’t take it personally when they say “no”—they may not be smart enough to say “yes.”

Keith Olbermann, Broadcast Journalist, MSNBC.

U.S. SOLDIERS IN CRIMINAL COURT

In the last seven years almost 1,000,000 U.S. soldiers have been deployed to Iraq or Afghanistan. Absence of these men and women from the country often has a disruptive effect on the nations courts. Whether the soldier is a witness in a case, a defendant in a criminal case, or a plaintiff or defendant in a civil case his or her absence may result in delays, default judgments that are later subject to being set aside, or a plethora of collateral consequences, particularly in the case of divorce and child custody proceedings.

To address some of these issues, Congress adopted the Servicemembers' Civil Relief Act of 2003 (SCRA) (formerly known as the Soldiers' and Sailors' Civil Relief Act of 1940). The Act provides a process by which service members can get an automatic stay of any civil proceedings pending after they have been deployed. It tolls the statute of limitations from running for or against a service member in certain circumstances. It contains provisions allowing for termination of leases and limitations on eviction. There are numerous other provisions, some of which extend rights to the family of the service member as well, but they are beyond the scope of this article.

Only one published case in Kansas has interpreted this Act.

In *In Re Marriage of Bradley*, 282 Kan. 1 (2006), Levi Bradley sought a mandatory 90 day stay of the proceedings under the Act when his wife filed a motion to modify temporary custody in his divorce proceedings. He had been deployed to Iraq and wasn't scheduled to return for six months. The Court refused to grant the stay. The Kansas Supreme Court agreed that the mandatory stay required by the Act was not appropriate because Levi had not included the three necessary items in his motion (1) a statement as to how his current military duties materially affect his ability to appear; (2) when he will be available to appear; and (3) a statement from his commanding officer stating that his current military duty prevents his appearance and military leave is not authorized for him at the time of the statement.

There are also several Kansas statutes that provide relief to military members and their families. *See*, 2008 Session Laws, Chapt. 72 (educational opportunities for military children), Chapt. 151 (permanent parenting plans for deployed personnel), Chapt. 156, §4 (deferral of real property tax) K.S.A. §73-201 (veteran's preference); K.S.A. §48-292 (reinstatement to healthcare plans relinquished during service); K.S.A. §75-4364 (free tuition to dependants of military personnel killed in line of duty); K.S.A. 79-32,213 (tax credit for employers); K.S.A. §79-32,117 (enlistment and retention bonuses exempt from income tax); K.S.A. §16a-2-405

(borrower protections). But what about criminal cases?

The Act has no application to criminal cases, but issues regarding service members still arise in these courts.

K.S.A. 2007 Supp. §8-2110(d) requires that the court waive the drivers license reinstatement fee when the failure to comply with a traffic citation is due to the person enlisting or being called to military service, requiring the person's absence from Kansas.

What if a defendant or witness cannot appear because of military service? The judge is not required to grant a continuance, but there are ways to easily verify whether the defendant is indeed in the military service and where.

To obtain certificates of service or non-service under the SCRA you can use the public website:

<https://www.dmdc.osd.mil/scra/owa/home>

This website will provide you with the current active military status of an individual. There is no charge for this certificate.

You can also receive certificates from the individual Services by sending your correspondence to the appropriate military office listed below. If other than current status needs to be verified, then you need to send your request direct to the Services listed below. The charge for each SCRA certificate (as of February 21, 2002) is \$5.20. Checks should be made payable to "Treasurer of the United States."

Determining Military Status of Witness/Party

ARMY:

Army World Wide Locator Service
Enlisted Records and Evaluation Center
8899 East 56th Street
Indianapolis, IN 46249-5031
Note: All requests must be in writing

NAVY:

Bureau of Naval Personnel
PERS-312E
5720 Integrity Drive
Millington, TN 38055-3120
Phone: 901-874-3388

AIR FORCE:

Air Force Manpower and Personnel Center
ATTN: Air Force Locator/MSIMDL
550 C Street West, Suite 50
Randolph Air Force Base, TX 78150-4752
Locator Service: 210-652-5775

MARINE CORPS:

Commandant of the Marine Corps
Headquarters, U.S. Marine Corps
(MMSB10)
2008 Elliott Road, Suite 201
Quantico, VA 22134-5030
Locator Service: 703-784-3941/3944

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Soldiers in Criminal Court

Military Legal Points of Contact to Help Facilitate Military Witness/Party Contact

ARMY:

Litigation Division
General Litigation Branch
901 N. Stuart St.
Arlington, VA 22203
Phone: 703-696-1631
Fax: 703-696-8178

NAVY/MARINE CORPS:

Office of the Judge Advocate General
General Litigation Division (Code 14)
1322 Patterson Avenue, Suite 3000
Washington Navy Yard, DC 20374-5066
Phone: 202-685-5450
Fax: 202-685-5472

COAST GUARD:

Commandant (CG-0945)
US Coast Guard
2100 2nd St. SW
Washington D.C. 20593
Phone: 202-372-3740
Fax: 202-372-3967

Major U.S. Air Force Domestic Installation Legal Offices:

KANSAS:

22 ARW/JA
53285 Pratt court, Suite 109
McConnell Air Force Base, KS 67221-3624
Phone: 316-759-3590
Fax: 316-759-1637
Office Hours: 0730-1630 (Central)
Email: jamconn@jag.af.mil

The following questions were asked of Colonel Rodger A. Drew, Jr., Staff Judge Advocate, U.S. Air Force, HQ Washington, D.C.. Col. Drew serves on the Executive Committee of the ABA Judicial Division, National Conference of Special Court Judges and made a very informative presentation on behalf of the Conference at the ABA Annual Meeting in New York in August 2008. He was gracious enough to answer our questions for *The Verdict* regarding these important issues.

Question: If a criminal defendant who is in the military is required as a part of his or her sentence or probation to complete alcohol and drug treatment, anger management classes, individual counseling, etc. are those services that are available on base? Is there a way we can get verification of attendance and successful completion? How could the court access that information? Is it appropriate for the court or court staff to contact the JAG office at the base to try to coordinate the defendant's court requirements with his or her military service?

Answer: At most, if not all standard sized military installa-

tions, these services are available to military members (and their dependants) at no cost to the individual (there may be some cost for dependants, depending on the type of dependant military medical care plan chosen by the family). When military authorities become aware of corresponding incidents, it is standard for the command and/or military medical treatment facility to order (in the case of military members; the military has limited authority over dependants, other than possibly making treatment a condition for retaining privileges, such as the access to the base -- including on base housing) enrollment and participation in such programs. It is understood that such treatment through military channels will likely take the individual away from the workplace during duty hours. Generally, military members (who are in essence salaried, not hourly, employees) are permitted time off during the duty day for medical appointments (which these would generally be considered) without the requirement to take leave or otherwise make up the time away from the office. (It is more an issue of whether the work gets done. If not, we are expected to work overtime until it is.)

Question: What if the service member is a victim or witness in a criminal case? The defendant is entitled to a speedy trial, but the victim/chief and necessary witness has been deployed. Is there anything that can be done...or will the perpetrator walk?

Answer: The court should contact the corresponding Service contact listed above. Various arrangements can be made, depending on the circumstances, including written or video depositions, interrogatories, remote telephonic or VTC testimony, or even the possibility of returning the military member to the situs of the court to testify live. Please note that command authorities will likely attempt to find any alternatives to returning the individual, especially if he/she is deployed to a combat zone.

Question: Does the military require that a servicemember report any "civilian" arrests/convictions?

Answer: Yes.

Question: If a service member is on civilian probation, does the military need/want to know that information?

Answer: Yes.

Question: If so, how would notification best be provided?

Answer: The best means would be for the court or prosecutor to contact the local JAG office. If the military member is not assigned to the local installation, the JAG office should be able to assist in contacting the appropriate military authorities.

Question: A service member has a notice to report for duty on a date certain, but is jailed making it impossible to report. Does the court have any legal duty to release the defendant?

Soldiers in Criminal Court

Answer: Generally no. When a military member is in civilian confinement, they enter into a "bad time" status. Effectively their military commitment (and likely military pay) are suspended and they are required to make up bad time after release. This would also be technically true if the individual was serving a partial release program whereby they are confined only on the weekends. Since military members are supposed to be available for duty in an emergency situation 24/7, they would have to account to military authorities for their confinement time, even on non-duty days.

Question: Is there some sort of notice that the court should send to the military? How? Where? When? If we are required to release, how do we get verification that the service member actually reported?

Answer: Again, coordination with the individual's servicing JAG office would be appropriate. The JAG office can work with the individual's commander to keep him/her informed as well as to provide any needed feedback to the court.

Question: The Servicemembers Civil Relief Act (SCRA) does contain some provisions tolling the statute of limitations in civil cases during periods of service. Are there any similar provisions regarding the statute of limitations in criminal actions?

Answer: The Servicemembers Civil Relief Act (SCRA) generally has no applicability to criminal proceedings. Stated a different way, it neither allows a military member to stay criminal proceedings against him/her nor does it toll any criminal statutes of limitations. (Of course any state or federal statutes of limitations that might be stayed when the defendant is outside the jurisdiction of the court would still apply, but the defendant's military status would be irrelevant.) However, the SCRA does have application to bail bond sureties. Subsection 513(c) of the act states that the "court may not enforce a bail bond during the period of military service of the principal on the bond when military service prevents the surety from obtaining the attendance of the principal." 50 U.S.C. app. § 522.

Question: Can you think of any other issues that come up with regards to service members in criminal court? Do you know of any writing on this topic?

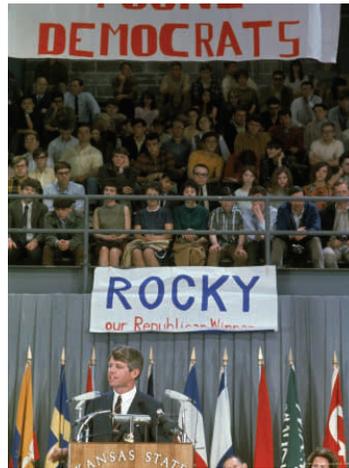
Answer: We're not aware of any other writing on the topic (which doesn't mean there isn't anything else out there). One other issue to address, however, is whom should judges, or more likely prosecutors, contact for military criminal history records of defendants/witnesses? They should contact the Military Justice Division for the respective military service. For the Air Force it is: AFLOA/JAJM, 112 Luke Ave., Room 343, Bolling AFB, DC 20032-8000; (202) 767-1539. For the other services, use the contact information above and that office can refer you to their Military Justice Division.

Election 1968

Did you know that Kansas played a key role in the presidential campaign of Robert F. Kennedy?

On March 17, 1968 Robert F. Kennedy flew to Kansas City to launch his presidential campaign. President Johnson had announced he would not be running and the clear front runner to replace him was Eugene McCarthy. Kennedy had long been scheduled to give the Alf Landon Lecture at Kansas State University and so he decided to make this the venue of his first campaign speech. His staff was very nervous about how he would be received. Kansas had only voted for a Democratic presidential nominee three times since 1916. When Martin Luther King, Jr. spoke on the campus in January, he had not been met with very large crowds. Kennedy's staff was worried that if Kansas was a disaster, his entire campaign could be derailed. He was to follow the KSU speech with a speech at KU the next day. He was afraid that if conservative students booed him and McCarthy supporters heckled him, his campaign would be finished in one day.

The night before the speech he stayed in the Governor's mansion with Gov. Docking, who's father had been a strong Kennedy family supporter and often thought of as an "honorary" Kennedy, meaning part of the inner circle of family and friends. Ethel Kennedy expressed her concern that the conservative KSU students may attack their car. She need not have worried.



Kennedy attracted a record-setting 14,500 students to Ahearn Field House. His reception at KU was even more raucous, with 19,000 students crowding into Allen Field House. The speeches he gave at KSU and KU have gone down in history as some of his best work. His focus was the Vietnam war. His words have been reprinted in several recent publications. By substituting the word "Iraq" for "Vietnam",

many believe his words are equally as profound today. His words were met with thunderous applause and when he stepped off the podium, students rushed the platform and knocked over chairs just trying to touch him. A photographer for Look magazine watched the melee and reportedly shouted in awe, "This is Kansas, *\$#\$ Kansas! He's going all the *\$#\$ way!"

Information derived from "The Last Good Campaign," by Thurston Clarke, as reprinted in the June 2008 edition of Vanity Fair magazine.

Unpublished Opinions

Pursuant to Kansas Supreme Court Rule 7.04(f), unpublished opinions are not precedential and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion. However, whenever cited, a copy of the opinion must be attached to the document, pleading or brief that cites them. Westlaw has now started indexing Kansas unpublished opinions. Therefore, in conducting legal research you may be routed to an unpublished decision. With that in mind, The Verdict, will start summarizing unpublished opinions that deal specifically with cases out of municipal courts or directly related to issues that arise in municipal courts.

FAILURE TO MAINTAIN EMPLOYMENT AS BASIS TO REVOKE PROBATION *Unpublished Decision*

Jason Wilson was required to maintain employment as a condition of his probation. He was fired from his job for excessive absenteeism. The district court revoked his probation. He argued that his probation should not be revoked because he had applied for another job shortly after he was terminated. In *State v. Wilson*, Slip Copy, unpublished, 2008 WL 2891148 (Kan. App. July 25, 2008) the Court of Appeals upheld the revocation of his probation. Wilson “cannot escape the consequences of his own actions-failing to maintain employment because he continually failed to show up for work-simply by turning in a new job application each time he’s fired.” He “knew that maintaining employment meant he couldn’t lose a job based on his own unexcused actions.”

IF CRIME IS COMPLETED, CAN’T BE GUILTY OF “ATTEMPT” *Unpublished Decision*

Jonathan Gonzales was convicted of attempted aggravated sexual battery. In order to prove an attempted crime, the prosecution must establish that (1) the defendant intended to commit a crime; (2) the defendant committed an overt act toward the perpetration of that crime; and (3) the defendant failed to complete the crime. In *State v. Gonzales*, Slip Copy, unpublished, 2008 WL 3367561 (Kan.App. August 8, 2008) the Court of Appeals found that the facts, when viewed in the light most favorable to the State, supported a charge of a completed aggravated sexual battery. The crime was completed. Therefore, since the State charged an “attempt,” the defendant walks. His conviction must be set aside.

The Court was clearly frustrated by having to reach this con-

clusion. In his concurring opinion, Judge Leben wrote:

“I recognize that the result of our decision may seem unjust...But the result is due to the charging decision that the State made. It charged Gonzales only with an attempt offense. The prosecutor appears to have recognized at preliminary hearing the possibility that the evidence showed actual touching. When the district court declined to amend the charge based on the evidence presented at the preliminary hearing, the State still had the option to dismiss the case altogether and refile it with the correct charge...Instead, the State proceeded to trial on a charge that did not match the evidence. Double jeopardy now bars any retrial, and we cannot uphold a conviction that is not supported by the evidence.”

ADMISSIBILITY OF TEXT MESSAGES *Unpublished Decision*

The admissibility of text messages was at issue in *State v. Winder*, Slip Copy, unpublished, 2008 WL 3367575 (Kan. App. August 8, 2008).

Gary, the son of a drive-by shooting victim, received several text messages from “Rocky”, a name and number he had pre-programmed on his cell phone (meaning Rocky Winder). These messages contained threats and one insinuated that if he didn’t assist Rocky “UR mom might be the victim.” Gary showed the text messages to police. The police officer copied the messages down verbatim in his report. Rocky Winder was eventually charged with the shooting. Prior to trial, Gary lost the cell phone that had the text messages on it. The defendant moved to suppress the testimony regarding the messages arguing (1) the failure to produce the cell phone violated the best evidence rule, (2) the prosecution could not lay a proper foundation for the messages; and (3) the text messages were inadmissible hearsay.

As to the “best evidence” rule, the Court found that even though an electronic communication may qualify as a “writing,” if the writing is lost or destroyed without fraudulent intent by the proponent, the best evidence rule does not apply. That was the case here.

Although the defense was forced to concede that the text messages came from Rocky’s cell phone, it argued that the prosecution could not lay a proper foundation to establish that Rocky is the person who sent them. The Court found that sufficient foundation was laid when testimony was presented that the messages referenced previous conversations between Gary and Rocky. Therefore, the content of the messages circumstantially established that Rocky sent them. In addition, any doubt as to whether Rocky sent the messages, goes to the weight and not the admissibility of the evidence.

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Finally, the Court held that the messages were hearsay, but fell under the “party admission” exception to the hearsay rule. They were sent immediately after the shooting. Therefore, they are admissible hearsay.

HOUSE ARREST NOT ALLOWED FOR 4TH OR SUBSEQUENT DUI CONVICTION *Unpublished Decision*

Deborah Rauch was convicted of her 5th DUI. At sentencing she requested she receive a minimum of 90 days in jail with work release and house arrest. The district judge gave her work release after serving 72 hours confined, but held that he had no authority under the statute to release her to house arrest. In *State v. Rauch*, Slip Copy, unpublished, 2008 WL 3367603 (Kan.App. August 8, 2008) the Court of Appeals agreed. Although the statute specifically allows house arrest on a 3rd offense, it does not have such a provision under the penalties for a fourth or subsequent offense. Therefore, house arrest is not an option for 4th and subsequent offenders.

COURT FINDS DELAY WAS REASONABLE IN SERVING PROBATION VIOLATION WARRANT *Unpublished Decision*

In April 2002, Michael Crout was placed on probation for one year on a misdemeanor theft charge. An **arrest** warrant was issued for him in August 2002 based on a probable cause finding that he was in violation of his probation. In January 2004 (17 months later), Crout made his first appearance on the probation violation. At the hearing, the Court set a date for a final hearing and ordered him to submit to a drug screen before leaving the courthouse. He did not submit to the drug screen and the Court issued a **bench** warrant that



“The Fourth Amendment contains 54 words. If their meaning were not subject to debate, many trees would have been saved, many disputes averted, and Professor Wayne LaFave would not have been able to publish a multi-volume treatise containing by his count 1,687,149 words, mostly on the interpretation and application of the Fourth Amendment.”

Judge Steve Leben, writing the dissent in *State v. Morlock*, __ Kan.App.2d __ (August 29, 2008).

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same day. He was not arrested on that warrant for three years.

The defendant moved to dismiss the motion and terminate his probation due to the delay in serving the warrant.

In *State v. Crout*, Slip Copy, unpublished, 2008 WL 3852172 (Kan. App. August 15, 2008), the Court seemed to only be concerned about the three year delay. It did not touch on the 17 month delay.

The State was able to present evidence that the sheriff’s office had determined, within a day of the warrant being issued, that Crout lived in Missouri. Since misdemeanor out-of-state warrants are not enforced in Missouri and Kansas officers have no jurisdiction in Missouri unless they are in fresh pursuit, there was no way for Kansas to arrest him as long as he stayed out of Kansas. The State was able to show that the sheriff’s office rechecked his address 2-3 times over the next three years to verify that he was still in Missouri.

The Court found that the delay was reasonable. It seemed to rely most heavily on the fact that Crout was put on actual notice of the revocation proceeding at his January 2004 court appearance. He willfully decided not to appear at the hearing. (Although, the facts indicate that the warrant was issued when he failed to show up for a drug test). The hallmark of due process, it opined, is notice and an opportunity to be heard at a meaningful time and in a meaningful manner. The three year delay was due entirely to Crout’s failure to appear at a hearing for which he had actual notice. Therefore, the revocation of his probation was proper.

COURT RECOGNIZES A DEFENDANT MAY PLEAD TO TWO 4TH TIME DUI OFFENSES *Unpublished Decision*

In *State v. Shumate*, Slip Copy, unpublished, 2008 WL 3916029 (Kan. App. August 22, 2008) the Court of Appeals was asked to determine whether the trial court abused its discretion when it required that the defendant’s two convictions for being a 4th time DUI offender be turn consecutively instead of concurrently. The Court found this was an issue totally within the discretion of the trial court and affirmed the running of the sentences consecutively.

Editor’s Note: This case is summarized due to the fact that it is again a situation in which the Court recognizes that a person may plead to two 4th time DUI offenses. As you will recall, the Court held in *City of Dodge City v. Wetzel*, 267 Kan. 402 (1999) that a person could actually have two second time offenses. In *Wetzel*, the Supreme Court found that the defendant’s municipal court conviction as a 2nd time offender was not void, even though by the time the conviction was final it was actually a third DUI (defendant had an intervening conviction in another county by the time he was finally convicted and sentenced as a 2nd time offender following a *de novo*

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appeal). The result was the defendant ended up with three misdemeanor DUI convictions, all valid according to the Wetzel court. Contrast this with the decision in *State v. Elliott*, 281 Kan. 583 (2006) where both the Court of Appeals and the Supreme Court held that in the case of municipal offenses a court is to simply count priors to determine if there is jurisdiction, ignoring whether there may in fact be two first offenses or two second offenses.

FACTS DO NOT SUPPORT OBSTRUCTION CHARGE WHEN DEFENDANT IS SIMPLY EXERCISING HIS RIGHT TO REMAIN SILENT

Unpublished Decision

Police received a dispatch of a domestic disturbance in which the defendant was the aggressor. They arrived at the home and found the reporting party. He told the officers that his parents were inside the house and that his step-mother had a purple mark on her eye. The officers look through the window and saw two people inside arguing. After several minutes, the step-mother walked outside. She had a bright purple mark under her eye. The defendant remained in the house and one of the officers reported that heard what he believed to be the sound of a shotgun being loaded. The officers established a perimeter around the house. The defendant would not come out of the house when requested. He held officers at bay for almost two hours, although he did talk to the officers over the phone. When he finally came out, he was charged with obstruction of official duty, to wit: “unlawfully, knowingly and intentionally obstruct, resist or oppose any person in the discharge of any official duty.” Although the complaint did not state which official duty the officers were attempting to discharge, the jury instruction indicated that the State was alleging that the officers were prevented from “following up a report of domestic battery.”

In *State v. Robinson-Bey*, Slip Copy, unpublished, 2008 WL 3916007 (Kan. App. August 22, 2008), the Court held in a 2-1 decision (with a vigorous dissent filed by Justice Greene), that there was no showing that the defendant’s delayed compliance with the officer’s order to step outside the residence substantially hindered, or increased the burden of the officer’s official duty to investigate a domestic battery. No charges had been filed against the defendant. He spoke with the officers by phone, so they could ask him anything they needed to know regarding the investigation. He did not provide false information, threaten or shoot at the police or attempt to run. He was not charged with hindering the officers by impairing their ability to arrest him, but with hindering the officers’ ability to investigate a domestic battery. There was insufficient evidence, according to the majority, that the defendant’s actions in any way hindered the investigation. The bulk of the investigation had already taken place. Although he hung up the phone at one point when the officers advised him he was accused of hitting his wife, the Court opined that this was simply and invocation of his right to

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remain silent. The officers didn’t have to speak with Robinson-Bey to complete the investigation. They had evidence of the battery and a witness.

Justice Greene, in his dissent, warns that the majority decision finding that the defendant’s actions were equivalent to exercising his right to remain silent has “placed us on a slippery slope...virtually any obstruction of official duty could be viewed as “the equivalent of exercising the right to remain silent,” and that would include running away, providing false identification, or shooting at police.”

FACTS DO SUPPORT OBSTRUCTION CHARGE WHEN DEFENDANT RUNS FROM OFFICERS DEMANDING HE STOP, EVEN THOUGH HE ONLY RUNS 150 FEET

Unpublished Decision

Police received a dispatch of a verbal domestic incident outside a residence. There was an active warrant for one of the suspects. As the officer approaches the residence, he observes a person matching the description given by dispatch. He approached the individual on foot. The officer asked the person to stop and asked if he could ask him a few questions. He asked for the person’s name. He responded, “My name’s Del.” When the officer inquired whether or not that was short for “Vondel” (the suspect they were seeking with the warrant), the defendant ran from the scene. He ran about 150 feet as the officer was yelling at him to stop. After several shouts from the officer, the defendant stopped and surrendered to the officer. In *State v. Johnson*, Slip Copy, unpublished, 2008 WL 3916026 (Kan. App. August 22, 2008), the Court found that the defendant’s refusal to comply with the officer’s repeated orders to stop and his actions in running away substantially hindered and impeded the officer’s attempt to carry out his official duty.

Editor’s Note: K.S.A. §21-3808, the subject of these obstruction cases, mirrors POC §7.2.

ADMINISTRATIVE SEARCH WARRANTS; NUISANCE ABATEMENT

Unpublished Decision

Kenneth Hill owned vacant, fenced property in Topeka. City code enforcement personnel discovered several property maintenance code violations on the property, to wit: scrap wood, tires, auto parts, household items, furniture, scrap metal, an inoperable vehicle and trash and debris, all of which constituted a “nuisance” under city code. They sent him a notice giving him 10 days to clean up the property. The notice further advised him that if he did not clean up the property or request a hearing within 10 days, the city would go in and abate the nuisance. He would be charged the costs of abatement plus administrative penalties.

Hill signed the nuisance violation notice on March 5. On July 26, when the property was still in the same condition, the City

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applied for an administrative search warrant to enter the property to abate the nuisance. It was signed by the municipal judge and posted on the property the same day. City crews entered the property and cleaned it up.

In September an administrative order assessing costs and penalties was issued to Hill in the amount of \$777.51. With the order, he was informed that he had 10 days to request a hearing if undue hardship or extenuating circumstances existed to warrant modification of the order. Hill requested a hearing and one was held on October 11. At the end of the hearing, the hearing officer found that the bill would stand as issued. Hill appealed to the district court. He requested the district court judge order the City to return his property and pay damages for wrongfully taking his property. The City moved for summary judgment.

The district court judge found that the record was inadequate to determine whether there was substantial evidence to support the City's findings so it remanded the case to the City for a full evidentiary hearing. Such a hearing was held with both the City and Hill presenting witnesses. The detailed report of the administrative hearing was filed with the Court. He filed an objection to the hearing and the district court allowed further evidence to be taken before the district court. The crux of Hill's argument was that he had taken steps to abate the nuisance and the City failed to put him on notice that those efforts were insufficient prior to entering his property and disposing of items that he valued at between \$10,000 and \$12,000. The trial court ruled that his rights had not been violated. He appealed to the Court of Appeals.

In *Hill v. City of Topeka*, Slip Copy, unpublished, 2008 WL 3005197 (Kan.App. August 1, 2008), the Court held that in reviewing the city's administrative order the trial court is limited to determining if the decision was within the scope of its authority, supported by substantial evidence and neither fraudulent, arbitrary nor capricious. The appellate court applies the same standard. The Court found that Hill was given more than ample opportunities to challenge the City's actions, that he had actually had two post-deprivation hearings and that there was sufficient evidence that his efforts to clean up the property were inadequate. "*Because Hill had made no reasonable efforts to abate the nuisance on his property, the city actions of coming onto his property and abating the nuisance were completely reasonable.*"

Editor's Note: In *Topeka*, the warrants for these "code" searches are issued by the district court judge. In addition, the City has hired a separate "administrative hearing officer" to hear all the code violation appeals.

The Verdict

OFFICER MAY FORCEABLY REMOVE DEFENDANT'S HAND FROM POCKET WHEN DEFENDANT REFUSES TO DO SO

Unpublished Decision

Officer Regan stopped Wallace Harper for driving without a valid license. Harper was exiting his car in a driveway when the officer caught up to him. As they approached each other and the officer advised Harper why he was being stopped, Harper had his right hand in his pocket. Based on officer safety concerns, the officer instructed Harper to put both hands on the trunk of his vehicle. Harper refused to take his hand out of his pocket. The officer grabbed Harper's right arm and pulled his hand out of his pocket. When he did so, one package of marijuana and two packages of cocaine dropped to the ground. Harper was charged with drug possession among other things. He moved to suppress the packages on the basis that the "search" by the officer was illegal. He argued the officer's actions went beyond a *Terry* frisk and was actually a search of his pockets without probable cause.

In *State v. Harper*, Slip Copy, unpublished, 2008 WL 4068157 (Kan.App. August 29, 2008), the Court of Appeals held that when a law enforcement officer has stopped a person for questioning and reasonably suspects that the officer's personal safety requires it, the officer may frisk the person for firearms or other dangerous weapons. Even though no such pat-down actually occurred in this case, the requisite reasonable suspicion was present to allow the officer to remove Harper's hand from his pocket. Therefore, no Fourth Amendment violation occurred. The packages were properly admitted into evidence.

CHAIN OF CUSTODY FOR BLOOD TEST RESULTS

Unpublished Decision

Richard Mayhood was given a blood test at the regional hospital after a DUI arrest. The lab tech extracted the blood and gave it to the requesting police officer. The officer packaged the sample that night, but it remained in either his vehicle or the evidence locker for several days before he mailed it to the KBI. The KBI received it the next day. The chemist testified that the KBI requires that either the container with the blood sample itself or the next proximal container be sealed with tamper-proof evidence tape. This vial only had Scotch tape on it, which is not considered tamper-proof. However, the vial was in a zip lock bag, which was sealed with tamper-proof tape and the bag was inside an envelope that was sealed with tamper-proof tape. Thus, it complied with KBI protocol as properly sealed.

Mayhood objected to the introduction of the blood results on the basis that there was an insufficient chain of custody to show the integrity of the sample. The State presented evidence that it was in the officer's custody until it was mailed and had not been materially altered when the KBI received it. The Court of Appeals, in *State v. Mayhood*, Slip Copy, unpublished, 2008 WL 4291614 (Kan.App. September 19, 2008), found that this was

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sufficient. The State was not required to show that the officer kept the sample under lock and key. The sample complied with KBI protocol and any deficiency in the chain of custody goes to the weight of the evidence, rather than its admissibility.

ADMISSION OF BLOOD AND URINE TESTS WITHOUT A SPONSORING WITNESS *Unpublished Decision*

Joseph Jones was accused of drugging and sexually assaulting a 12 year-old girl. The girl's grandmother took her to the hospital following the attack. The attending nurse took blood and urine samples, which tested positive for marijuana and alcohol. The results of the tests were admitted at trial without a sponsoring witness who could be cross-examined regarding the testing procedures and results. The trial court found that the results were business records. The defendant argued that this violated his Sixth Amendment right to confront the witnesses as outlined in *Crawford v. Washington*, 541 U.S. 36 (2004).

In *State v. Jones*, Slip Copy, unpublished, 2008 WL 4291467 (Kan. App. September 19, 2008), the Court of Appeals held that even though the testing was done as part of a sexual assault kit, the results of which clearly would be used against the defendant in a criminal case, that the hospital lab tech conducting the testing on the blood and urine had no reason to believe that that test results would be used in a criminal prosecution. The blood was drawn upon doctor's orders to check for the victim's overall health. The hospital lab tech who tested the blood had no idea the circumstances of the victim or the draw. It was just a routine hospital test, with the results contained in the hospital records. The samples were no different than any other samples the hospital tested. Therefore, the test results are not testimonial and do not violate the defendant's confrontations rights as expressed in *Crawford*. The trial court did not err in admission of the test results through the testimony of the nurse.

EVIDENCE NECESSARY FOR CRIME OF MAKING A FALSE INFORMATION *Unpublished Decision*

William Sheldon was convicted of making a false information for the following actions:

Waymon Young came into Sheldon's pawn shop attempting to pawn a firearm. However, Young had a prior felony conviction and didn't want to go on record as having a firearm to pawn. So, he asked Sheldon if he could pawn the gun in his wife's name. Sheldon said he could as long as he had his wife's permission. Young called his wife and got her permission and her social security number. Young then completed the pawn report, incorrectly reporting her race and date of birth, and signed her name on the pawn contract. She (Linda) later returned to the pawn shop to retrieve the pawned gun (pay to get it back).

A month later, Young again returned to Sheldon's pawn shop

The Verdict

and with his wife's permission, pawned the gun in her name. However, this time he signed his own name to the contract.

A month later, police noticed the discrepancy between the name on the contract and the name signed to the contract, as well as the incorrect race and date of birth. Sheldon was eventually charged and convicted of three counts of making false information in violation of K.S.A. §21-3711 (a felony). He appealed.

The statute states that making false information is "making, generating, distributing or drawing, or causing to be made, generated, distributed or drawn, any written instrument, electronic data or entry in a book of account with knowledge that such information falsely states or represents some material matter or is not what it purports to be, and with intent to defraud, obstruct the detection of a theft or felony offense or induce official action." In *State v. Sheldon*, Slip Copy, unpublished, 2008 WL 4291510 (Kan. App. September 19, 2008), the Court of Appeals held that since Sheldon was not acting within his own identity when he directed or "caused" the pawn reports to be completed in Linda's name, he could not be charged with making false information. Young may have been guilty, but not Sheldon.

JURISDICTION OF CITY POLICE OFFICERS OUTSIDE OF CITY LIMITS *Unpublished Decision*

Hiawatha police officer followed a car within the city as it traveled very slowly and drifted within its lane. As the vehicle exited Hiawatha, the officer radioed the Brown County Sheriff's Department to inform them of this potentially dangerous situation. The nearest deputy, Gruber, was 20 minutes away, so he asked the Hiawatha officer to follow the car and pull the vehicle over if necessary. He did and ended up stopping the car 4 miles outside the City of Hiawatha after the driver continued even more erratic driving behavior. He eventually arrested the driver for DUI. The sole issue in *State v. Davidson*, Slip Copy, unpublished, 2008 WL 4291617 (Kan. App. September 19, 2008) was whether the officer had authority/jurisdiction to stop a vehicle outside his own city limits.

The Court of Appeals held that he did have the authority since Hiawatha and Brown County had a longstanding written agreement to assist one another outside of their respective jurisdictions. Even though the defendant argued that this was only effective if the requesting jurisdiction initiated the contact ("don't call us, we'll call you"), the Court found such a restrictive rule was not necessary. It didn't matter who initiated the call, as long as a request for assistance had actually been made.

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INTOXILYZER 5000 CALIBRATION CERTIFICATE IS NOT TESTIMONIAL EVIDENCE

Unpublished Decision

In *State v. Benson*, Slip Copy, unpublished, 2008 WL 4416028 (Kan. App. September 26, 2008), the trial court admitted a certificate from the National Highway Traffic Safety Administration certifying the calibration on the Intoxilyzer 5000 machine used to test Benson. The certificate indicated that the machine had been tested and found to be in compliance with federal standards. Benson objected on the grounds that his constitutional right to confrontation had been violated by not requiring that the State produce the individual who calibrated the machine. He relied on *Crawford v. Washington*, 541 U.S. 36 (2004).

The Court of Appeals held that a calibration certificate is prepared as a routine administrative matter required by the State and is not prepared in anticipation of any particular criminal proceeding. Therefore, the certificate is nontestimonial in nature and the defendant had no constitutional right to confront the individual who performed the calibration test.

RETURNING TO STEAL FROM A STORE FROM WHICH YOU ARE BANNED = AGGRAVATED BURLARY

Unpublished Decision

Cleo Moler shoplifted at Wal-Mart in Wichita and was given a written and oral Notification of Restriction From Property (which he signed) not to return to that Wal-Mart or any Wal-Mart. Almost two years later he returned to Wal-Mart and engaged in a self-help exchange (stole merchandise and then tried to return it for cash). He was charge with aggravated burglary (knowingly entering a building in which there is a person, without authority to do so, with the intent to commit a felony or theft. K.S.A. §21-3716.) In *State v. Moler*, Slip Copy, unpublished, 2008 WL 4416035 (Kan. App. September 26, 2008) the Kansas Court of Appeals found the State had established “unauthorized entry” by evidence of the signed “ban notification.”

The defendant also argued that the jury should have been given a limiting instruction because by introducing the “ban notification” the State was introducing evidence of prior bad acts. The Court held that a limiting instruction should have been given, but failure to do so was not reversible error.

SUFFICIENCY OF COMPLAINT WHEN VENUE NOT ALLEGED IN COMPLAINT

Unpublished Decision

Norman Cramer was charged with multiple counts of indecent liberties. The complaint, which was filed in Washington County, failed to allege where the conduct took place. After he was convicted by a jury, Cramer moved to dismiss

The Verdict

for lack of jurisdiction. The Court of Appeals found in *State v. Cramer*, Slip Copy, unpublished, 2008 WL 4416022 (Kan.App. September 26, 2008), that the complaint was not defective because it contained an attached statement that individually itemized the allegations, including the locations where they took place. The attached statement was referenced in the complaint and filed with the complaint.

ILLEGAL SUBSTANCES CAN BE ESTABLISHED BY CIRCUMSTANTIAL EVIDENCE

Unpublished Decision

Officer found a white powdery substance and a green leafy substance scattered in and around Damien Belt’s vehicle. While at the police station, Belt said he had been driving around all day getting high on weed and crack in his car, and he bought the crack earlier in the day on the streets. He said that prior to being pulled over he tried to chew up both the cocaine and marijuana. During trial, the prosecutor did not introduce the substances seized and did not bring in a chemist to testify as to the identity of the substances. In *State v. Belt*, Slip Copy, unpublished, 2008 WL 4471921 (Kan. App. October 3, 2008), the Court of Appeals held that illegal substances can be proven by circumstantial evidence, including the defendant’s own statement. The prosecution is not required to introduce the drugs into evidence or have them tested if there is sufficient circumstantial evidence to establish what it is.

UNLAWFUL EXTENSION OF PUBLIC WELFARE STOP

Unpublished Decision

Michael Shafer was asleep in his car parked in his own driveway when an officer responded to his address based upon a call from dispatch to “check the welfare of a subject that was passed out or slumped down in the wheel of his car.” When the officer arrived, Shafer’s car was backed into the driveway with the driver’s door standing open and Shafer was found “either passed out or sleeping.” The officer attempted to wake him. He awoke and explained that he was sleeping in his car because he had been locked out of his house. The officer determined that Shafer was OK and not in need of any medical care. The officer asked Shafer for his identification. The officer took it and ran it through dispatch for wants and warrants. When that cleared he returned the identification to Shafer. As the officer prepared to leave, Shafer reached into his pocket and removed a glass pipe and other items, then “fumbled underneath the dash with these items.” The officer requested Shafer exit the car, retrieved the evidence that was under the dash and pat Shafer down. He was charged with possession of drugs.

In *State v. Shafer*, Slip Copy, unpublished, 2008 WL 4416032 (Kan. App. September 26, 2008), the Court of Appeals held the evidence must be suppressed. Once the officer took Shafer’s identification, a seizure occurred. A public safety encounter is not for investigation purposes. Asking for the identification

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Unpublished Opinions

(Continued from page 30)

exceeded the legitimate scope of the encounter, therefore all evidence obtained must be suppressed. The evidence observed by the officer was fruit of the poisonous tree. Judge Leben wrote a lengthy dissent arguing that this was not a seizure at all and even if it was, the officer's observations in "plain view" were sufficient to justify the further search.

DEFENDANT MAY APPEAL OUT OF TIME IF NOT ADVISED OF APPEAL RIGHTS BY COURT OR ATTORNEY

Unpublished Decision

Going along with the decision in *State v. Scoville*, 286 Kan. ___ (2008), the Court in *State v. Hodges*, Slip Copy, unpublished, 2008 WL 4710679 (Kan. App. October 24, 2008) found that if a defendant is not advised by the court or his or her attorney of the right to appeal and the time limit for filing same, the appellate court will allow docketing the appeal out time.

Editor's note: *This was, of course, a district court case. There has been no case on point dealing with de novo appeals from municipal courts or magistrate courts if the court or counsel has not advised the defendant of the right to appeal and the 10-day time limit. This should serve as a warning, however, that judges should be making sure defendants are so advised.*

Black Hawk Parents

(Continued from page 11)

In sum, Jane has already suffered unimaginable consequences in being a disappointment to her family and friends. She is more than truly remorseful for her actions, has already learned from these experiences and will not make the same mistake again. I was in attendance at court in May when her case was continued, and heard several people come before you who had not even bothered to bring a mere \$20 for a fee, or had skipped court appearances several times, etc., and you were willing to extend them another chance in order to keep them out of jail. There is no more deserving of another chance than Jane. She has already paid the non-refundable fee for the Weekend Intervention Program, and serving the actual confinement itself would not provide any valuable service to her or the community.

I would most like for the conviction itself to be reversed/removed and, without knowing if that's even possible, still request it. Absent that, would you at least consider 50 hours of community service in lieu of confinement for Jane, with a matching 50 hours for myself? If you should wish to talk with me in person or over the phone, I am more than willing to be available at your convenience. Thank you very much for your time and consideration.

Sincerely,
Janice Doe

The Verdict

Alcohol + Energy Drink = Hazardous Combination

Youth and Energy Drinks

The popularity of non-alcoholic energy drinks has grown greatly in the last few years. Reports indicate that teens and young adults are the core consumers of these energy drinks. Drinkers started mixing their energy drinks with vodka and other alcoholic beverages, claiming that the combination gives them the energy to party longer and harder. Taking their cue, a number of companies are now adding alcohol to energy drinks and marketing pre-mixed drinks. These Alcoholic Energy Drinks (or "AEDs") combine alcohol with caffeine, taurine, guarana, ginseng and other ingredients found in non-alcoholic energy drinks.

Marketing to Youth

Some alcohol companies market AEDs with the same "energy" theme, promoting partying and heavy drinking. Companies have used taglines that appeal to youth such as: "You can sleep when you're thirty," "Say hello to an endless night of fun," and "Who's up for staying out all night?" Companies market their products over the Internet, on web sites for the drinks and on MySpace and Facebook.

Packaging and Brand Images

Some AEDs come in containers or use names and images similar to those used for non-alcoholic energy drinks or with suggestive "energy" graphics (e.g., lightning bolts, elevators, or batteries) and brand names. Although young consumers know the difference, reports suggest that many parents, teachers, law enforcement personnel and retail clerks can't easily distinguish between the two types of products and may not be aware that AEDs exist. Warning to parents: Make sure the "energy drink" in your child's purse or backpack isn't an alcoholic energy drink.

Source: California Attorney General's Crime and Violence Prevention Center: <http://www.safestate.org>



These 3 Contain Alcohol

The Verdict

Fall 2008

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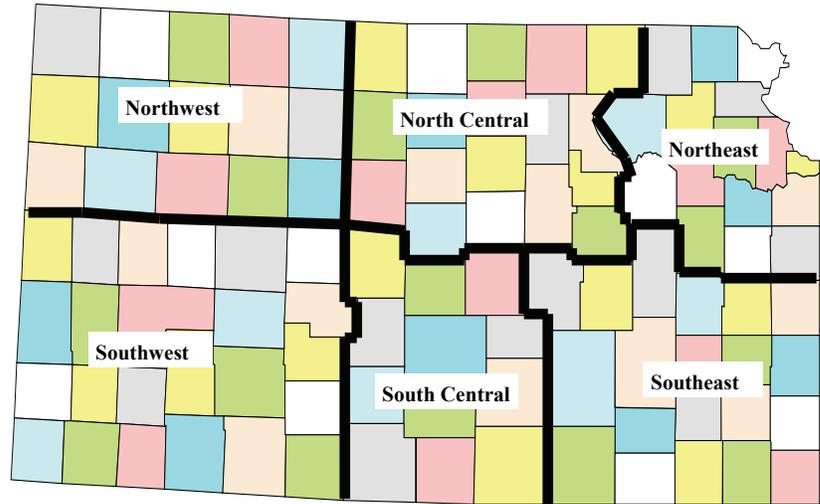
**C/O Overland Park Municipal Court
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All KMJA dues should be sent to:

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Plainville, KS 67663

If you have any questions, you can reach her at (785) 434-2018.

KMJA MEMBERSHIP REGIONS



Interested in serving on the KMJA Board of Directors? At the April 2009 meeting the following positions will be up for election:

- President-Elect
- Secretary
- Treasurer
- Northwest Director
- Southeast Director

See map above to determine your region. Anyone interested should contact

President
John McLoughlin
(620) 855-2215

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There's room for lots of correspondents!! Please volunteer by sending in an article or idea.

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