



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



A STEP BACK IN TIME

DISCRETION IS THE BETTER PART OF VALOR

Reading the opinions of the last 10 years of the Kansas appellate courts, one can not help but be struck by the salacious detail contained therein. Young people seeking to learn about the Kansas legal system by reading recent cases receive an education regarding the sexual proclivities of Kansas offenders far beyond that allowed in the schools. By providing such detail, the atrocities committed against victims are committed to print for all to see in perpetuity. However, if we take a step back in time, we will find that the Kansas appellate courts went to great lengths to consciously set forth the facts in the most discreet way possible and only to the minimum extent necessary to reach the legal ruling in the case. However, there was one case where the Court tried to be discreet, only to be challenged by one of the litigants.

Ione Ebaugh was member of the McPherson Baptist Church,

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Following is summary of bills which have been signed by the Governor this legislative session that you may find interesting. This is not an exhaustive list. If there are any more with implications to municipal courts, they will be summarized in the Summer edition of *The Verdict*.

ALL DOCKET FEES, INCLUDING REINSTATEMENT FEES AND MUNICIPAL COURT APPEALS FEES INCREASED BY \$9

Effective July 1, 2008, virtually all docket fees have been increased by \$9. This is to fund a judicial branch nonjudicial salary adjustment fund. Reinstatement fees will go up to \$59 per charge and municipal court appeal fees will go up to \$71.50. See HB 2968.

FUNERAL PICKETING

SB 226 prohibits protests from being within 150 feet of a funeral for one hour before, during and two hours after the service. It will also be unlawful to block a public street or sidewalk. Violators will be subject to fines and six months in jail (Class B misdemeanor).

Similar legislation was passed and signed last year, but was

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SPOTLIGHT ON: BRYCE ABBOTT

Wichita Municipal Judge Bryce Abbott was born in Topeka, but spent his younger years in Junction City, where his father practiced law. He is the oldest of four children. His mother worked sporadically growing up, but actually graduated college later in life and subsequently became an accomplished artist, her primary medium being watercolor. His father went on to become Chief Justice of the Kansas Court of Appeals and later a justice on the Kansas Supreme Court.

Judge Abbott graduated from Junction City High School and went on to the University of Kansas for his undergraduate degree, and Washburn Law School. Following law school, he moved to Wichita to practice law, eventually opening the Wichita office of Wallace, Saunders, Austin and Brown. He later worked for Martin & Churchill. He primarily handled civil defense work. He was appointed to the Sedgwick County District Court bench in 2001 by Governor Graves. He was defeated in Sedgwick County's partisan judicial election

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Spotlight on:

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system the following year. In 2003, he became municipal judge for the City of Wichita. He hears primarily traffic and DUI cases. He has heard well over 300 DUI trials since 2003.



Judge Abbott has been married for 20 years and has two sons, ages 16 and 11. He has been very active in local youth baseball, has served on the Council Board of the Boy Scouts and has been actively involved in the Kansas Children's Services League for several years. When he has spare time, he likes to hunt and fish. His parents are both still living and moved to Wichita in late 2007.

Wichita Municipal Court runs five courtrooms, five days a week and has night court for housing code and animal code cases in one of four substations throughout the city. Although he said the high volume of cases can often be very daunting, he enjoys his position tremendously and likes to be in a position to help people.



**ROCK CHALK JAYHAWK!
CONGRATULATIONS TO
THE 2008 NCCA DIVISION I
BASKETBALL CHAMPIONS**

Updates from O.J.A.

ANNOUNCING NEW JUDGES!!

CONFERENCE REMINDERS

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

Please mark your calendars and plan to attend the 2008-2009 conferences:

- | | |
|----------------------|------------|
| Blaise Plummer | Admire |
| Gary Howland | Marysville |
| Sheila Schultz | Osawatomie |
| Thomas Dower | Hutchinson |
| John Bingham | Jewell |
| Claude Warren | Parker |
| Claude Warren | Prescott |
| Bobbie Young | Mound City |
| Penny Pollock Barnes | Bronson |
| Joel Jackson | Geneseo |
| Timarie Walters | Stafford |
| Connie Sams | Richmond |

District Judges' Spring Conference
June 18-19, 2008
Overland Park, KS

Municipal Court Clerks' Fall Conference
September 18-19, 2008
Junction City, KS

District Judges' Fall Conference
October 19-20, 2008
Wichita, KS

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

ANNUAL CASELOAD REPORTS

Your FY 2008 Annual Caseload Report form is due in the Office of Judicial Administration by July 1, 2008. The statistics will cover the time period of July 1, 2007 through June 30, 2008. If you have any questions regarding the report, please contact Denise Kilwein at 785-296-2256.



Our condolences to the family of Judge James O'Connor who passed away on January 4, 2008. Judge O'Connor served as District Magistrate Judge in Nemaha County since 1987 and municipal judge for the cities of Sabetha, Seneca, Wetmore, Centralia and Onaga. He was a former barber, chief of police, EMT and chief of the ambulance service. He is survived by his wife, Lana, a son, a daughter and 5 grandchildren.

Judicial Ethics Opinions

JE 160
February 4, 2008

A judge inquires as to whether a judge can serve as the director of a county disaster agency.

K.S.A. 48-929 requires each county in this state to establish and maintain a disaster agency responsible for emergency management and coordination of the response to disasters. The statute requires the disaster agency to prepare a disaster emergency plan for the area under its jurisdiction and keep it current. The statute further provides that the disaster agency shall prepare and distribute to all appropriate officials a clear and complete statement of the emergency responsibilities of all local agencies and officials as well as the disaster chain of command.

Canon 4C(2) of the Code of Judicial Conduct (2007 Kan.Ct.R. 632) provides in pertinent part as follows:

“A judge shall not accept appoint to a governmental committee or commission or other governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system and the administration of justice...”

Based upon the requirements of K.S.A. 48-929, the county disaster agency is entirely concerned with issues of fact and policy on matters other than the improvement of the law, the legal system and the administration of justice.

In addition, the position in question is provided for by state law and as such falls within the provisions of Article 3, Section 13 of the Kansas Constitution which would prohibit the judge serving as the director of a county disaster agency.

We believe our opinion is consistent with Judicial Ethics Opinion JE 38 and JE 149.

We are, therefore, of the opinion that the judge cannot serve as the director of a county disaster agency.



ATTORNEY GENERAL OPINIONS

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

AG OPINION No. 2008-2
JANUARY 11, 2008

NO LIMIT TO NUMBER OF CLEMENCY APPLICATIONS AN INDIVIDUAL MAY SUBMIT

Clemency power is the power to reduce criminal punishment. It generally includes the right to commute sentences, grant reprieves, and grant pardons. The Kansas Constitution vests pardoning power in the governor “subject to regulations and restrictions prescribed by law.” The statute does provide that the state will only pay for publication of one in a twelve month period. The applicant is responsible for the cost of publication of any more.

The Parole Board has no authority to enact regulations that limit the number of applications a person may submit. However, the legislature may enact such legislation if it chooses.

AG OPINION No. 2008-7
APRIL 1, 2008

CITY LAW ENFORCEMENT RESPONSIBLE TO TRANSPORT MENTALLY ILL FOR EVALUATION AND FOOT THE BILL FOR TRANSPORT

The city law enforcement officer who makes an initial determination that a person is mentally ill and likely to cause harm to self or others is responsible for transporting the person to an appropriate treatment facility for evaluation. However, a court may order any “suitable person,” including a sheriff, to transport a person to a treatment facility specified in the order. Finally, absent statutory authority, the costs incurred by a law enforcement agency in transporting a mentally ill person cannot be taxed to such person, those responsible by law for the person, or the person’s county of residence.

“Most defendant’s on felony offenses do not receive the “Get out of jail free” card found in Monopoly game sets. Instead they usually are asked to post a cash or surety bond.”

Justice Leben writing for the majority in *State v. Thammavong*, Slip Copy, unpublished, 2008 WL 762507 (Kan. App. March 21, 2008)

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.

EMERGENCY-AID DOCTRINE DOES NOT ALLOW A SEARCH AFTER THE EMERGENCY IS UNDER CONTROL

Police receive information that Phillip Jeffery is in his apartment and has cut his wrists and is attempting to hang himself. There is no indication that there is anyone else in the apartment with him. There is no indication that he is trying to harm anyone other than himself. When they arrive, Jeffery will not allow them in. When he finally takes the chain off the door, they rush in, wrestle him to the ground and handcuff him. The officers then proceed to search his entire apartment, in walk-through fashion. They said they were looking either for any person who might be injured or any weapons that Jeffery might use to hurt himself or others. They found marijuana and drug paraphernalia. He moved to suppress on the basis of an unconstitutional search.

The State argued that the emergency-aid doctrine applied. Under that doctrine, entry without a warrant is allowed if (1) the police have reasonable grounds to believe that there is an emergency at hand and there assistance is needed immediately for the protection of life or property; and (2) there is a reasonable basis to associate the emergency with the area or place to be searched.

In *State v. Jeffery*, ___ Kan.App.2d ___ (January 11, 2008), the Kansas Court of Appeals found that the state could not meet the second prong of the test. When officers have subdued a person in his own home for his own protection, the officers are not authorized to search the entire residence under the emergency-aid exception to the warrant requirement unless specific information exists to support entry into other areas of the home, such as an immediate threat to the subdued person from elsewhere in the residence or another person who may be injured or in need of immediate assistance elsewhere in the residence. In this case, Jeffery was subdued, there was no indication anyone else was in the house, and there was no fear of injury from items in the house because the officers were going to transport him to a mental health facility. The evidence recovered must be suppressed.

The Verdict

INDECENT SOLICITATION OF A CHILD IS NOT A LESSER INCLUDED OFFENSE OF AGGRAVATED INDECENT SOLICITATION OF A CHILD WHEN AGE OF CHILD IS NOT IN DISPUTE

The sole difference in the relevant portions of the indecent solicitation of a child and aggravated indecent solicitation of a child is the age of the victim. (lewd fondling or touching of children under the age of 14 is aggravated indecent liberties). Therefore, in *State v. Lowden*, ___ Kan.App.2d ___ (January 11, 2008), a case involving lewd fondling and touching, the Court held that when the age of the child is not in dispute (in this case 13), one is not a lesser included offense of the other.

BOND FORFEITURE ORDER IS EFFECTIVE WHEN PRONOUNCED FROM THE BENCH; DIFFERENCE BETWEEN BOND FORFEITURE AND BOND REVOCATION

Patrick Jones failed to appear for his felony arraignment after having posted a bond. The judge ordered his bond "revoked." Failure to appear after 30 days of incurring a bond forfeiture constitutes aggravated failure to appear. *See*, K.S.A. §21-3814. Jones was subsequently charged with aggravated failure to appear. The district court dismissed the charge at preliminary hearing stating that the forfeiture did not occur until the surety makes payment on the bond. It is unclear whether the surety ever paid or whether the defendant was picked up on the warrant before the surety paid or less than 30 days after the surety paid.

In *State v. Jones*, ___ Kan. ___ (January 11, 2008), the Kansas Supreme Court held that the judge is required by the statute to order the bond forfeited upon a defendant's failure to appear and that order is effective upon pronouncement from the bench. The date the surety pays has no impact on determining the date of the forfeiture.

In addition, there was some discussion of the parties with regards the judge's use of the term "revoked" vs. "forfeited." Under legislative amendments made in 2006, the two words normally do have separate meanings. K.S.A. 2006 Supp. §22-2807 only allows a judge to forfeit a bond on a failure to appear. Any other violations of the conditions of the bond can only result in the bond being revoked and the defendant remanded to custody. However, since this involved a failure to appear and the judge is required to "forfeit" the use of the term "revoked" by the judge did not alter the legal nature of the judicial act.

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Legislative Updates

(Continued from page 1)

struck down by the Kansas Supreme Court. The aspect of the legislation identified by the Court in its rejection has been removed from this version of the bill.

FAILURE TO COMPLY WITH WILDLIFE AND PARKS CITATION

Taking a cue from traffic citations, SB 267 makes it a class C misdemeanor to fail to comply with a wildlife and parks citation (by either failing to appear or failing to pay fines and costs). The violator’s wildlife license shall also be suspended or revoked until compliance. A \$50 reinstatement fee is also assessed upon compliance.

EXPANDED ADVANCE VOTING LOCATIONS

SB 65 expands to all counties (instead of just counties with a population exceeding 250,000) the ability of county election officers to designate places other than the central county elections office as satellite advance voting sites.

DISPLAY OF OLD OR FOREIGN LICENSE PLATES ON THE FRONT OF A VEHICLE

HB 2622 prohibits the owner of a Kansas registered vehicle from affixing any registration on the front of the vehicle. The same limited exceptions apply for truck tractors, model year plates on antique vehicles and personalized plates. Since the phrase “Kansas registered vehicle” was inserted in the statute, it would seem to suggest that there is no prohibition against out of state cars displaying front license plates.

UTILIZATION OF UNUSED MEDICATIONS ACT

HB 2578 creates the Utilization of Unused Medications Act which, through a voluntary program, allows adult care homes, mail service pharmacies, and medical care facilities to donate unused medications to indigent health care clinics, federally qualified health centers, or community mental health centers for Kansans who are medically indigent.

DMV CAN DESTROY RATHER THAN RETURN SURRENDERED DRIVER’S LICENSES

HB 2665 amends K.S.A. §8-257 to allow the DMV to destroy driver’s licenses that are required to be surrendered due to suspension or revocation. Prior law required the division to keep and return the licenses at the end of the suspension or revocation.

DEFINITION OF “SMALL BUSINESS”

SB 579 requires state agencies to consider the impact of proposed rules and regulations on small businesses. The bill defines “small businesses” as any person, firm, corporation, partnership, or association with 50 or fewer employees, the majority of whom are employed in the State of Kansas.

AMENDING THE CODE OF CIVIL PROCEDURE FOR ELECTRONICALLY STORED INFORMATION

SB 434 amends the Code of Civil Procedure to include several provisions regarding the disclosure and discovery of electronically stored information for use in district court proceedings. It also creates a safe harbor from sanctions relating to routine destruction of electronically stored information.

AMENDING JOURNAL ENTRY REQUIREMENTS IN STATE CRIMINAL PROCEEDINGS

Amendments to K.S.A. §22-3426 in SB 419 require that the journal entry in a state criminal proceeding state whether the defendant was represented by an attorney or waived counsel in writing **or on the record**. The statute had required proof of a written waiver.

ALLOWING FOR DISPOSAL OF VEHICLES IMPOUNDED BY THE KANSAS CORPORATION COMMISSION

SB 509 allows the Kansas Corporation Commission (KCC) to dispose of vehicles impounded from motor carriers and later abandoned by those carriers. The KCC must notify the vehicle owners and lien holders before disposing of an impounding vehicle. The KCC is directed to deposit the net proceeds into the State General Fund.

“GOLD STAR MOTHER” AND “IN GOD WE TRUST LICENSE PLATES

HB 2691 establishes a “Gold Star Mother” license plate available to mother of soldiers who died in active duty. Kansas is the 23rd state to begin issuing such plates. HB 2704 establishes “In God We Trust” specialized license plates for those so inclined. *See page 6, herein, for sample.*

NOTICE OF FILING OF FOREIGN JUDGMENT

SB 423 makes some minor clarifying amendments to current law on notice of filing of a foreign judgment.

RIGHTS OF PUBLIC SERVANTS

SB 438 prohibits an employer from terminating any employee because the employee serves as a volunteer firefighter, volunteer certified emergency medical services attendant, volunteer reserve law enforcement officer, or volunteer part-time law enforcement officer.

Legislative Updates

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CITY OR COUNTY CAN REGULATE PLACEMENT OF CORRECTIONAL PLACEMENT RESIDENCES

SB 536 allows city and counties to place licensing and zoning restrictions on correctional placement residences as long as it doesn't prohibit them altogether. The term "correctional placement residences" is now also defined in the statute.

INTERSTATE COMPACT ON EDUCATIONAL OPPORTUNITIES FOR MILITARY CHILDREN

HB 2714 enacts the Interstate Compact on Educational Opportunities for Military Children and requires all courts to take judicial notice of its existence. The stated purpose of the compact is to remove barriers to educational success imposed on children of military families because of frequent moves and deployment of their parents. It sets out certain rules regarding transferring of school records and placement in like level courses so they are not placed at a disadvantage. It requires open communication between schools and removes barriers that schools may have to participation of these children in extracurricular activities and sports.

VICTIM POLYGRAPHS

HB 2726 prohibits any law enforcement officer, prosecutor or other government official from requiring that any victim of a sex crime or incest submit to a polygraph examination or similar truth telling device as a condition of proceeding with the investigation or charging or prosecuting the offense.

REQUIRED CORRECTION OFFICER TRAINING REDUCED FROM 80 TO 40 HOURS ANNUALLY

HB 2740 reduces the annual in-service training requirement for department of corrections parole officers and corrections officers from 80 hours to 40 hours.

KANSAS EMERGENCY COMMUNICATIONS PRESERVATION ACT

HB 2805 prohibits any city or county from adopting any ordinance or resolution that would preclude federally licensed amateur radio service communications. It also prohibits said entities from adopting any ordinances or regulations that govern the number, height, or placement of antennas based on either health or aesthetic concerns unless it reasonably accommodates amateur radio operators.

PROHIBITING POSSESSION OF ECSTASY

Sub. For HB 2545 adds specific hallucinogenic drugs such as ecstasy to the list of substances that are illegal to possess or have under one's control.

CYBERBULLYING IN THE SCHOOLS

HB 2758 defines cyberbullying as bullying by use of any electronic communication device through means including, but not limited to, e-mail, instant messaging, text messages, blogs, mobile phones, pagers, online games and websites. It requires school districts to adopt school-wide plans to address cyberbullying.

MEDICAL MALPRACTICE SCREENING PANELS

Currently, if a medical malpractice liability action is filed in this state, any party can request that a medical screening panel be appointed. HB 2188 expands this to allow the appointment of a separate screening panel for each name defendant. It expands the time after which the panel must submit its findings from 90 days to 180 days. It also increases compensation for panel members.

ELECTRONIC SOLICITATION OF A MINOR

SB 477 adds electronic solicitation of a minor to the list of sexually violent crimes requiring registration pursuant to the Kansas Offender Registration Act.

REGULATING MOTOR BOAT NOISE

HB 2657 changes the amount of permitted exhaust noise from motorboats to 92 decibels. It also allows an officer who is authorized to enforce the noise standard and who has cause to suspect a motorboat is not in compliance to direct the operator to submit the boat to an on-site test. If the owner does not bring the boat into compliance within 60 days it can result in conviction for a new class C misdemeanor.

PROCEDURE TO SEAL COURT RECORDS OR CLOSE COURT PROCEEDINGS

HB 2825 sets forth a new procedure in either a criminal or civil case in which the court, on its own motion or by request of a party, may hold a hearing regarding whether to seal or redact the court records or close the court proceeding. The Court must make written findings "of cause." The bill does not apply to the Kansas Code of Care of Children, the revised Kansas Juvenile Justice Code, the Kansas Adoption and Relinquishment Act, or the Supreme Court Rules. A court in said cases would be allowed to issue a protective order.

SAMPLES FROM OTHER STATES OF NEW LICENSE PLATE LOGOS APPROVED THIS YEAR IN KANSAS:



Court Watch

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DEFINITION OF “POCKET KNIFE” AND “DANGEROUS KNIFE”

Wichita police stopped David Moore for a traffic infraction and arrested him for driving on a suspended license and outstanding warrants. When they searched him, they found an item in his back pocket that was both a hair comb and a knife with a 3.5-inch serrated blade. Moore was a convicted felon. He was charged with an aggravated weapons violation for carrying a concealed dangerous knife. He was convicted. On appeal, he argued that the knife was a pocket knife and therefore not prohibited, that the term “dangerous knife” is unconstitutionally vague, and that the knife was not a “dangerous knife.” K.S.A. 2006 Supp. §21-4201 states, in relevant part:

“(a) Criminal use of weapons is knowingly:
...
(2) carrying concealed on one’s person, or possessing with intent to use the same unlawfully against another, a ...dangerous knife, ...or any other dangerous or deadly weapon or instrument of like character, except that an ordinary pocket knife with no blade more than four inches in length shall not be construed to be a dangerous knife, or a dangerous or deadly weapon or instrument.”

The statute does not define “ordinary pocket knife.” So, the Kansas Court of Appeals set out to define it in *State v. Moore*, ___Kan.App.2d ___ (January 18, 2008). It cited with approval definitions from other states and from Webster’s dictionary. It found that an ordinary pocket knife is a type of knife occurring frequently in the community in which the blade folds into that handle to fit it for being carried in the pocket. It agreed with the district court that the defendant’s knife was not an ordinary pocket knife. Although the blade was less than 4” long, the blade was serrated, similar to a steak knife. It was concealed in a comb that was 7 inches long. The blade did not fold into the comb, it was sheathed in the comb. It was also not the type of knife that one encounters in the community routinely.

The Court went on to find that the knife was, in fact, a “dangerous” knife and that the term “dangerous knife” was not unconstitutionally vague.

Editor’s Note: See also, POC §10.1, which is identical to K.S.A. 2006 Supp. §21-4201.



BREATH TEST CALIBRATION OR CERTIFICATION DOCUMENTS, OPERATOR CERTIFICATION DOCUMENTS, AND DRIVING RECORDS ARE NOT “TESTIMONIAL” EVIDENCE AND MAY BE OFFERED WITHOUT AN ACCOMPANYING WITNESS FOR CROSS-EXAMINATION

Scott Dukes was convicted of DUI and driving on a suspended license. He argued on appeal that proving proper calibration and certification of the breath test machine and his license suspension without calling the witnesses who maintained his driving record and handled the calibration and certification process violated his constitutional right to confront the witnesses against him (a la *Crawford v. Washington*, 541 U.S. 36 2004).

The prosecution presented the testimony of the sheriff’s department deputy who was the custodian for the Intoxilyzer 5000 records. The prosecution obtained admission, without objection, of a packet containing documents showing that the machine was properly certified, the officer who tested Dukes was certified to operate the machine, and the standard solution used had the required known value. Verification of the standard solution came from a lab employee who did not testify. As for the driving record, it is unclear how it came to be admitted, but it usually comes in as a self-authenticated business record with the officer who made the stop connecting the dots with regards to the information provided by the defendant and the identifying information on the driving record.

In *State v. Dukes*, ___Kan.App.2d ___ (January 18, 2008), the Court of Appeals found that since these records are required to be maintained whether any particular case goes to litigation or not, they are not testimonial. The Court went on to state that the ruling does not preclude a defendant from issuing a subpoena to gain the attendance of a witness who may be examined concerning legitimate concerns regarding these records, however failure of the state to produce these witnesses absent a subpoena does not violate *Crawford*.

“Our review shows that most appellate courts have disagreed with Dukes’ line of argument, and we do too.”

CONFLICTING EXPUNGEMENT STATUTES

K.S.A. 2006 Supp. §21-4619 (a mess of a statute since it was amended several times in the 2006 Legislative session and also appears at K.S.A. 2006 Supp §21-4619c) provides for the expungement of certain convictions, arrest records and diversion agreements. K.S.A. 2006 Supp. §22-2410 also provides for the expungement of certain arrest records “and subsequent court proceedings.”

Under K.S.A. 2006 Supp. §22-2410 there is no “waiting period” before the expungement request can be filed. How-

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Court Watch

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ever, under K.S.A. 2006 Supp. §21-4619 there are various ‘waiting periods’ depending on the crime. The wait is five years in the case of most felonies, but some only require a three year wait. Some convictions can never be expunged.

Daniel Yrigolla and Lawrence Ortiz were arrested and charged with a severity level 3 drug and placed on diversion. They petitioned the Court for expungement of their arrest records. (presumably at some point less than five years after their diversion was completed, although the opinion doesn’t indicate the time frame that had passed). The question in *State v. Yrigolla*, ___Kan.App.2d ___(January 25, 2008), was which statute applied.

The Court of Appeals held that K.S.A. 2006 Supp. §22-2410 applies to expungement of arrests that did not result in a conviction due to mistaken identity, no probable cause for the arrest or a not guilty finding. K.S.A. 2006 Supp. §21-4916(a) (2) or (b) applies to the expungement of arrests which did not result in a conviction due the arrestee’s entering into a diversion agreement with the State. Since that statute requires a five year waiting period for persons placed on diversion for a severity level 3 drug felony, Yrigolla and Ortiz must wait 5 years after completing diversion before applying for expungement.

Editor’s Note: *This case involves expungement statutes that apply only to state cases. However, it is summarized here because in pertinent part these statutes mirror sections in the code of procedure for municipal courts, K.S.A. 2006 Supp. §12-4516 and , K.S.A. 2006 Supp. §12-4516a. Therefore a similar ruling could be expected regarding the limited scope of K.S.A. 2006 Supp. §12-4516a.*

PROPER JURY POLLING

Dustin Holt was convicted of first degree murder. The jury had sent out several questions during deliberations and at one point had even indicated that they were hung on the murder count. When the verdict was announced, defense counsel asked that the jurors be polled. The clerk asked each juror, individually by name “*Is this the verdict of the jury?*” Each juror replied, “*Yes, it is.*” On appeal, the defendant argued that the clerk should have asked, “*Is this your verdict?*” and by failing to do so had deprived him a right to an impartial and unanimous jury verdict.

In *State v. Holt*, ___Kan.__(February 1, 2008), the Supreme Court held that although the Sixth Amendment guarantees the defendant a right to an impartial jury, there is no constitutional right to a unanimous verdict. This right is only statutory. K.S.A. §22-3421, which deals with releasing the jury verdict, is silent on exactly how the jury is to be polled. The

trial court found that While trial courts do not have to be “letter perfect” in their polling procedures and language, the better practice is to poll the jury in such a way as to ensure that every juror is answering for him or herself, e.g., asking “*Is this your verdict?*” It cites the American Bar Association “Principles for Juries and Jury Trials” in support of this practice. However, because Holt did not object to the polling at the time, he did not preserve the issue for appeal.

OFFICER’S MISTAKE OF LAW CAN INVALIDATE THE TRAFFIC STOP, HOWEVER IT DOES NOT INVALIDATE DRIVER’S LICENSE ACTION TAKEN BY THE DEPARTMENT OF REVENUE FOLLOWING SUCH A STOP

Thomas Martin was pulled over by a Prairie Village police officer for having a malfunctioning rear brake light. However, at least two of his rear brake lights were working. The officer believed that if any of the brake lights were out, the ordinance had been violated. However, the ordinance (which was identical to K.S.A. §8-1708(a) and K.S.A. §8-1721) only required vehicles to be equipped with two stop lamps. *See also*, STO §149. After the stop, the officer developed information sufficient to suspect Martin of DUI and took him to the station for a breath test, which he failed. At his administrative driver’s license hearing, he argued that since the officer made a mistake of law, the stop was unlawful and therefore all evidence following the stop must be excluded under the exclusionary rule. This includes, he argued, the basis for suspension of his driver’s license, to wit: failure of the breath test.

In *Martin v. Kansas Dept. of Revenue*, ___Kan. ___(February 1, 2008), the Kansas Supreme Court first found that with regards to whether or not an officer’s mistake of law alone may invalidate a traffic stop, was a matter of first impression with it. It pointed out that several Court of Appeals panels had addressed the issue with a variety of results. It cited with approval the position espoused by the Tenth

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2007 Municipal Judges Manual Updates

Be on the lookout for the 2007 Supplement to the Kansas Municipal Judges Manual. Areas covered in the updates include impoundment or interlock for second time DUI offenders, a chart to aide in determining which traffic laws require you to take action on the license, jurisdiction over cases that would be felonies in district court and new collection provisions.

Court Watch

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Circuit. It cited cases from the Tenth Circuit which held that it is “fundamentally unfair to hold citizens to the traditional rule that ignorance of the law is no excuse, while allowing those entrusted to enforce the law to be ignorant of it.” A police officer must be held to a more demanding standard of legal knowledge than any citizen who may be subject to the officer’s exercise of authority. Therefore, it concluded that an officer’s mistake of law (as opposed to a reasonable mistake of fact) alone can render a traffic stop violative of the Fourth Amendment and §15 of the Bill of Rights. The officer in this case lacked constitutional authority to stop Martin.

The Court went on to discuss whether the exclusionary rule applies to administrative driver’s license hearings, thus excluding from consideration the evidence of Martin’s breath test failure. Again, after an exhaustive review of Kansas cases as well as cases from other jurisdictions, the Court held that the exclusionary rule had no application in driver’s license hearings. The deterrent effect of the rule is accomplished in the criminal arena. Any additional deterrent effect if applied beyond the criminal arena

“would be minimal and does not outweigh the remedial imperative of preventing alcohol-and/or drug-impaired drivers from injury or killing themselves or others. Responsive administrative license regulation is essential to that public good. It should not be hamstrung by application of the rule here.”

The defendant’s driver’s license suspension stands.

Justices Rosen and Luckert dissented in the majority opinion. They asserted that the exclusionary rule should apply to administrative driver’s license actions.

COMPETENCY OF A FUGITIVE IS PERTINENT IN AN EXTRADITION PROCEEDING

David Patton was arrested in Kansas. He had an arrest warrant out of Florida for two counts of murder. He was charged with being a fugitive from justice under the Kansas Uniform Criminal Extradition Act.

Extraditions are controlled by Article IV, 2 of the U.S. Constitution, which provides in part:

“A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime.”

This provision has been further codified in Kansas by adoption of the Uniform Criminal Extradition Act. In view of the constitutional mandate for extradition, extradition proceedings are intended to be limited in scope in order to facilitate a swift and efficient transfer of custody to the demanding state. Generally, the only thing to consider is (a) whether the documents on their face are in order; (b) whether the petitioner has been charged with a crime in the demanding state; (c) whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive.

At the hearing, David Patton challenged extradition and filed a motion to have himself declared incompetent.

In *State v. Patton*, ___ Kan. ___ (February 1, 2008) the Supreme Court was asked for the first time, to decide whether or not the competency of the fugitive needed to be taken into account at the extradition hearing: not the fugitive’s competency when the crime was committed, but his/her competency at the time of the extradition hearing. After an extensive analysis, the Court found that since a fugitive had a right to counsel, under Kansas law, at the extradition hearing, the fugitive must be able to assist counsel. This right would be meaningless if the fugitive does not possess some level of competency. The Court goes on to hold that the issue of whether the documents are legal on their face and whether the fugitive was in fact charged with a crime in another state, can be tested by counsel without any input from the fugitive. However, the fugitive must be competent enough to assist counsel in the determination of whether he or she is the person named in the request for extradition and whether or not he or she is a fugitive. Therefore, the Court adopted this as its standard for determining competency.

AFTER PROSECUTION HAS COMMENCED, STATEMENTS OF A JAIL HOUSE INFORMANT PLANTED IN DEFENDANT’S CELL ARE NOT ADMISSIBLE FOR ANY REASON

Donnie Ventris was charged with felony murder and aggravated robbery, among other things. Prior to trial, the prosecution recruited Johnnie Doser to share a cell with Ventris and to “keep [his] ear open and listen” for incriminating statements. Ventris allegedly confessed to Doser to the murder as a “robbery gone bad.” At trial, Ventris claimed that he did not commit the murder and had no idea that his girlfriend was going to rob the victim. Although the State agreed that Ventris’s statements to Doser were in violation of his Sixth Amendment right to counsel, it argued that such testimony could be used for impeachment purposes. The district court allowed Doser’s testimony and Ventris appeals.

When the government deliberately elicits incriminating statements through an informant acting as their agent, the cases are clear that a violation of the defendant’s right to counsel has occurred. Cases are clear that these statements cannot be used in the prosecution’s case in chief. The issue in *State v.*

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Ventris, ___Kan. ___(February 1, 2008) is whether or not the statements can be used for impeachment. The Court held that a criminal prosecution commences when the complaint is filed and a warrant is issued. Sixth Amendment right to counsel attaches at that point. Therefore, once the prosecution has commenced, defendant's statements made to an undercover informant surreptitiously acting as an agent for the State are not admissible at trial for any reason, including the impeachment of the defendant's testimony. Again, the Court has included a very thorough and in depth discussion of this issue.

Justice McFarland wrote an equally lengthy and in-depth dissent. She argues that the decision is contrary to the weight of authority of other jurisdictions that have considered the issue. She concludes that *"Today's decision seriously undermines the truth finding process of the adversary system by allowing criminal defendants to pervert the shield provided by the Sixth Amendment 'to a license to testify inconsistently, or even perjuringly, free from the risk of confrontation with prior inconsistent utterances.'"*

**WITNESS MAY NOT COMMENT ON DEFENDANT'S
GUILT OR INNOCENCE; PROSECUTION CANNOT REFER
TO INVOCATION OF RIGHT TO REMAIN
SILENT IN CLOSING**

Paul Drayton was the prime suspect in the murder of James Mayberry. After being given *Miranda* warnings, he agreed to speak to a detective. However, after about 50 minutes of questioning, he invoked his right to silence and requested that the interview end. During trial, Drayton testified to a version of events (pointing to his innocence) that he did not share during his 50 minute interview with police.

The prosecution asked the detective who conducted the interview whether, in light of Drayton's testimony, he found anything unusual about the prior 50 minute interview. The detective testified it was unusual because:

"...It seems to me that, if someone were asking me questions about a homicide, and the questions became pointed to the level that I felt that I was possibly being accused of that homicide, that the person possibly being accused would not be completely truthful, if he were not involved in the death of that person, that he would not tell. or give the police a statement that could be followed up that could possibly remove him of suspicion. I felt that, after yesterday's testimony by Mr. Drayton, that it would have been possibly embarrassing for him to admit to having sex with a victim, however, it certainly could have shed a light on some evidence

that was located. And I don't know why he wouldn't have told me that at the beginning."

In *State v. Drayton*, ___Kan. ___(February 1, 2008), the Court found that the detective was commenting on Drayton's credibility. Basically, he was testifying that "In my opinion, an innocent person would have told me the truth at the outset." This is not allowed. The determination of truthfulness is solely for the judge or jury to decide. The Court has no discretion in whether or not to allow such testimony. It makes no difference if the witness is testifying as an expert or a lay witness. It is inadmissible as a matter of law. So even if there is no objection from the opposing side, the judge must disallow the testimony.

In closing argument, the prosecutor referred to the defendant's earlier silence, by inferring that if he were not guilty he would have spoken up earlier. This too is error.

"It is constitutionally impermissible for the State to elicit evidence at trial of an accused's post-Miranda silence. Doyle v. Ohio, 426 U.S. 610 (1976). A Doyle violation occurs when the State attempts to impeach a defendant's credibility at trial by arguing or by introducing evidence that the defendant did not avail himself or herself of the first opportunity to clear his or her name when confronted by police officers but instead invoked his or her constitutional right to remain silent."

The Supreme Court reached the same decision just one week later in *State v. Hunt*, ___Kan. ___(February 8, 2008) where the defendant told a detective that he would tell the agent everything he knew about his mother's murder the next day. He then invoked his right to an attorney and his right to remain silent and gave no statement the next day. The prosecutor reminded the defendant of this in cross-examination after he took the stand. He acknowledged that he told the detective he would tell him everything the next day. The prosecutor then asked, *"Did you tell Agent Papish everything you knew?"* The defendant responded, *"After I asked for an attorney, he left me."* Again citing *Doyle*, the Court reiterated that even where the defendant invoked his or her rights after initially speaking to the officer, it is error to attempt to impeach a defendant's credibility at trial by introducing evidence that the defendant did not avail himself of the opportunity to clear his name when confronted by police.

**INMATE PHONE CONVERSATIONS: IMPLIED CONSENT
TO MONITORING**

Joseph Anderews was in jail, charged with two counts of felony theft. While in jail, he made numerous phone calls to his girlfriend. These phone calls were recorded on the Evercom system at the jail. Later, members of the sheriff's department listened to the calls. Andrews told his girlfriend that there was dope and guns in the trailer he was charged with stealing. Sheriff's deputies used this information to get

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a search warrant of the trailer. They discovered marijuana and a shot gun. Andrews was charged with unlawful possession of a firearm and possession of marijuana. At trial, he moved to suppress the evidence on the basis that the sheriff's office violated the state wiretapping statute by recording his private phone conversations.

The Evercom system had been in use at the jail since 2003. Its primary purpose was to assist in maintaining security at the jail. The jail handbook, which is made available to all inmates, advises inmates of the phone monitoring system and that all of their calls are recorded. There are also signs posted above the phones which state "All calls from inmate telephones are subject to monitoring recording. If you use the telephone, you are agreeing to the monitoring and recording, and if you do not agree, you may utilize the U.S. mail or the inmate visitation program." Finally, when a call is made, within the first 5 to 15 seconds a female voice interrupts the conversation and advises both parties that the call is being recorded. The maximum time allowed for calls is 15 minutes and during that time the voice will interrupt 3-4 times reminding the parties that the call is being recorded. If jail personnel have reason to believe that the phone is being used to discuss criminal activity, deputies will listen to the calls.

In *State v. Andrews*, ___Kan.App.2d ___(February 15, 2008), the Court agreed with the district court and found that Andrews had consented to his conversation being recorded by talking on the phone in spite of all the warnings. He had no expectation of privacy. As long as one party to a conversation consents to its recording, the wiretap statutes don't come into play. An inmate has given implied consent to electronic surveillance when he or she is on notice that his or her telephone call is subject to monitoring and recording and nonetheless proceeds with the call.

UNADJUDICATED CRIMINAL OFFENSES MAY BE USED IN CROSS-EXAMINATION AS EVIDENCE OF BIAS, INTEREST, MOTIVE OR PREJUDICE

Generally, unadjudicated criminal offenses may not be used to impeach a witness in a criminal case. However, in *State v. Scott*, ___Kan.App.2d ___(February 22, 2008), the Court of Appeals found that evidence of pending criminal charges against a witness is admissible for the limited purpose showing bias, prejudice, interest and motive of the witness in testifying as he or she did. In *Scott*, the chief witness for the prosecution, who had volunteered to serve undercover to purchase drugs from the defendant, had criminal charges pending for forging the defendant's checks. The defendant and witness had a friendly relationship until the forgery, which took place several months before the drug buy. The defendant had actually turned the witness into police. The defense

sought to show that the witness had a motive for testifying falsely in order to send the defendant to prison. The district court did not allow the defense to cross-examine on an unadjudicated criminal case. The Court of Appeals reversed the guilty finding and remanded the case for a new trial.

LAWFUL TO STOP VEHICLE IF TAG NOT ON REAR OF VEHICLE AS REQUIRED BY KANSAS LAW, EVEN IF THE TAG IS PROPERLY DISPLAYED PER THE LAW OF ITS LICENSING STATE

Kansas State trooper stopped defendant on I-70 because he saw no license plate attached to the rear of his vehicle. Kansas law requires license plates to be attached to the rear of a vehicle. See, K.S.A. §8-133 and STO §198. When he approached the vehicle, the defendant pointed to the front window where a document was taped on the passenger's side that said it was a "One Trip Permit" from the state of California. Although the trooper had never seen or heard of one of these permits, it seemed to allow the defendant to make one trip from one place in California to one place outside the state, in this case Lawndale, California to Buffalo, New York. According to California law, the permit had to be placed in the inside front windshield. It turns out the permit was valid and posted lawfully according to California law.



The trooper gave the defendant a warning for violating K.S.A. §8-133 for not having the registration attached to the rear of the vehicle, returned his driver's license and ticket and told him "have a good one" and walked back in the direction of his patrol car. Before getting there, the trooper effectuated the infamous "Colombo" move and turned, retraced his steps and approached the driver again. He asked if he could ask the driver a few more questions. The driver assented and the Trooper asked if he could search the car. The driver agreed and the Trooper found 9 kilograms of powder cocaine.

The issue in *U.S. v. Martinez*, ___F.3d ___(10th Cir. March 3, 2008), was whether or not the stop of the vehicle was lawful. In other words, after viewing the One Trip permit and determining it was valid, was the trooper justified in continuing the detention to write a warning ticket and then subsequently asking for permission to search?

The Tenth Circuit found that the trooper would have been justified in writing the defendant a ticket for not having his registration displayed on the rear of the vehicle, as required by Kansas law. Although the Kansas motor vehicle reciprocity statute, K.S.A §8-138a, allows an out-of-state licensed driver the privilege of operating a motor vehicle in Kansas, it does not regulate the "manner" in which the vehicle is operated.

"While one might argue that Kansas seems tough on out-of-staters-requiring them to move temporary tags from the front

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to the back as they pass through Kansas—we are not free to rewrite Kansas law.”

The Court went on to opine that an officer is not chargeable, for Fourth Amendment purposes, with knowledge of “obscure details of the motor vehicle licensing regimes of distant states.” Although the Court stopped short of saying that the reciprocity statute could not be a defense to any citation written, it stated that for “purposes of the Fourth Amendment, the trooper’s skepticism about the propriety of the permit and its placement, as well as his concomitant decision to detain Mr. Martinez briefly to run a computer check, was objectively reasonable.”

The Court distinguishes this case from *United States v. Edgerton*, 438 F.3d 1043 (10th Cir. 2006).

“Edgerton involved the self-same Trooper Dean now before us, pulling over a car for violating the very statute now at issue before us. And, as here, Trooper Dean was unable to see any license plate on the rear of the defendants’ car and effected a stop. But from there, the cases diverge. After the stop in Edgerton, the driver drew Trooper Dean’s attention to a Colorado temporary license tag that **was** visibly affixed to the rear window. Trooper Dean nonetheless continued the detention for purposes of writing a warning for a putative violation of K.S.A. §8-133. After issuing the warning, Trooper Dean, just as here, briefly walked away only to return and ask for permission to search the vehicle, soon to discover drugs. We held that, while the initial stop was reasonable under the Fourth Amendment, once Trooper Dean saw that a tag existed, that it was properly placed on the rear of the car, and given that he had no basis for suspecting its invalidity, ‘any suspicion that Defendant had violated 8-133 dissipated.’ 438 F.3d at 1051...

By contrast, in our case reasonable concern about a possible infraction of Kansas’s law requiring display of a license plate on the rear of a vehicle, minor though such an infraction may be, did **not** dissipate once Trooper Dean approached and viewed the One Trip permit. In fact, closer inspection **confirmed** that no license plate was affixed to the rear of the Jeep as required by K.S.A. 8-133 and thus supported the detention of Mr. Martinez for a reasonable time to prepare a traffic citation—a period the trooper, again, in not alleged to have exceeded.”

PROSECUTION NOT REQUIRED TO SHOW THAT THE OFFICER CONDUCTING THE BREATH TEST HAS READ THE MANUFACTURERS OPERATIONAL MANUAL AND COMPLIED WITH SAME IN ORDER TO ADMIT BREATH TEST RESULT

Alan Wenzel was arrested for DUI. He blew .118. During trial, the officer testified that he had been trained by the Kansas Department of Health and Environment (KDHE) and certified by

KDHE to operate the machine. He also testified that he followed KDHE procedures in conducting Wenzel’s test. Another officer testified that the intoxilyzer machine had been certified by KDHE and that the machine had been tested regularly, under KDHE procedures, to ensure that it maintained its proper function.

Wenzel contended on appeal to the Kansas Court of Appeals that the prosecution must also show that the testing machine was operated according to the manufacturer’s manual based on *State v. Bishop*, 264 Kan. 717, 725 (1998) and *State v. Lieurance*, 14 Kan.App.2d 87, 91 (1989), *rev. denied* 246 Kan. 769 (1990).

In *State v. Wenzel*, ___Kan.App.2d___(March 7, 2008), the Court held that testing officers are not required to read the operating manual for themselves, but may instead rely upon KDHE’s statement of the required procedures. KDHE has the obligation to consider the manufacturer-issued manuals in developing its protocol. Therefore, testimony that the officer followed the KDHE protocol is sufficient. The Court went on:

“About 20,000 arrests are made in Kansas each year for driving under the influence of alcohol...It would make no sense to require several hundred law-enforcement officers to separately review the manufacturer’s manuals each week to decide how to perform breath tests using the Intoxilyzer 5000 machine. We are not required to ignore common sense here because the legislature has clearly provided that it is KDHE’s obligation to distill any important requirements from those manuals into a set of testing protocols, and it is KDHE’s obligation then to certify each officer’s ability to run these machines after appropriate training.” [Citations omitted.]

COURT DECLINES TO ISSUE AN ADVISORY OPINION ON THE CONSTITUTIONALITY OF THE FUNERAL PICKETING LAW

In 2007 the Kansas Legislature adopted the Funeral Privacy Act. The Act sets time and place restrictions on protests at funerals. The legislation was clearly aimed at Fred Phelps and the actions of the Westboro Baptist Church in Topeka. However, in an attempt to avoid litigation challenging the constitutionality of the statute, the Legislature inserted a “judicial trigger.” It would only become effective after a state or federal court found it to be constitutional. The legislation directed the attorney general to file suit to determine its constitutionality.

In *State v. Sebelius*, ___Kan. ___(March 11, 2008), the Supreme Court unanimously ruled that such a provision violates the separation of powers doctrine in two ways. First, a lawsuit filed pursuant to the provision does not present a “case or controversy.” It seeks solely an advisory opinion.

Second, it usurps the legislature’s duty to make a preliminary

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judgment on the constitutionality of inoperative legislative provisions. It went on to state that “courts do not have jurisdiction over purely hypothetical questions associated with nonexistent duties.” It also refused to sever the provision from the rest of the Act, so that the state could begin enforcement. To do so, the Court opined, would ignore a clear statement of legislative direction.” The Court released the decision quickly so that the legislature would have a chance to take action this legislative session if it chose to do so.

The decision, authored by Justice Luckert, contains a very detailed and thorough analysis of constitutional principles and shows a Court that could not be defined as “activist” by any stretch of the imagination, but a Court bound by the strict construction of the constitution of the state of Kansas.

PROSECUTION CAN WAIVE PROBATION VIOLATIONS IF THERE IS NO EVIDENCE THAT THERE WERE ANY ATTEMPTS TO SERVE THE PROBATION VIOLATION WARRANT

The State filed a timely motion to revoke Thaddeus Myers’ DUI probation on June 10, 2004 for failure to report, failure to make payments and failing to complete one of the special conditions of his probation. A warrant was issued for his arrest. The warrant was served on him 2½ years later. The defendant had moved to Oklahoma without notifying his probation officer and the sheriff’s office could not show any service attempts on the warrant in the years between its issuance and service.

In *State v. Myers*, ___Kan.App.2d___(March 14, 2008), the Court held, consistent with its prior holdings, that “in light of the nearly complete absence of evidence as to efforts actually made by the State to attempt service on Myers or investigate his whereabouts” the State waived the probation violations asserted in its June 10, 2004 motion to revoke. The case was remanded for the district court to terminate Myers’ probation and release him from any further liability in the case.

PAROLE OFFICER IS NOT REQUIRED TO PERSONALLY DELIVER WRITTEN ARREST-AND-DETAIN ORDER TO LAW ENFORCEMENT

K.S.A. 2007 Supp. §75-5217 provides that a State parole officer may authorize another law-enforcement officer to arrest a parolee by giving the other officer a written arrest-and-detain order. In *State v. Edwards*, ___Kan.App.2d___(March 28, 2008), the Court of Appeals held that the parole officer is not required to personally deliver the written order to every officer who may be called upon to look for the parolee. When the parole officer gives the written order to one officer in a law enforcement agency and that officer commu-

nicates receipt of the order to other officers within that agency, any of the officers within the agency has authority to arrest an individual who has violated parole.

MERE LISTING OF DNA LOCI IN JOHN DOE WARRANT IS INSUFFICIENT TO IDENTIFY THE DEFENDANT WITH PARTICULARITY TO TOLL THE STATUTE OF LIMITATIONS

The Fourth Amendment to the U.S. Constitution and K.S.A. §22-2304 require an arrest warrant to contain the name of the defendant or, if the name is unknown, any name or description by which the defendant can be identified with reasonable certainty. The cases of Douglas Belt are considered by many to be the very first cases in the United States in which a warrant was issued to a John Doe defined only by DNA profile. John Doe warrants had been issued with DNA descriptions for seven sexual assaults committed from 1989 through 1994 in McPherson, Saline and Reno counties. All the warrants identified the defendant as “John Doe described by deoxyribonucleic (DNA) analysis as LOCI D2S44 and D17S79.” The supporting affidavits further described John Doe as a male and stated that the DNA description would be unique only to one person.

In 1991 Douglas Belt submitted a DNA sample for testing, but due to mislabeling by the KBI, a different individual’s DNA was sent to the FBI and was found not to match John Doe. It wasn’t until 2002 when Belt was arrested for capital murder in Sedgwick County that a new DNA sample was taken and a match made to the seven sexual assault cases. Amended complaints and new warrants were issued for Douglas Belt. They were personally served on him in the Sedgwick County jail.

Belt moved to dismiss all the complaints arguing that the John Doe warrants were too vague to meet the identification standards of the Constitution and the Kansas statute and thus did not toll the statute of limitations applicable to the charged crimes (all of which had been exceeded by the time of the amendment into Douglas Belt’s name). He introduced testimony from Dr. Dean Stetler, an associate professor in molecular biosciences at KU. He testified that “*the DNA loci listed in the complaints and warrants were common to all humans. The loci are merely addresses devoid of identifying content. The “D” simply means the sample came from a human, the following number designates the chromosome observed. and The “S” stands for simple locus, meaning a sequence is found only one time on the chromosome; and the final number describes the location of the sequence. To have more specifically identified a particular person, Stetler testified, the State should have recited that defendant John Doe’s DNA was analyzed at these two loci and then described the information contained at each place.*” Stetler showed an example of a John Doe warrant filed in an unrelated case which described DNA information contained at 14 different loci. He opined that it was a description that would be spe-

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cific to only one other person on Earth. A description that included only two loci would be unique to 1 in 500 persons.

The State countered that when the warrant is considered in conjunction with its supporting affidavit any vagueness was cured. In any event, the State argued, any delay in execution of the warrants was caused by the defendant's efforts to conceal his identity.

In *State v. Belt*, ___ Kan. ___ (March 28, 2008), the Supreme Court agreed with Belt. First it found that there had been no concealment by Belt. In order for concealment to toll the statute of limitations for prosecution, the concealment must be "of the fact of a crime" and "must be the result of positive acts done by the accused and calculated to prevent discovery; mere silence, inaction, or nondisclosure is not concealment." Belt submitted a blood sample in 1991. It was the KBI's mislabeling that caused him to be excluded as a suspect, not any effort by him to evade apprehension.

Next, the Court reiterated that a warrant need not provide the name of the suspect, so long as it describes the suspect "sufficiently to identify" him or her. So John Doe warrants are not per se unconstitutional. However, the Court was persuaded by Dr. Stetler's testimony. In Belt's cases, the DNA profile only listing the loci was not sufficiently unique. Had it been, then it would have withstood constitutional scrutiny. The Court agreed with Belt that there was no reason why the State couldn't have listed his unique profile, they had the information. The affidavits did not fill in the gaps. Because the warrants were invalid, the statute of limitations was not tolled and all charges against Belt related thereto must be dismissed.

DISCOVERY OF AN OUTSTANDING ARREST WARRANT FOLLOWING AN UNLAWFUL SEARCH OR SEIZURE, MAY OR MAY NOT REQUIRE SUPPRESSION OF EVIDENCE OBTAINED SUBSEQUENT TO SAID ARREST

Officers detained defendant and asked for his identification, with no basis to believe he had violated any laws. He was cooperative. Officers detained him long enough to run his name for wants and warrants. He had an outstanding arrest warrant. Upon their search incident to the warrant arrest, the officer discovered marijuana on his person. The defendant moved to suppress due to the unlawful detention. The State argued that pursuant to *State v. Jones*, 270 Kan. 526 (2001), the officers had the right to arrest the defendant pursuant to the warrant, regardless of whether he was being unlawfully detained when the warrant was discovered. Since the arrest was lawful, it argued, the evidence obtained during a search incident to the arrest was lawfully obtained. The question, therefore, before the court was whether the discovery of an

outstanding arrest warrant during an unlawful detention is an intervening event which removes the taint of the unlawful detention from evidence retrieved in a search incident to the warrant arrest.

In *State v. Martin*, ___ Kan. ___ (March 28, 2008), the Court conducted an in depth analysis of the *Jones* case and tried to reconcile it with its decision in *State v. Damm*, 246 Kan. 220 (1990), in which the Court conducted a "but for" analysis in excluding evidence obtained pursuant to a warrant arrest that was the result of an unlawful detention: but for the arrest, there could be no search and without the search there was no evidence. Therefore, the *Damm* court opined, the evidence was inadmissible as "fruit of the poisonous tree."

The Court concluded that neither *Jones* nor *Damm* established a bright line rule. "*The discovery of an outstanding arrest warrant does not always automatically wipe the slate clean for an officer unlawfully detaining the subject of the warrant. On the other hand, an unlawful detention that begets knowledge of an outstanding warrant does not always automatically immunize the fugitive from prosecution for crimes discovered during the warrant arrest. In that regard, we note that the exclusionary rule is not absolute.*"

The Court found that it must apply three factors (1) the time lapsed between the illegality and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct in determining if the evidence seized should be excluded. In this case it found that the outstanding arrest warrant was an intervening circumstance which sufficiently attenuated the taint of the unlawful detention so as to permit the admission of the marijuana.

CRIMINALS AND THE VIENNA CONVENTION

Over the last several years the Kansas appellate courts have had an opportunity to examine the impact of the Vienna Convention on state cases. See, *In re L.A.M.*, 268 Kan. 448 (2000); *State v. Rosas*, 28 Kan.App. 2d 382 (2000); *State v. Gomez*, 130 P.3d 148, 2006 WL 619182 (Kan. App. 2006); *State v. Amaya-Ticas*, 176 P.3d 251, 2008 WL 440827 (Kan.App. 2008). The Vienna Convention is a 79-article, multilateral treaty to which both the United States and several other countries are signatories. The treaty requires an arresting government to notify a foreign national who has been arrested of his or her right to contact his or her consul. The Kansas court, as have many other state courts, has refused to recognize any individually enforceable rights under the treaty unless the proponent can show some prejudice by the government's failure to comply with its provisions.

The United States Supreme Court recently addressed the issue in *Medellin v. Texas*, ___ S.Ct. ___ (March 25, 2008). Medellin is a Mexican national, who has lived in the United States since preschool. He was convicted of capital murder

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and sentenced to death for the gang rape and brutal murders of two Houston teenagers. He was arrested a few days after the crime. He was given his *Miranda* warnings by investigators and signed a written waiver and detailed confession. Local law enforcement did not, however, inform Medellin of his Vienna Convention right to notify the Mexican consulate of his detention. His conviction and sentence were affirmed on appeal.

He first raised the Vienna Convention argument in an application with the State for postconviction relief. The state court held that he could not raise the issue because he had not raised it at trial or in his appeal. It also rejected the claim on its merits, finding that he failed to show any prejudice by the failure to notify the Mexican authorities. (Similar to what Kansas cases have held).

He then filed a habeas petition in federal court. The court denied his requested relief on the same basis, to wit: there had been on showing of prejudice.

In the meantime, pursuant to the Vienna Convention, Mexico brought a claim against the United States before the International Court of Justice (ICJ) in the Hague, to force the United States to comply with the Convention in the *Case Concerning Avena and Other Mexican Nationals (Avena)*. Mexico has no death penalty and it and other nations that oppose capital punishment have sought to use the ICJ to fight for foreigners facing execution in the U.S. Medellin was one of the named 51 Mexican nationals who Mexico argued were entitled to review and reconsideration of their state-court convictions and death sentences.

The ICJ held that the United States had violated Article 36 (1)(b) of the Convention by failing to inform the petitioners (including Medellin) of their Vienna Convention rights. The ICJ held that those named individuals were entitled to review and reconsideration of their U.S. state-court convictions and sentences **regardless of their failure to comply with generally applicable state rules governing challenges to criminal convictions.**

In a subsequent case involving different Mexican nationals, *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006) the Supreme court held that contrary to the ICJ opinion in *Avena*, the Convention did not preclude the application of state default rules. President Bush then filed a Memorandum stating that the United States would “discharge its international obligations under *Avena* by having State courts give effect to the decision.”

With *Avena* and the President’s Memorandum in hand, Medellin filed a second Texas state-court habeas petition

raising the same issue of denial of his Vienna Convention rights. Remember the Alamo? Texas does not have a history of going “gently into that good night” to quote Dylan Thomas. The Texas Court of Criminal Appeals dismissed Medellin’s application as abuse of writ and concluded that neither *Avena* nor the President’s Memorandum was binding federal law that could displace the State’s limitations on filing successive habeas applications. So off Medellin went to the U.S. Supreme Court.

The United States Supreme Court, in a 6-3 decision, agreed with Texas. The opinion written by Chief Justice Roberts and the dissent written by Justice Beyer, contain in-depth analysis of international treaties, ICJ authority, and United Nations charters. The majority concludes that while a treaty may constitute an international commitment, it is not binding domestic law unless Congress has enacted statutes implementing it or the treaty is “self-executing” and it is ratified on that basis. Neither is the case with the Vienna Convention. ICJ decisions do not bind individuals, only nations. And finally, the President does not have the authority by Memorandum or otherwise to compel state courts to act absent a grant of such authority by Congress or the constitution. Again, neither was the case here.

DEFINITION OF SELF-PROPELLED CRANE

Kirk Zeit was convicted of a violation of K.S.A. 2007 Supp. §8-142 (a misdemeanor) for operating one of the company’s cranes on a roadway when it was not registered. The legislature has made it illegal to operate an unregistered vehicle on a Kansas highway, but has exempted self-propelled cranes. *State v. Zeit*, ___Kan.App.2d___(April 4, 2008), focused on the definition of “self-propelled crane” and whether Zeit’s crane met that definition. The ultimate question came down to whether or not the operator of the crane had to be located in an enclosed permanent housing or module on the crane in order for the crane to meet the definition of self-propelled. The Court held that Zeit’s crane was a self-propelled crane and therefore his conviction was set aside. The opinion also was accompanied by photographs of the crane.



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UNFINISHED MEDICAL CENTER IS A “BUILDING” FOR PURPOSES OF BURGLARY STATUTE

Donald Storey was convicted of burglary of a non-dwelling in violation of K.S.A. §21-3715(b) for entering the Wesley Medical Center construction site in Wichita and stealing some items. The structure was approximately 70% complete. It had a roof, a concrete floor, installed electrical work, and four brick walls with openings for yet-to-be installed windows and doors. The issue in *State v. Storey*, ___Kan. ___ (April 4, 2008) was whether or not said structure constituted a “building” for purposes of the burglary statute. The Court found that it was and therefore affirmed the conviction.

JURISDICTION OF TRIBAL OFFICER OUTSIDE THE RESERVATION

Jackson County Sheriff’s Department and the Prairie Band Potawatomi Tribal Police Department agreed to cooperate and assist each other in the operation of a DUI sobriety check point in Jackson County, a few miles outside the reservation. David Cornelius was stopped at the check point and refused to submit to a BAC test. He was issued several citations by a tribal police officer. At the administrative hearing on his driver’s license, he argued that the tribal officer had no jurisdiction to write him any tickets or request he take a breath test. K.S.A. §22-2401a(3)(a) states that tribal officers can only exercise powers off the reservation if the tribe maintain proper liability insurance which waives tribal immunity and is approved by the attorney general. The statute goes on to state that nothing in the statute “shall be construed to prohibit any agreement between any state, county or city law enforcement agency and any Native American Tribe.” Without such a written agreement, Cornelius argued, the tribal officer had no jurisdiction to suspend his license.

In *Cornelius v. Kansas Dept. of Revenue*, ___Kan.App.2d___ (April 4, 2008), the Court held that the Jackson County Sheriff’s Department had specifically, although orally, enlisted the assistance of the tribal police. Such an agreement does not have to be in writing. An oral agreement for assistance is sufficient, just as it is between city police and sheriffs. See, K.S.A. §22-2401a(2)(b) and *State v. Rowe*, 18 Kan.App.2d 572, 574, 856 P.2d 1340, rev. denied 253 Kan. 863 (1993). In effect, the sheriff had appointed the tribal police officers as deputies, as he is authorized to do under statute. See, K.S.A. §19-805(a). The tribal officer was acting within his authority and Cornelius’s suspension stands.

PLEA AGREEMENTS ARE SUBJECT TO CONTRACT LAW ANALYSIS

The prosecutor entered into a plea agreement with the defendant that she would recommend probation on an aggravated assault case if the defendant’s criminal history score was a level C or better. It was. However, the prosecutor had not considered the fact that a gun was involved in the crime, therefore the case was a presumptive prison case, not a presumptive probation case. In order to grant probation in this presumptive prison case, the judge was required to find that the nonprison sanction will serve community safety interests by promoting offender reformation. At sentencing, the prosecutor recommended probation as promised, but otherwise said only negative things about the defendant. She accused the defendant of making misstatements, of continuing to stalk to victim and emphasized the dangerous nature of the crime.

In *State v. Foster*, ___Kan.App.2d ___ (April 11, 2008) the Court found that when the prosecution breaches a plea agreement, the defendant is denied due process. In this case, the Court found, the words the prosecutor used did not meet the minimum requirements for a “recommendation.” The Court cited the American Heritage definition of “recommend” meaning “to praise or commend (one) to another as being worthy or desirable,” or “to make (the possessor, as of an attribute) attractive or acceptable.” The prosecutor did not state anything that would cause an objective person to conclude that probation was worthy, desirable, attractive or even acceptable. Although a prosecutor does not have to be enthusiastic in making the recommendation agreed upon in the plea bargain, it must at least make the recommendation. The prosecutor may not so undermine the recommendation that only lip service has been paid to it. By not recommending that the judge make the necessary findings of community safety, the prosecutor breached the plea agreement.

The Court further found that plea agreements are generally subject to contract law and Kansas law implies a duty of good faith and fair dealing in every contract. A party to a contract may not do anything that would have the effect of destroying or injuring the right of the other party to receive the benefit of the agreement. The prosecutor must fulfill, not sabotage, the agreement. He or she cannot, by words or actions, cast substantial doubt on the recommendations of the plea bargain. The defendant waives key constitutional rights in entering a plea. If it is induced by promised recommendations from the prosecutor, the defendant is entitled to receive the benefit of the bargain. In this case, the defendant’s sentence was vacated and the case was remanded for resentencing before a different judge.

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Court Watch

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CAPITAL PUNISHMENT IS STILL CONSTITUTIONAL AND THREE-DRUG LETHAL INJECTION IS NOT CRUEL AND UNUSUAL PUNISHMENT

In a 7-2 decision, with Justices Ginsburg and Souter dissenting, the U.S. Supreme Court has held that capital punishment is constitutional and that the Eighth Amendment's prohibition of cruel and unusual punishment does not demand avoidance of all risk of pain in carrying out executions. *See, Baze v. Rees*, ___ S.Ct. ___, 2008 WL 1733259 (April 16, 2008). The case, along with its concurring and dissenting opinions, is fascinating reading for anyone interested in the topic of capital punishment.

The argument against the three-drug protocol used by Kentucky in this case was that *if* the initial anesthetic does not take hold, the other two drugs can cause excruciating pain. One of those drugs, a paralytic, would leave the prisoner unable to express his discomfort. Studies had found that recent executions using the process took much longer than usual, with indications that the prisoners were in severe pain. The Kentucky death-row inmates who brought the case argued that a single large dose of barbiturate should be used, which causes no pain, much the same way animals are euthanized. In fact 23 states prohibit veterinarians from using the challenged three-drug protocol on animals.

Although the case was about the *method* used, and not the constitutionality of the death penalty, the opinion does reaffirm the constitutionality of the death penalty. It also contains a history of methods of execution in this country.

The petitioners argued that while the constitution may not demand the avoidance of all risk of pain in carrying out executions, they contend that the Eighth Amendment prohibits procedures that create "unnecessary risk" of pain. In other words, the defendant is entitled to the "least risk" alternative. The Court disagreed. In discussing the history of executions, it pointed out that to be found "cruel" within the meaning of the term in the constitution, the punishment had to involve the deliberate infliction of pain for the sake of pain itself. It cited examples of torture, live disembowelment, beheadings, public dissection and burning alive as cruel. They involve torture or lingering death. However, the punishment of death itself is not cruel. The Supreme Court has upheld death by hanging, firing squad, electrocution and the gas chamber, even though more humane methods are now widely in use. An execution method may result in pain, either by accident or as an inescapable consequence of death, but by itself, that does not qualify it as cruel and unusual punishment. An accident with no suggestion of malevolence does not give rise to a constitutional violation.

The petitioners argue that if the first drug is not administered properly, pain may result. However, they did not present sufficient evidence to establish that the risk of improper administration was substantial given the extensive and detailed protocol used by Kentucky. Justice Roberts wrote, in the majority opinion, that courts cannot turn into boards of inquiry charged with determining "best practices" for executions "each ruling supplanted by another round of litigation touting a new and improved methodology."

Thirty of the 36 states and the federal government that impose capital punishment are using the same three drug cocktail that was used in this case. Executions in those states have been on hold since the Court agreed to take the case in September of last year. Florida has already announced that it will lift its moratorium and resume executions.

DEFENDANT HAS RIGHT TO APPEAL EVEN WHEN HE PLEADS GUILTY BEFORE THE MAGISTRATE

Defendant agreed to plead guilty before a district court magistrate judge to possession of drug paraphernalia in exchange for the prosecution's dismissal of a possession of marijuana charge. The magistrate accepted the plea and pursuant to the agreement sentenced the defendant to 60 days in jail, suspended, with a 12 month supervised probation.

The defendant appealed the finding for a trial *de novo* in front of the district court judge pursuant to K.S.A. §22-3609a (2007). The district court judge dismissed the appeal finding that the defendant could not appeal a guilty plea. The judge reasoned that the appeal is a remedy for a defendant "aggrieved" by a judgment of the magistrate and the defendant cannot claim he was aggrieved by a judgment on a plea that he voluntarily entered. The judge further found that if the defendant wanted to appeal the magistrate's finding he would first have to file a motion to withdraw his plea under K.S.A. §22-2610 (2007). Since he had not done so, the district court lacked jurisdiction. The defendant appealed to the Court of Appeals.

The Court held in *State v. Gillen*, ___ Kan.App.2d ___ (April 18, 2008), that the defendant did have the right to appeal a guilty plea. The right to an appeal is strictly statutory. The statute doesn't say anything about being "aggrieved" by the judgment. It merely states that "A defendant shall have the right to appeal any judgment of a district magistrate judge..." With regards to appeals from both magistrate courts and municipal courts, the law is clear that a "judgment" is the pronouncement of guilty and the determination of punishment. The plea is irrelevant.

Editor's Note: This case comes to the same conclusion with regards to pleas before a magistrate as *City of Dodge City v. Frey*, 26 Kan.App.2d 559 (1999); *City of Liberal v. Vargas*, 28 Kan.App.2d 867, rev. denied 271 Kan. 1035 (2001) and *City of Wichita v. Bannon*, 37 Kan.App.2d 522 (2007) concluded with regards to pleas before a municipal court

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Step Back in Time

(Continued from page 1)

clerk of the church and a teacher in the public schools. Lee Miller was a member of the local school board and chair of the committee on school buildings. One day, the janitor at Ione's school went to Miller and told him that the pastor from the Baptist church, Rev. Pennington, was arriving at Ione's school room after school was out and remaining until after dark. The school board asked the pastor to come to a meeting that would be confidential. Rev. Pennington told the school board that he went there to conduct church work for which he needed Ione's assistance as the church clerk. He agreed he would stop going to her room at the school.

Two months later, the janitor informed the school board that there had been "renewed visits" and "improprieties." A special meeting was called. The janitor, the pastor, and Ione were present. The Board met in executive session. At the conclusion it was agreed that Ione would finish out her teaching year, but would not be re-employed.

Apparently, McPherson became rife with rumors and gossip. Ione's brother Clarence heard there had been an investigation. Although his mother had told him some details, he went to the president of the school board to find out more. The president told him some of the story. Clarence asked if there was anyone who could tell him more. Clarence was a good friend and long time acquaintance of Lee Miller's. The president suggested that Clarence talk to Lee. Clarence and Lee spoke in private. Lee told Clarence what he knew. He told Clarence that if "the preacher had possessed the sense God gave a goose it would have never happened."

Mrs. Johnson was a cousin of Ione's. Ione's mother told Mrs. Johnson that Ione had been fired from school. The Johnson's were concerned about this. Mr. Johnson knew Lee Miller. In fact, he thought Lee was the president of the school board. He went to Lee to inquire about "how serious the charges must have been to justify the school board turning Ione down and not giving her the teaching job back." Lee told Johnson the details. Mr. Johnson assumed Lee was telling him what the janitor had in turn told him. Lee told Mr. Johnson it was unfortunate for the girl.

Johnson then started going to other members of the school board to circulate a petition to re-employ Ione.

Charles McGiffert was a trustee of the Baptist church. He heard the rumors circulating about the pastor and Ione. One of the deacons of the church told McGiffert to go see Lee Miller about it. The deacon and McGiffert went to Lee's office. Lee relayed what had transpired in the executive session of the school board and what the janitor had said.

Ione sued Miller for slander for his conversations with her

brother, her cousin's husband and the church trustee. In *Ebaugh v. Miller*, 127 Kan. 464 (1929), the Court found that the doctrine of "common interest" caused the conversations to be conditionally privileged. The doctrine, as explained by the Court:

"The rule of common interest, as, for example, common interest of members of a school board, members of a church, or other organization, is invoked, and it is said one friend may not, in conversation with another friend, slander a third person, however strongly solicited to do so. The case is governed by an entirely different rule—the rule relating to confidential communications made in good faith in response to inquiries by a person having an interest in the information sought. In such cases, the person of whom inquiry is made rests under a duty, legal, moral, or social, according to the nature and purpose of the inquiry, to tell what he knows regarding the subject inquired about. [Citations omitted]."

The privilege is only lost if there is malice. The Court found that there was no evidence of malice on Miller's part.

"The only expression of defendant's attitude toward plaintiff contained in the evidence in her behalf is defendant's statement to Johnson that it was unfortunate for the girl. In that interview Johnson said the preacher ought to be strung up. Malice toward plaintiff on Johnson's part is scarcely inferable from his statement. The circumstances forbid. Sympathy for the young woman in plaintiff's situation, and not malice, is a perfectly natural sentiment. Defendant testified he bore plaintiff no ill will, and had done all he could to protect her; and in this instance the court properly required the jury to consider all the evidence in determining whether defendant maliciously defamed her."

The Court supported the jury verdict in favor of Lee Miller. It also pointed out that the jury "found plaintiff was innocent of the improprieties on her part which had been talked about, and found that defendant acted both without bad faith and without malice, in his conversations with those who interrogated him." That would have ended the whole thing and no one would have known the details of what the janitor saw. Ione's good name remained in tact. The Court got through the entire decision and analysis of the law without putting in print any salacious details.

But, the plaintiff felt a need to petition the Court for rehearing. She argued that Lee Miller forfeited his "common interest" privilege because he exaggerated the reports received from the janitor when he communicated them to Clarence and McGiffert.

In *Ebaugh v. Miller*, 128 Kan. 3 (1929), issued two months later, the Court was forced to go into the details of what the janitor relayed to Lee Miller and the rest of the school board.

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judge. In fact the Court refers to those cases for support. The defendant has the right to appeal, regardless of his plea. Since the right to appeal is statutory, if the legislature wants to prohibit appeals from guilty pleas, it can do so.

FOLLOWING A LAWFUL TRAFFIC STOP AN OFFICER CAN ASK DRIVER IF HE HAS BEEN DRINKING BEFORE ADVISING HIM OF *MIRANDA* RIGHTS

Defendant was stopped for straddling the center yellow line three times and traveling at an unusually slow rate of speed. The officer advised the defendant of the reason for the stop. Based on the defendant's mannerisms, the officer asked him if he had been drinking. The driver replied, "I sure have been." In response to the next several questions the driver told the officer that he had just finished his last drink a minute before the stop, that he had been coming from Coach's bar, and that he had been drinking all day long. The officer then had the driver step from the car and perform field sobriety tests which ultimately resulted in his arrest for DUI. The driver was never advised of his *Miranda* rights.

The issue in *State v. Vanek*, ___ Kan.App.2d ___ (April 18, 2008) was whether or not the driver's statements about his drinking should be suppressed because he was not given the *Miranda* warnings prior to that initial questioning by the officer. The Court found that during a lawful traffic stop, a law enforcement officer is not required to *Mirandize* an individual before asking routine investigatory questions where the individual is not in legal custody or deprived of his or her freedom in any significant way. This is true even though the officer suspects the individual may have committed a crime, and even though the individual is not free to leave during the lawful detention. The Court opined that it was

"too simplistic to say Vanek's interrogation was custodial simply because a reasonable person would not have felt free to terminate the interrogation and leave. Whether a reasonable person would have felt free to leave is the test to determine when a person has been seized or detained. . . This is not the test to determine when a person is in custody for Miranda purposes. A person who is lawfully seized or detained by a law enforcement officer is not free to leave or terminate the encounter. Clearly this fact alone does not make the encounter custodial for purposes of whether Miranda warnings are required before questioning. Otherwise, Miranda warnings would need to be the first words spoken by a law enforcement officer during any Terry stop."

The statements come in.

Step Back in Time

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Here is the janitor's account:



The janitor became suspicious when the preacher would arrive after class was out and stay until after dark. He said that when he first became suspicious he went down to the sewing room one night to close the windows, and he said as he opened the door the preacher jumped back and grabbed his hat and said, 'Well, I guess that is all,' and Miss Ebaugh said, 'Well, that is all but one thing, and I will attend to that.'

He said he went in and closed the window, and the preacher went out ahead of him, and he said he went up town. He said the longer he studied over it the more suspicious he became. He said he stayed up town about half an hour, and he went back to the school building and went into the sewing room, and they weren't there, and he went from the sewing room over into the cooking room, and he said they were in there, and he thought he had his arm around her.

His suspicions continuing, he made a peep hole in the ceiling so that he could watch them at the desk, and he saw Rev. Pennington and Ione sitting at her desk and Rev. Pennington had his hand on her thigh, close to her body, while she was combing her fingers through his hair. She then put her arm around his neck and drew his head over to her shoulder and kissed him."



The Court found that Lee Miller's translation to Clarence that Ione and Rev. Pennington were "caught in the basement with the door locked one night" and that she was "sitting on his lap, hugging and kissing" did not disclose "carnality embellished and exaggerated." The Court concluded with an apology for having to print this evidence:

"The petition for rehearing chides the court for not referring to this subject in the original opinion. The court preferred not to print the evidence which has been set out above, and supposed reference to the findings, that defendant acted in good faith and without malice, would be sufficient. Since plaintiff insists on a discussion of the subject, the court has no choice in the matter."

NUTS AND BOLTS

Question: *An attorney, who is also a state representative, appeared in court in January and asked that his client’s traffic case be continued until the end of the legislative session. That is 4-5 months! Do I have to grant his request?*

Answer: Yes.

K.S.A. §46-125 (2000) states that from 15 days before the legislature convenes (so roughly starting January 1), and until the 10th day after adjournment (which would roughly be mid-May), members of the Kansas legislature shall not be required to appear in any court in this state and participate in the trial of an action pending therein or the hearing of any motion or application or any other proceeding in which the member is either employed as an attorney or is an interested party. In addition, no member of the legislature can be required to appear at a deposition during said time frame.

K.S.A. §46-126 (2000) states that “any member of the legislature who may have a case pending in any court in this state, may have the same continued until the legislature shall adjourn sine die in the manner hereafter provided for.”

Finally, §46-127 (2000) puts the responsibility on the judge to know who is in the legislature and continue their cases even if they don’t ask.. “[A]ll judges of the courts of this state shall take judicial notice of the personnel of the legislature, and it shall be the duty of said judge to continue the trial of any cause in which any member of the legislature appears as attorney of record or party...”

Questions regarding vehicle tags often come up in municipal courts. Defendants are confused about the rules related to getting and transferring tags. Below is a reprint from the Department of Revenue Website of some of the most commonly asked questions and the answers supplied by the Department:

Question: *I just bought a new vehicle. Can I transfer the tags from my old vehicle (which I sold or traded in)?*

Answer: Pursuant to K.S.A. §8-135 and §8-135b, an individual has 30 days from the date of the purchase of a new vehicle to register and apply for title on the new vehicle. During this time frame, the individual is allowed to put the tag from the vehicle he or she traded in or sold on the new vehicle. (S)he should also carry a copy of paperwork showing that the vehicle is newly purchased. The individual must

go to the local county treasurer's office within the 30 days and apply for a title and transfer the plate over.

If you still own the “old” vehicle, you may not transfer the tags from it to another vehicle.

Question: *How long does a new owner of a vehicle have to make application for title and registration? How long after moving to Kansas do I have to make application for a Kansas title and registration?*

Answer: Application must be made within 30 days from date of purchase.

On and after the 31st day there will be a \$2.00 late fee added to the title fee. Autos, light trucks, motorcycles and RV’s will be assessed penalty and interest charges for personal property tax and late registration fee of \$1.00 per month will be assessed in addition to the title fee. Contact your local county treasurer’s motor vehicle office regarding monthly penalty and interest charges.

When a vehicle has been located in Kansas for up to 90 days or more, including frequent absences (leaving for weekends with the intent of returning) application for Kansas title and registration is required. This includes vehicles owned by someone outside of Kansas but have been loaned to someone in Kansas to use within this state. The person borrowing the vehicle will need a power of attorney form TR-41 from the owner to complete the application for title and registration.

The “owner’s name” on the title should appear as follows:

Owner’s Name
c/o Borrower’s Name
Borrower’s Street
Borrower’s City, KS ZIP

Question: *I want to add or remove a name as an owner for a vehicle that has a lien. What is the procedure for a lienholder’s consent to transfer when the title is being held in electronic format? What is the procedure for a paper title without a lien?*

Answer:

etitle: The lienholder will complete a TR-128, “Lienholder’s Consent to Transfer” to remove a name(s) (at least one of the original owners must stay on the title), or to add a spouse, father, mother, son or daughter, or to change a person’s name due to marriage or court order (legal document must also be attached to the title application). The TR-128 should be submitted to the county treasurer’s motor vehicle office, along with the registration receipt or verification showing the current lien and indicates that the title is being held in electronic format (etitle). A title fee will apply, along with any other appropriate fees or taxes.

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Paper title: If paper title was previously issued, the title must be attached or the reason for a duplicate title must be marked on the title application, TR-200 or TR-212. The vehicle title record will be changed, and the owner will be issued a new registration receipt by the treasurer’s motor vehicle office. A title fee will apply, along with any other appropriate fees or taxes. If there was no lien holder listed on the paper title or if a lien release is attached to the title application, a new paper title will be issued. If there is a lien on the paper title with no lien release attached, the new title will be held electronically until the lien is released.

Question: *How do I make application for title for a vehicle that I just purchased or received as a gift?*

Answer: The new owner of a vehicle or trailer (including ATV’s or work site utility vehicles) must make application for title and registration within 30 days of taking delivery of vehicle. The new owner(s) listed on the assignment as purchaser will need to take the assigned title, proof of insurance, and if purchased from a Kansas dealer, proof that sales tax was paid. If the vehicle or trailer was purchased from an individual or an out of state dealer proof of the purchase price will be required. This proof can be a bill of sale or the purchase price on the title assignment. For out of state dealers, a copy of the sales contract or agreement. If the vehicle is being given as a gift, an Affidavit of Fact, form TR-12, must be completed. If the assignment of title has the “purchase price” space in the assignment of title, write the word “gift” in this space. If the buyer and seller are related as child, parent, grandchild, or grandparent, an Affidavit of Relationship, form TR-215 can be completed and attached also. If the title was issued by another state, an MVE-1 inspection form must be obtained from the Kansas Highway Patrol or their designee. Take all of this paperwork to your local county treasurer’s motor vehicle office to make application for title and registration. If the owner wants to allow someone else to act on his or her behalf, a power of attorney will be required.

Question: *I sold my vehicle and want my name removed from the vehicle record. How do I do that?*

Answer: To have your name removed as vehicle owner from the vehicle record after the title has been assigned and delivered to the new owner, a Seller's Notification of Sale, form TR-216 may be completed and submitted to the Titles and Registrations Bureau along with the required fee listed on the current form.

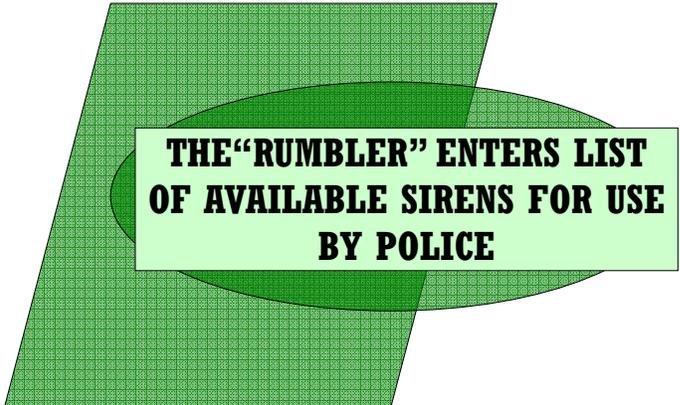
To ensure that you have proof of transfer of ownership, you can make a copy of the front and back of the title after it has been assigned.

When you transfer or surrender the registration (license plate), in the county treasurer’s motor vehicle office, the record for the disposed vehicle showing your name as owner will no longer be the current ownership record and you will not need to file a Seller’s Notification of Sale form.

Always remove the license plate(s) from a vehicle or trailer you have sold or disposed of by assigning the title.

Information outlined above was obtained from Kansas statutes and the Kansas Department of Revenue Website: <http://www.ksrevenue.org/>

Copies of all forms can also be downloaded from the website.



Early in the 20th century, police departments around the world began using wind-up sirens to alert people to their presence. By the time of the Depression, models with electrical motors were being used. As more and more police cars took to the street in urban areas, police cars using the same sirens could not hear each other when approaching the same intersection. This was called the “wash-out” effect. In the early 70’s, sirens with different patterns and frequencies were introduced. The yelp, the wail, the fast and the hi-lo sirens were born. Now for the new century, a new siren has been gaining steam, the “Rumbler.”



The Rumbler sends out low, bone-rattling vibrations, so it is not only heard, but also felt. Drivers report that they can feel their seats vibrate from over 200 feet away, even with the windows up and the stereo on.

About 40 police departments nationwide have installed Rumblers including New York City, Chicago and Washington, D.C. They cost about \$350 per cruiser and are sold by Federal Signal.

More Judges Behaving Badly

JUDGE GUILTY OF DWI RESIGNING



A federal bankruptcy judge convicted of driving while intoxicated in Manchester, N.H., announced he was resigning as of April 1. He called the court administrator from the Caribbean, where he was on a previously arranged vacation.

Robert Somma, 63, of Newbury, was in a collision on Feb. 6, 2008 after leaving a gay bar in his Mercedes wearing a black cocktail dress, fishnet stockings and high heels, the Union-Leader of Manchester reported. He rear-ended a pickup truck at a traffic light. The arresting officer did not mention the judge's unusual attire in the arrest report, but did write that Somma "had a difficult time locating his license in his purse." Officials believe the judge drove from Boston because his wife was out-of-town and no one in Manchester knew who he was. He reported to the officer that he had been drinking gin and tonics at the Breezeway Pub, which bills itself as "New Hampshire's favorite gay and alternative bar."

This was Somma's first DUI offense. He immediately pled no contest, was fined \$600 and had his driver's license suspended for a year, which will be cut in half if he successfully completes driver-education and alcohol-awareness classes.

According to a press release issued by the First Circuit federal court in Boston, Somma will remain on leave until his resignation takes effect. Under federal law, he could have remained in office, since he has a 14-year term which just started in 2004.

Gary Wente, circuit executive of the first district, in a released statement, said Somma "rendered excellent service" as a bankruptcy judge since his appointment. Lawyers described him as well-prepared, even-handed, reserved and courteous. He has made no comments to the press and when his wife was confronted by a local newspaper, she said, "I suspect that he will not be interested in talking to anyone from the newspaper."

JUDICIAL COUNCIL RECOMMENDS IMPEACHMENT OF FEDERAL JUDGE

The Fifth Circuit Judicial Council issued an order in December 2007 recommending impeachment of federal district court judge G.Thomas Porteous, Jr. of New Orleans. His misconduct included:

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- ◆ Hiding assets from the bankruptcy estate. He filed numerous false statements under oath during his personal Chapter 13 bankruptcy proceeding, including filing it under a false name.
- ◆ Leaving gambling losses off his list of debts
- ◆ Getting short-term credit from casinos after the bankruptcy judge had ordered him to get approval of the court or a trustee before taking on any debt
- ◆ Making unauthorized secret payments to "preferred creditors" after going to bankruptcy court.
- ◆ Taking "gifts and things of value" from lawyers with cases before him, and leaving the gifts off financial disclosure statements.



The allegations were uncovered during the FBI's Operation Wrinkled Robe, an investigation of the relationship between state judges in Jefferson Parish Louisiana, where Porteous served until he was appointed a federal judge in 1994, and bail bondsman Louis Marcotte, who was sent to prison for racketeering.

The report was sent on to the Judicial Conference of the United States, a 27-member judicial body chaired by U.S. Supreme Court Chief Justice John Roberts, which will decide whether to recommend that the U.S. House of Representatives impeach Porteous. The U.S. House has impeached 13 judges in its history. The Senate convicted seven and an eighth resigned.

For the first time in history, the Judicial Conference of the United States has decided that, effective in May 2008, the public will have more access to cases in which federal judges are disciplined. Final orders on complaints about judges will be posted on appeal court websites.

CALIFORNIA JUDGE REMOVED FROM BENCH FOR NUMEROUS VIOLATIONS OF CODE OF CONDUCT



Monterey County California Superior Court Judge José Valásquez was removed from the bench in October 2007 by the California Commission on Judicial Performance for:

- In eight cases, revoked the probation of unrepresented defendants (without a hearing) who had appeared in court voluntarily to request a modification of probation;
- In six cases, increased or threatened to increase a defendant's sentence for asking legitimate questions or offering a defense;

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Judges Behaving Badly

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- In five cases, asked defendant convicted of speeding violations if it felt good to “peel out” and conditioned their sentences on their responses;
- In seven cases, informed unrepresented defendants at arraignment that their only choices were to plead guilty or accept diversion without advising them of their constitutional right to plead not guilty and have a trial;
- Improperly issued bench warrants for absent defendants because their attorneys were not present when their cases were called and refused to recall the warrants when the attorneys later appeared and explained their absence; and
- Made inappropriate comments in 14 instances that disparaged counsel or suggested, as a “joke,” that a person appearing before him was about to be remanded to custody.

Judge Valásquez had previously been publicly censured for hanging a crucifix in his courtroom, allowing his name to be used in pro-choice newspaper advertisement, calling three of his fellow judges “racist” and alluded in the press to a conspiracy against him.

NEW JERSEY MUNICIPAL JUDGE REPRIMANDED FOR MULTIPLE ETHICS VIOLATIONS

New Jersey municipal judge, Henry Broome, Jr., was reprimanded by the New Jersey Supreme Court in November for multiple ethics violations. Among them:

- Failing to follow a state-court prohibition against dismissal of charges for refusal to take a Breathalyzer test;
- Participating in plea negotiations while sitting as a judge in a case;
- Negotiating and approving a plea agreement in the prosecutor’s absence;
- Accepting plea agreements without first ascertaining the factual basis;
- Warning a defendant who testified in his own behalf that the judge would have him “indicted” if he lied under oath;
- Advising litigants at the start of court session of his “\$100 policy,” namely that fines of that amount or less were due and payable on the day imposed. (even though state law required that payment plans be allowed).

The Court recommended reprimand instead of removal due to

The Verdict

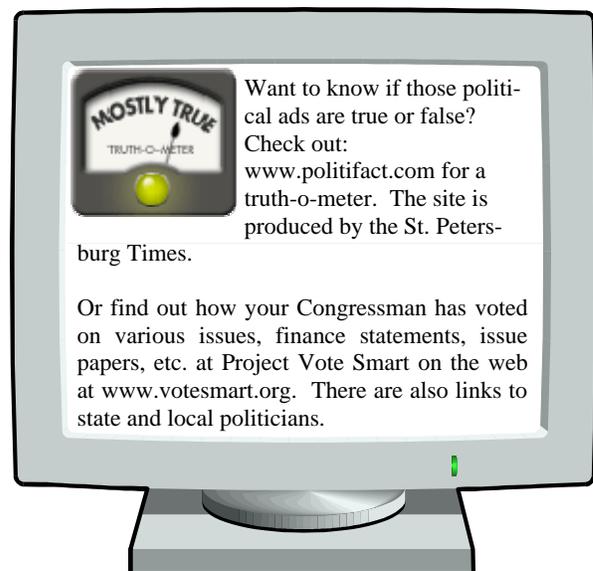
his long tenure on the bench (31 years) in several Atlantic County towns (Absecon, Brigantine, Egg Harbor City, Linwood, Longport, Mullica Township, Northfield and Somers Point). It was reported the Broome earned more than \$150,000 per year from his eight part-time judgeships.

JUDGE PRESIDES OVER DIVORCE OF HIS PARAMOUR AND ORDERS HER HUSBAND TO PAY CHILD SUPPORT FOR CHILD JUDGE Sired

And finally, we have Judge Wendell Miller, Jefferson Davis Parish, Baton Rouge, Louisiana. He was removed from office by the Louisiana Supreme Court in February 2007. Judge Miller had a 10 year adulterous affair with his secretary, Heather Viator. He fathered her child while she was still married to Michael Viator. Many of the allegations against him were made public when she filed a sexual harassment suit against him after their affair went south.

Among the reasons for removal:

- ◆ Weekly sexual trysts with Ms. Viator in chambers
- ◆ Presiding over the Viator’s divorce case and signing the order requiring Michael Viator to pay child support for the child that the judge had actually sired (unbeknownst to Mr. Viator)
- ◆ Contacting Heather Viator after a no-contact order had been issued
- ◆ After litigation had been filed against him by Michael Viator, issued two press releases to get out “his side of the story” thereby making a public comment on pending litigation and making comments which were intended to influence the courts and the public by lending the prestige of his office to advance his private interests.



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**ON A MIDNIGHT, DARK AND
DREARY**

Here is yet another example of poetic judges. This example comes from Texarkana, Texas. The plaintiff's were traveling slowly, towing a large pick up truck, down an East Texas county road when they were rear-ended by a Pilgram's Pride truck full of chickens. They sued the trucking company for negligence. The Texarkana Court of Appeals started the opinion:

*On a midnight dark and dreary,
Our two plaintiffs, worn and weary,
Slowly going, a "dark" truck towing on lonely
stretch of road.
Suddenly, there came approaching
Pilgram truck, their rear encroaching,
Crashed into the truck that the two startled
trav'lers towed.
In the wreckage sat the two,
All immersed in chicken "stew,"
With hurts sustained and backs that pained;
Decided that they'd sue.
Judge and jury found for the pair,
For hurts to backs (and "parts" in hair).
The Pilgram, placed in some despair,
Now asks for us, "Please make it fair."
On this appeal, Pilgram contends
The trial court gave too much amends.
He says the proof is just too small
To make a damages pile this tall;
For weakness of proof on some damages found.
We must cut a part out of that mound.
He, too, asks fault be re-compared-
The fault that the Pilgrim and two plaintiffs
shared.
"The way that the trial court figured, it erred."*

The Court did find that the damages were miscalculated. See, *Pilgram's Pride Corp. v. Cernat*, 205 S.W.3d 110 (2006).



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 of interest to municipal courts.

URINE TEST ADMISSIBLE IN DUI PROSECUTION EVEN IF IT DOESN'T CONCLUDE IMPAIRMENT AT TIME OF DRIVING *Unpublished Decision*

Jesse Brown was stopped during a DUI checkpoint in Overland Park. He failed several field sobriety tests, had difficulty exiting his car and had several indicators of impairment. The arresting officer testified that the car smelled of cocaine smoked through a pipe and when Brown attempted to exit his vehicle a piece of glass tubing commonly used to smoke cocaine dropped to the pavement. A drug recognition expert evaluated him and determined he was under the influence of more than one drug. He blew .075 on the intoxilyzer and took a urine test. He was ultimately charged with possession of drug paraphernalia, DUI, DWS, and failure to register his vehicle.

At trial the forensic toxicologist who examined the urine sample testified that it was positive for alcohol, marijuana, cocaine and Oxycodone, any one of which could adversely affect a person's ability to drive. However, she acknowledged that the positive result confirmed only that drug use had occurred at some point prior to the sample being produced. It did not conclusively demonstrate that the defendant was impaired at the time the sample was given. She could only stated that Brown had taken cocaine within 12 hours of giving the sample and that he had ingested Oxycodone within the previous 48 hours. In addition, she had no idea as to the quantity of the drugs consumed or whether they were actively effecting him at the time of the stop.

Brown moved to dismiss the DUI on the basis that the toxicology report was irrelevant since there could be no conclusions drawn concerning impairment at the time of driving. He argued the prejudicial effect of the report outweighed its probative value and there was insufficient evidence to convict.

In *State v. Brown*, Slip Copy, unpublished, 2008 WL 142119 (Kan. App. January 11, 2008), the Court found that the evidence was relevant. To be relevant, it doesn't have to clearly established the desired inference the offering party is trying to establish. It merely has to have a "tendency" in reason to prove any material fact. There must be a material or logical connection between the asserted facts and the inference or result they are intended to establish. In this case the material fact to prove was that Brown was impaired by drugs or alcohol. A necessary element to that proof is that he ingested drugs or alcohol. Although not dispositive, the urine sample results establish that he took drugs and alcohol before he was driving. The jury can consider this along with the other evidence of impairment (observations of officers, field sobriety tests, driving, other tests, etc.) in reaching their verdict.

ROUTINE QUESTIONS THAT AREN'T SO ROUTINE UNDER THE CIRCUMSTANCES *Unpublished Decision*

Officer's executed a search warrant at a private home to search for a particular suspect and guns from a recent burglary. Chelsey Allison was alone in one of the bedrooms. Narcotics were lying on a table in the room in plain view. Officers found Jeremy Parks, the owner of the house, and another individual in the garage. They were all arrested, handcuffed, and gathered on the floor of the garage. None of them were advised of their *Miranda* rights.

Officer Watkins started asking each of the arrestees, including Allison, "to obtain basic information, including name, date of birth, and address." He testified he asked each of them, "where they lived, one at a time, you know, what's your name, where do you live." Allison stated she was staying at the house with her boyfriend, Parks. Up to that point, he did not know that Allison lived at the house. She was charged with possession of the drugs and drug paraphernalia that were found in plain view in the bedroom she was in when the police arrived.

Allison moved to suppress her statements on the basis that she was not advised of her *Miranda* warnings. The State argued that questions the officer asked were no different than routine booking questions, that are clearly allowed absent *Miranda*. Courts have held that these types of questions are not "interrogation." In *State v. Allison*, Slip Copy, unpublished, 2008 WL 183341 (Kan.App. January 18, 2008), disagreed and found that the statements should have been suppressed.

First, there was no question that Allison was in custody. She was handcuffed and sitting on the garage floor, having been ordered there by the police. The police should have known that Allison's statements were reasonably likely to

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Unpublished Opinions

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elicit an incriminating response. Therefore, the questions were “interrogation.” “Where do you live” was directly related to the crime the officer’s were investigating. If asking Allison if she lived there, the officers were focusing on her as a suspect in a drug investigation. The fact that she lived there made their case stronger. In these circumstances, *Miranda* warnings were required.

SEARCH OF PROBATIONER’S PURSE

Unpublished Decision

Wendy Montgomery was on probation. She agreed to enter a detox program as part of her probation program with Community Corrections. When probation officers arrived to transport her to detox, they directed her to get in the back of their car. They told her they were going to search her before she got in. She was asked if there was anything on her or in her purse that would “poke” the officers or hurt them. She was also asked if she had anything she shouldn’t have.

Montgomery stated that she did have a syringe in her purse that could “poke” the officers. An officer opened the purse and Montgomery directed her to the zipper compartment where the syringe was found. They asked her what was in the syringe and she said cocaine or Demerol. Montgomery was charged with possession of meperidine.

In *State v. Montgomery*, Slip Copy, unpublished, 2008 WL 217050 (Kan. App. January 25, 2008), the Court found that the search was unlawful and the syringe must be suppressed. It found that although the encounter between Montgomery and the probation officers was voluntary, this was not a consent search. It was clear that the officers intended to search Montgomery’s purse from the outset, when she was directed to the back of the vehicle. Once she told them there was a syringe in the purse, they had probable cause to search the purse. “*However, this probable cause did not arise until after the officers had begun the unlawful search.*”

In addition, this was not a “special needs” search based on her status as a probationer. The Court found that the prevailing case law required some “reasonable suspicion” before a search of a probationer would withstand constitutional scrutiny. The Court found the probation officers had no reasonable suspicion to justify the search of Montgomery’s purse.

Finally, the Court states that “*while the need for officer safety is a legitimate government interest, it does not outweigh the privacy interests of a private citizen who has no knowledge that she is subject to search at any time and who has never signed a waiver giving up her Fourth Amendment rights [for example, in the probation agreement]. Further, the officers admitted that they could address their safety concerns by allowing Montgomery to place her belongings in the trunk before being transported.*”

The Verdict

COMPLETION OF THE DC-27 IS NOT A PRE-REQUISITE TO ADMISSION OF THE BREATH TEST IN A DUI TRIAL; MAINTENANCE LOGS ON MACHINE GO TO WEIGHT NOT ADMISSIBILITY OF BREATH TEST RESULTS

Unpublished Decision

In *State v. Hernandez*, Slip Copy, unpublished, 2008 WL 217046 (Kan.App. January 25, 2008), the defendant argued that the breath test in his case was not admissible because the officer did not complete a certification and notice of suspension, commonly known as a DC-27. The Court found that admission or completion of the DC-27 is not a pre-requisite to admission of the breath test result. Relying on *State v. Baker*, 269 Kan. 383 (2000) where the failure to check a box on the DC-27 was deemed to have no bearing on the admission of the breath test results, the Court opined:

“If a DC-27 form is inadmissible to prove facts omitted from its certification, it makes little difference (in this context) whether the form was completed at all. While the DC-27 form is indispensable in administrative proceedings ... in a criminal trial it is only one means of proof for the factors listed in K.S.A. 8-1002(a)(3).” Citations omitted.

The defendant also argued that since there were gaps in the maintenance logs on the intoxilyzer machine, the results were inadmissible. The Court reviewed K.A.R. 28-32-1(b) (4) which states:

“Reliability of instrument performance shall be assured by weekly testing with alcohol standards furnished by the department of health and environment. These results shall be reported monthly to the department of health and environment.”

The Court found that this regulation governs the logging of testing with alcohol standards, not the logging of maintenance.

“While some question remains regarding the precise maintenance conducted on certain dates in 2003, both the officer who performed the testing and the officer in charge of maintenance testified that the machine in question was operating properly when Hernandez was tested. The fact that the machine received unknown repairs at other times went to the weight of the evidence.”

COURT JUSTIFIED IN IMPOSING MAXIMUM SENTENCE FOR REPEAT DUI OFFENDER

Unpublished Decision

Christopher Raimo was arrested for one count of felony DUI (his sixth DUI) and driving on a suspended license.

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Unpublished Opinions

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While on felony bond, he was arrested for another DUI (#7) and driving on a suspended license. In *State v. Raimo*, Slip Copy, unpublished, 2008 WL 360652 (Kan. App. February 8, 2008), the Court found that the district judge did not abuse his discretion by giving the defendant the maximum penalty on each offense, running them consecutively and denying work release. The District Court judge stated that someone who obtains “DUI after DUI after DUI after DUI without any significant break in time” should not occupy one of the limited numbers of beds once the [work release] program is operational.” The Court explained that Raimo should be incarcerated for the public’s safety, considering these were his sixth and seventh DUIs. The Court of Appeals agreed and opined:

“[T]he increasing penalties for commission of DUI are in the nature of a recidivist statute. The purpose and policy of such statutes is that when the previous punishments imposed have failed to deter an offender from further infractions, a “harsher and more severe penalty is justified.” [Citations omitted]. Raimo’s repeated choice to drink and drive in violation of Kansas law has not been positively influenced by his previous punishment. Consequently, we conclude the district court properly imposed the maximum penalty, with the sentences to run consecutively.”

COURT NOT JUSTIFIED IN IMPOSING MAXIMUM SENTENCE FOR REPEAT DUI OFFENDER

Unpublished Decision

Gerardo Neave-Lira, Jr. was convicted of DUI in 1981, 1983, 1990 and 1992. All of these were misdemeanor convictions. Since they were entered before 1993, when the law was changed to make third and subsequent offenses felonies, the municipal court had jurisdiction over all four priors. In 1998, Neave-Lira was again convicted of DUI, however, all his priors were more than 5 years old, so he was again sentenced as a misdemeanor, first offender in a municipal court. In June 2006, Neave-Lira was again arrested for DUI. By this time the law had changed to require consideration of all priors, regardless of how old they were. Although he was charged as a “fourth or subsequent offender”, in taking the plea the district court judge asked if Neave-Lira was pleading guilty to a third time offense. He was advised of the maximum penalties for a third time offense. When the presentence investigation revealed that he was actually a sixth time offender, the district court sentenced him consistent with the “fourth or subsequent” penalty provisions.

In *State v. Neave-Lira*, Slip Copy, unpublished, 2008 WL 360653 (Kan. App. February 8, 2008), the Court held that the defendant must be resentenced as a third time offender because that was the penalty described at the time of his plea. So even though he is a sixth time DUI, the Court required that he be sentenced as a third time offender.

The Verdict

“MEASURED WITHIN TWO HOURS” AS DESCRIBED IN DUI STATUTE DOES NOT MEAN THAT THE BLOOD HAS TO BE ACTUALLY TESTED WITHIN TWO HOURS

Unpublished Decision

Terry Frazier argued in *State v. Frazier*, Slip Copy, unpublished, 2008 WL 440488 (Kan. App. February 15, 2008) that when the DUI statute (K.S.A. §8-1567(a)(2)) states that “No person shall operate or attempt to operate any vehicle within this state while:...(2) the alcohol concentration in the person’s blood or breath, as measured within two hours of the time of operating or attempting to operate the vehicle is .08 or more” it means the sample must actually be tested within that two hour window. He argued that “to measure” is defined as “to find out the size, extent, or amount of.” Therefore, the blood alcohol content is not “measured” until the alcohol content is determined, which in this case was several days later due to the fact that it was a blood draw. If the legislature had meant to only require the withdrawal of blood within two hours then it could have easily stated “as measured by a sample withdrawn within two hours.”

The Kansas Court of Appeals did not buy it. It found that the Kansas courts have always interpreted this provision as “as measured from samples taken within two hours.”

MOTION TO SUPPRESS MUST SET FORTH FACTS TO SUPPORT SUPPRESSION, CONCLUSORY STATEMENTS ARE NOT SUFFICIENT

Unpublished Decision

In *State v. Burton*, Slip copy, unpublished, 2008 WL 441015 (Kan.App. February 15, 2008), in a DUI case the defendant moved to suppress the results of the intoxilyzer because “it was improperly done.” The defendant listed no specific facts to support this “raw conclusion.” The Court found that pursuant to K.S.A. §22-3216(2) the motion must state facts showing wherein the search and seizure were unlawful.” Absent such a showing, the State has no burden to show that it was lawful. It reversed the district judge’s ruling to the contrary and remanded the case for trial.

COURT HOLDS PROSECUTION TO PLEA AGREEMENT

Unpublished Decision

Defendant agreed as part of plea agreement to plead no contest to possession of methamphetamine with intent to sell. He also agreed to testify against any co-defendants that might later be charged. The prosecution agreed to drop all other charges pending against the defendant and to recommend his sentence run concurrently with his sentences on recent charges in three other counties. The plea agreement was in writing, signed by both the plaintiff and the defense, and no other conditions were stated.

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Unpublished Opinions

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The defendant entered a plea and the case was set for sentencing. At sentencing, the prosecution asked permission to withdraw its offer of concurrent sentencing and instead recommended that the sentence be run consecutively to the cases in the other counties. The prosecution argued that the defendant had failed to honor the plea agreement. The prosecutor alleged that the defendant agreed to plead guilty to at least one severity level 1 felony and two severity level 2 felonies in the three counties in which he had been charged. It did not matter how those pleas were divided among the counties as long as the end result was one level 1 and two level 2 felonies. Turns out the defendant did not plead to a severity level 1 felony in any of the counties.

Despite the fact that the plea agreement did not contain any such language, the district judge accepted the prosecution argument and released it from the plea bargain. The judge sentenced the defendant consecutive to the other cases.

The Court found that contract law can be applied to construing plea agreements. In contract law, the parole evidence rule bars evidence that there is an agreement extrinsic to the one that is written. Since there was nothing in the written agreement about how the defendant would plead to the pending cases in other counties, the prosecution is bound by the terms of the written plea agreement. Extrinsic evidence is inadmissible to prove the meaning of a contract that is unambiguous on its face. Absent a finding of fraud or misrepresentation, the Court was not at liberty to fashion a new agreement.

**THE VIENNA CONVENTION DOES NOT EXTEND
INDIVIDUALLY ENFORCEABLE RIGHTS TO A
DEFENDANT UNLESS THE DEFENDANT CAN SHOW
ACTUAL PREJUDICE**
Unpublished Decision

Wilmer Amaya-Ticas pled no contest to aggravated indecent liberties with a child and attempted aggravated indecent liberties with a child. Two years later he filed a motion to set aside his plea on the basis that he was denied his right under the Vienna Convention to the assistance of the Mexican consulate before entering his plea.

The Vienna Convention is a 79-article, multilateral treaty to which both the United States and Mexico are signatories. The treaty requires an arresting government to notify a foreign national who has been arrested of his or her right to contact his or her consul. The issue becomes whether or not failure to comply with the treaty is the violation of some sort of enforceable right.

In *State v. Amaya-Ticas*, Slip Copy, unpublished, 2008 WL 440827 (Kan.App. February 15, 2008), the Court of Appeals

The Verdict

sites several federal court decisions and comes to the conclusion that absent some showing of prejudice by the failure to notify the consulate, it will not find error with a plea that, after close review, was knowingly and voluntarily entered. The defendant failed to point to exactly what he claims to have misunderstood with respect to his pleas and how such misunderstanding would **not** have occurred had he spoken to the Mexican consulate.

**OFFICER MUST HAVE REASONABLE SUSPICION
PERSON IS ARMED BEFORE CONDUCTING A
PAT-DOWN SEARCH; “CUSTOMARY PRACTICE”
WILL NOT SUFFICE**
Unpublished Decision

In *State v. Carson*, Slip Copy, unpublished, 2008 WL 496151 (Kan.App. February 22, 2008), police officer had person stopped on traffic offense and eventually obtained consent to search his car. The officer testified that it was his procedure when conducting a car search at night to always pat-down the driver for his own safety. In the pat-down of the defendant, he found methamphetamine.

The Court of Appeals suppressed the drugs on the basis of an unlawful search. It discussed the fact that the search was in warm weather, so the defendant was not wearing any bulky clothing. The defendant had been cooperative and the encounter was pleasant. The officer did not notice any bulges or have any reason to believe that the defendant was carrying a weapon. The officer stated that he did the pat-down to ensure his own safety and he always felt his safety was at risk. Without any articulated facts that would form the basis for a reasonable belief that the officer's safety was at risk, the pat-down was unlawful and anything recovered from it must be suppressed.

**IMPROPER CONDUCT BY JUDGE AT PROBATION
REVOCATION HEARING**
Unpublished Decision

Immediately after Kenneth Bennett was placed on probation, the sentencing judge asked him whether he would test positive for anything. He told her he would test positive for alcohol and marijuana, but nothing else. She had him tested and he was positive for cocaine, marijuana and amphetamines. A warrant was issued the following week from Bennett for a probation violation. He was brought before the judge. Before his attorney could speak on his behalf, the judge announced that she was “*finding that Mr. Bennett is in violation of his probation*” even though “*there is no real condition or order that says that eh must be truthful.*” She then told Bennett's attorney to “*Go ahead and make your arguments. I'm finding he's in violation.*”

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Unpublished Opinions

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Bennett and his attorney told the judge that he had not meant to mislead the court. He admitted he had used cocaine and ecstasy 2 days before sentencing but said he did not believe it would show up in his urine test. The judge didn't believe him and said:

"[P]erhaps you maybe should have been a little bit smarter to know how long those drugs stay in your system. And I don't believe that you don't know. You look like a smart guy. Everybody knows that that stuff stays in your system for three to six days."

In *State v. Bennett*, Slip Copy, unpublished, 2008 WL 588138 (Kan.App.; February 29, 2008), the Court had quite a bit to say about the judge's actions in this case.

First, it was conceded by the prosecution that there was no basis to revoke Bennett's probation due to drug use, because the use took place prior to being placed on probations. Therefore the focus was on whether or not Bennett had made misrepresentations to the judge.

The judge's premise that Bennett lied to her was based on her contention that it is both true and commonly known that cocaine and amphetamines are detectable through a urinalysis for 3 to 6 days after usage. The Court said that it was proper for a judge to take notice of such facts in some circumstances. But the judge did not provide any support for her assumption and the Court of Appeals couldn't find any either. In fact the information if found suggested that the period of detectability in urine of amphetamines was 48 hours and cocaine was 2-3 days. Since the Court of Appeals could not determine that the judge's assumptions were true, it was improper for her to impute such knowledge to the defendant.

Second, the law is clear that a misrepresentation by the defendant is only actionable when the judge relied on the misrepresentation in the sentencing decision. Since the judge in this case announced her decision to grant probation before she asked Bennett what the results of a drug test that day would be, she did not rely on his misrepresentation in sentencing and thus his probation could not be revoked for the alleged misrepresentation.

Finally, Bennett argued that his due process rights were violated by the judge's lack of impartiality. The Court saved its most stinging comments for this argument:

"We too have concerns when a judge tells a defendant that she has decided the issue before hearing argument. In addition, our review of the transcripts of the sentencing and probation revocation hearings does not show the dignity of proceedings and level of respect to parties that Kansas citizens rightly expect and deserve from their judges. It is important that those appearing in courts have confidence that a fair

The Verdict

hearing is provided to them. We therefore direct that the case be assigned to a different judge on remand."

FAILURE TO INTRODUCE TREATMENT EVALUATION AT PROBATION REVOCATION HEARING FOR FAILURE TO COMPLY WITH THE EVALUATION IS NOT FATAL IF PROBATION OFFICER TESTIFIES

AS TO ITS CONTENTS
Unpublished Decision

Defendant Francis Pyles was convicted of lewd and lascivious behavior. He was placed on intensive supervision probation and required to get a sex offender evaluation and comply with the terms. The evaluation recommended an outpatient treatment program. The State filed a motion to revoke Pyles' probation after he was discharged from the program for failure to accept responsibility for his crime.

Inter alia, he argued that the state failed to meet its burden of proof at the revocation hearing because it failed to provide the district court with a copy of the evaluation. In *State v. Pyles*, Slip Copy, unpublished, 2008 WL 588379 (Kan. App. February 29, 2008), the Court found that the testimony of the intensive supervision officer that the evaluation recommended the defendant complete an outpatient sex offender treatment program was sufficient. She also testified that she explained the evaluation recommendations to the defendant. This was sufficient, the Court held, to prove the recommendations in the evaluation. There was no error in failing to admit the evaluation itself.

EVIDENCE REQUIRED FOR FAILURE TO MAINTAIN A SINGLE LANE

Unpublished Decision

Robert Weber was charged in Park City with failure to maintain a single lane. The state statute, K.S.A §8-1522, and STO §45 state:

"A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."

The officer testified that he observed Weber cross the lane markers on two occasions and on one occasion jerk his vehicle back quickly to get in his proper lane. He did not signal any of these movements. When he was stopped he became agitated and stated that he didn't do it. Weber did not testify at trial.

In the appeal of his conviction, he argued that while the City may have established that he did not maintain a single lane, they did not present any evidence that it was "practicable" to do so. Therefore, he argued that the charge must be dismissed. The City did not contest the

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Unpublished Opinions

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fact that “practicability” is an element of the offense. It simply argued that there had been sufficient evidence submitted of “practicability.”

In *City of Park City v. Weber*, Slip Copy, unpublished, 2008 WL 588143 (Kan.App.; February 29, 2008), the Court found that in viewing the evidence in the light most favorable to the City, a rational factfinder could have found the evidence was sufficient to support the finding of guilty. It agreed with the district court judge who opined that the officer stated that the roadway was unobstructed, which was evidence that there was no practical reason for the vehicle not to be in its lane. In addition, the defendant’s failure to signal was further evidence that he was not forced to leave his lane. Finally, the Court pointed to the fact that the defendant protested to the officer that he “didn’t do it.” This denial was further evidence that there was no reason for him to move outside his lane because he claims he didn’t move outside his lane. The conviction was affirmed.

SURETY’S RESPONSIBILITY TO KNOW DEFENDANT’S SITUATION BEFORE POSTING BOND

Unpublished Decision

Chris Fisher agreed to serve as surety for defendant, Thammavong on two Sedgwick County cases. The first one, for \$75,000, was posted in February 2006. Two of the conditions of bond were to appear for all future court appearances and not violate the law. In May 2006 Thammavong received new charges. His bond was ordered revoked and a new bond was set at \$100,000. His new case had a bond of \$10,000 and for some unknown reason the sheriff released Thammavong after Fisher posted the new \$10,000 bond. This bond had the same conditions as the prior bond. Thammavong failed to show up on the newer case and the \$10,000 bond was ordered forfeited. Judgment was entered on the bond.

Fisher, the bondsman, argued that had he known that Thammavong had violated his prior bond, he would not have posted the \$10,000 bond. Fisher had never been notified by the court of the forfeiture on the older case and the increase in the bond amount required. Again, for some unknown reason, the State did not seek to enforce the forfeiture of the original bond of \$75,000, only the later \$10,000 bond.

In *State v. Thammavong*, Slip Copy, unpublished, 2008 WL 762507 (Kan. App. March 21, 2008) Mr. Fisher’s was “*not well taken...Fisher, not the State, had the responsibility to investigate the situation before he financially backed Thammavong’s release from jail on the new felony case. Fisher could have checked the public records...and learned the events that had transpired.*” It held that the risk Fisher took on the later case was not increased in any way by the actions taken by the court on the older case. The bond forfeiture stands.

The Verdict

WHEN IS AN ARREST FOR DRIVING WITHOUT A LICENSE NOT REALLY AN ARREST?

Unpublished Opinion

Merriam police officer stopped Chris Murphy for speeding. They pulled into a convenience store and the officer pulled into a neighboring stall so as not to block Murphy. Murphy did not have a driver’s license on him, but instead handed the officer his social security card. The officer asked him if he had any picture identification. Murphy handed the officer a ticket he had received in Wyandotte county that had all his identifying information on it. The officer was able to confirm the information through dispatch.

A back up unit arrived and the two officers asked Murphy to step from his car. They again asked him if he had any other forms of identification. He replied that he may have some in his wallet, which was on the dashboard of his car. Murphy started to go get the wallet, but the officer told him to stop. The officer then took the wallet from the car, searched it and set it on the hood of his patrol car. The officer then asked Murphy if he had anything illegal in the car. Murphy responded that he did not believe he did. The officer then asked for permission to search the car. Murphy replied, “It’s not my car.” The officer testified that he regarded this statement as a denial of consent, but he searched the car anyway “for identification.” He did not see anything in the front seat, but in the back seat he saw some clothing. He searched the pockets. He unzipped a black canvass bag and smelled marijuana. He stopped his search and told Murphy that he was under arrest for driving without a license. The officer then returned to search the car where he found cocaine, methamphetamine, marijuana and drug paraphernalia. Murphy moved to suppress the evidence based on illegal search.

In *State v. Murphy*, Slip Copy, unpublished, 2008 WL 762526 (Kan. App. March 21, 2008), the Court of Appeals first found that an officer may arrest a person who fails to produce a driver’s license on demand because said offense is not a traffic infraction. In addition, it found that clearly a person is under arrest when the person is physically restrained or otherwise deprived of his or her freedom of action in any significant way or when he or she submits to the officer’s custody for the purpose of answering for the commission of a crime. The Court went on to say that the test for determining whether a person is under arrest is not based on the officer’s subjective belief, but whether a reasonable person would believe under the totality of the circumstances that he or she is under arrest.

The Court found based on all the circumstances that at the time to officer searched the car without consent “looking for identification,” Murphy was not under arrest, but was merely detained. Since he had no basis to conduct a search of the vehicle except for weapons in the immediate area;

(Continued on page 31)

Unpublished Opinions

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and since he had no consent to search, searching the bag in the back seat exceeded the scope of a lawful *Terry* search. Therefore, the cocaine, methamphetamine, marijuana and drug paraphernalia must all be suppressed.

IT COUNTS, IT DOESN'T COUNT, IT COUNTS... MORE ELLIOTT CONFUSION *Unpublished Opinion*

In *State v. Salsberry*, Slip Copy, unpublished, 2008 WL 762521 (Kan.App. March 21, 2008), the Court was facing a multiple DUI offender. His priors included a Louisiana state court conviction in 1990, a Wyandotte County conviction in 1994, two Hutchinson municipal court convictions in 2002 and a Reno County conviction in 2005. The offense at issue in this most recent case was from 2006 in Reno County. Therefore, if we were merely counting convictions this would be number six. But not so fast.

In a previously reported unpublished case, Salsberry had appealed his 2005 Reno County sentence, *State v. Salsberry*, Slip Copy, unpublished, 2007 WL 2178071 (Kan.App. July 27, 2007). The Court had found in that case that instead of a fifth time offender, he was only a third time offender, because the two Hutchinson municipal court convictions were void based on *State v. Elliott*, 281 Kan. 583 (2006). It counted the Louisiana and the Wyandotte County convictions as the only priors for sentencing purposes. He agreed in *Salsberry-I* that he had priors in Louisiana and Wyandotte County.

In this *Salsberry* case, the State provided no evidence of the Louisiana conviction, such as a journal entry or other documentation. The law requires the State to produce evidence about any disputed part of a criminal history to satisfy its burden of proof. Therefore, Salsberry argued that he was again a third time offender, not a fourth time offender (since the Court had already held in the *Salsberry-I* case that the two Hutchinson convictions were void). The Court of Appeals however held that he was a fourth offender, because if the Louisiana conviction is not counted, the first Hutchinson conviction would have only been a second offense, and thus the Court had jurisdiction. Salsberry was a fourth offender and properly sentenced as a fourth offender.

Editor's Note: So apparently, a municipal court can lack jurisdiction over a case one minute, and then have jurisdiction restored over the same case the next minute. At the time of the plea and sentencing, did the Hutchinson Municipal Court have jurisdiction or not? In *Elliott*, the Court did not seem to care why the municipal court may have sentenced a third time offender as a second time offender. Perhaps, as in this case, the City couldn't prove up the priors. Jurisdiction seems to be a somewhat fluid concept when it comes to DUI

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convictions, causing much frustration and confusion for municipal judges.

The Court does not discuss *State v. Kralik*, 32 Kan.App.2d 182 (2003) in which the Court held that a journal entry from another court declaring a defendant to be a certain level of offender was sufficient proof of priors. Instead it simply held that “[n]ormally the doctrine of *res judicata* would apply here, but under the circumstances, one of those municipal court convictions can now be used to increase Salsberry's sentence.”

“MANNERISMS” NOT PROTECTED BY THE FIFTH AMENDMENT *Unpublished Opinion*

In *State v. Jelks*, Slip Copy, unpublished, 2008 WL 940776 (Kan.App. April 4, 2008), the defendant argued that the evidence presented of his “mannerisms” at the time he spoke to police officers should be suppressed. The officers had testified that Jelks was “*real nervous...you could just sense that..he probably didn't want to be there.*” He argued such evidence was irrelevant, prejudicial and obtained in violation of *Miranda*. The Court of Appeals held that the physical manner in which a suspect articulates words is not testimonial and therefore *Miranda* has no application.



The current politicians being considered as vice-presidential material by the various candidates should consider the words of American statesman Daniel Webster, who was offered the vice-presidency in 1848: “No, thank you. I do not propose to be buried until I am really dead and in my coffin.”

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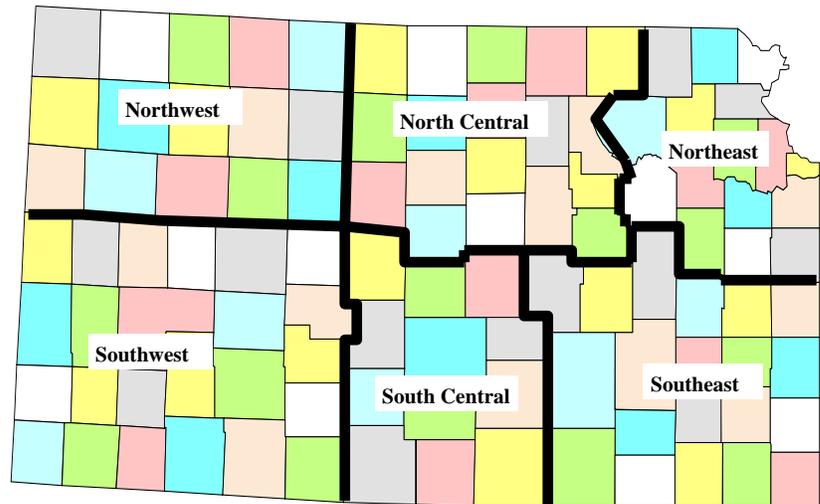
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