The Verdict

The Official Publication of the Kansas Municipal Judges Association

Issue 40 Summer 2007

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

LEGISLATIVE UPDATES

Following is summary of bills which have been signed by the Governor since the last issue. They are in addition to those already reported in the Spring edition of *The Verdict*.

DUI LAW - INTERLOCK OR IMPOUNDMENT REQUIRED ON SECOND TIME CONVICTIONS

House Sub. For SB 35 makes one pretty significant change in the DUI law (K.S.A. 2006 Supp. 8-1567 or STO 30). It requires that on second or subsequent convictions *"the court shall order that **each** motor vehicle **owned or leased** by the convicted person shall either be equipped with an ignition interlock device or be impounded or immobilized for a period of two years."*

The convicted person is to pay *"all costs associated with the installation, maintenance and removal of the ignition interlock device and all towing , impoundment and storage fees or other immobilization costs."* People are allowed to remove their personal property. The convicted person's motor vehicle includes any vehicle leased by the person. If the lease expires in less than two years from the date of impoundment or immobilization, then it shall

(Continued on page 8)

ELLIOTT BILL SIGNED INTO LAW

On May 9, 2007 Governor Sebelius signed SB 31, which was drafted to address some of the problems regarding municipal court subject matter jurisdiction that were created after the Supreme Court decision in *State v. Elliott*, 281 Kan. 583, 133 P.3d 1253 (2006).

Although the final version was significantly different than the one proposed by municipal judges and introduced by Sen. Emler, it appears to correct the *Elliott* problem.

It first amends K.S.A. §12-4104 to read as follows:

(Continued on page 3)

SPOTLIGHT ON: GREG KEITH

Greg Keith was born in Grand Island, Nebraska. His father was a teacher and his mother a homemaker. The family moved, along with his younger brother, to Wichita when he was six years old and he has been there ever since. He attended Wichita Southeast High School where he played the french horn and became involved with the Drum Corps International. He traveled the country during the summer for several years participating in the Drum and Bugle Corps.

He went on to Wichita State University where he started out majoring in music. However, since he did not believe he wanted to teach music, he changed to a major in criminal justice. It was there that he encountered a wonderful teacher by the name of Fred Benson. He continued to play in the pep band and marching band in college. Greg went on from WSU to Washburn Law School, where he graduated in 1988.

Following law school, Greg became an Assistant District At-

(Continued on page 2)

Spotlight on: Greg Keith

(Continued from page 1)

torney in Wyandotte County before returning to Wichita where he associated with the Case, Moses, Zimmerman and Wilson law firm. He is now a shareholder in the firm. He practices primarily in the area of juvenile offenders, criminal law, bankruptcy and domestic.

Amy and Greg have been married for 21 years. They have a daughter, Sarah, who is off to KU in the fall and a son, Dean, who is entering 8th grade. They recently rescued and adopted a Great Dane named "Rocky" who "thinks he's a lap dog." He continues to be active in the WSU Alumni Pep Band, the Drum Corps International, , his church, and his children's activities.

Greg was appointed judge in Haysville in 1995, in Valley Center in 1997 and in Park City in 2006. Each court meets several times a month. He enjoys his time on the bench.

"I wouldn't do this if I didn't think people could change and I could help guide them through some rough patches."

Greg has the distinction of being the first of Fred Benson's pupils to become a judge, although Fred did not live to see him take over his former position in Park City. He has appreciated his involvement in the KMJA.

"I love the camaraderie of the organization. Bouncing ideas off of fellow judges during the break is really as stimulating, if not more so, than the actual speakers."

Greg joins the KMJA Board as one its newest directors, representing the South Central District.

Updates from O.J.A.

ANNOUNCING NEW JUDGES!!

Since our Spring 2007 issue, the following new municipal judges have been appointed or elected:

-Gregory Keith Park City

▲▲▲▲

2007-2008 CONFERENCE REMINDERS

Municipal Court Clerks' Fall Conference
September 20-21, 2007
Wichita, KS

District Judges' Annual Conference
October 22-23, 2007
Overland Park, KS

Municipal Court Clerks' Spring Conference
April 4, 2008
Hutchinson, KS

District Judges' Spring Conference
June 8-10, 2008
Topeka, KS

Municipal Judges' Annual Conference
April 28-29, 2008
Topeka, KS

▲▲▲▲

SUMMER MEETINGS

Municipal Judges' Education Committee
August 3, 2007
Abilene, KS

Municipal Court Judges' Manual Committee
August 31, 2007
Topeka, KS

▲▲▲▲

REMINDERS

Your Annual Municipal Court Caseload Report was due by July 15, 2007.

ATTENTION!!

Some judges have complained about the delay in receiving copies of* The Verdict*. In order to have the Supreme Court mail it out at no cost to the KMJA, it has to go with some other mailing they are planning. This may cause a delay of several weeks or months. If you would like it emailed to you as soon as it is published, just send Judge Arnold-Burger your e-mail address and she will add you to the electronic mailing list. In addition, you can always check the KMJA website for the latest edition.

Elliott Legislation

(Continued from page 1)

(a) *The municipal court of each city shall have jurisdiction to hear and determine cases involving violations of the ordinances of the city,* ***including jurisdiction to hear and determine a violation of an ordinance when the elements of such ordinance violation are the same as the elements of a violation of one of the following state statutes and would constitute, and be punished as a felony if charged in the district court:***

(1) K.S.A. 8-1567, and amendments thereto, driving under the influence;
(2) K.S.A. 21-3412a, and amendments thereto, domestic battery;
(3) K.S.A. 21-3701, and amendments thereto, theft;
(4) K.S.A. 21-3707, and amendments thereto, giving a worthless check; or
(5) K.S.A. 65-4162, and amendments thereto, possession of marijuana.

(b) Search warrants shall not issue out of municipal court.

In addition, the legislation amended K.S.A. §22-2601 the jurisdiction of district courts to read:

Except as provided in K.S.A. 12-4104, and amendments thereto, the district court shall have exclusive jurisdiction to try all cases of felony and other criminal cases arising under ***the statutes of the state of Kansas****.*

Finally, the House decided to amend K.S.A. §8-1567(o)(1) to add the following at the end:

On and after the effective date of this act and retroactive for ordinance violations committed on or after July 1, 2006, an ordinance may grant to a municipal court jurisdiction over a violation of such ordinance which is concurrent with the jurisdiction of the district court over a violation of this section, notwithstanding that the elements of such ordinance violation are the same as the elements of a violation of this section that would constitute and be punished as a felony.

Similar language was not added to the other statutes cited in the new K.S.A. §12-4104, presumably because they do not have sections like K.S.A. §8-1567(o) which prohibits cities from varying their ordinances in any significant way when it comes to DUI.

It is unclear why the July 1, 2006 retroactive date was placed in the statute. Clearly that would catch post *Elliott* cases, but would have no impact on pre-*Elliott* convictions in which a defendant may argue the court lacked subject matter jurisdiction.

The amendments seem to give cities very broad jurisdiction over felony DUI, theft, domestic battery, worthless checks and possession of marijuana. However, it is unclear if it also ended up clearing up the issues in *City of Junction City v. Cadoret*, 263 Kan. 641 (1997) and restores full third time DUI jurisdiction to municipal courts. It appears to, but stay tuned!

Congratulations to Tom Herlocker

Thomas D. Herlocker, municipal judge, Winfield, was recently honored at the 2007 Kansas Bar Association (KBA) Annual Conference with the Outstanding Service Award. The Outstanding Service Awards are given for the purpose of recognizing lawyers and judges for service to the legal profession and/or the KBA and to recognize nonlawyers for especially meritorious deeds or service that significantly advance the administration of justice or the goals of the legal profession and/or the KBA.

PACIFIC INTERPRETERS

Submitted by Judge Cathy Lucas, Liberal

We have had difficulty in finding interpreters for languages such as Somalian or Chinese. Many times cases were dismissed due to lack of interpreters. Per my recent search of the internet I found Pacific Interpreters at www.pacificinterpreters.com or 1-800-311-1232.

A pro tem judge recently presided over a case in our court using the Pacific Interpreters, and I under-stand it went smoothly. Pacific Interpreters has interpreters for over 200 languages. It has been in business for over 15 years, and is based in Portland, Oregon. The interpreters are not court certified by the company. Pacific Interpreters will set up the account by initially faxing the court a service agreement to be signed and faxed back. The court clerk is given an access code to enter when the clerk calls for the court hearing to begin, so an exact starting time is not necessary. The clerk explains to the interpreter the type of hearing involved. The charge is $1.45 a minute from the time one picks up the speaker phone until the speaker phone is hung up.

Judicial Ethics Opinions

JE -151
May 17, 2007

Q: May a district judge participate as a player and/or auctioneer in his or her country club's fundraising member guest tournament where the judge pays the entry fee and after the first day's play teams are flighted and then sold by an auction within each flight with 15% deducted and returned to the club in the form of a fundraiser and the balance becomes the prize for which teams within each flight play against each other for shares of the prizes?

A:

1). It is our opinion that service as an auctioneer at a fundraising event clearly violates Canon 4C(4)(b) which states: "A judge should not solicit funds for any educational, religious, charitable, fraternal, o9r civic organization for use or permit the use of the prestige of office for that purpose."

2). Whether or not a judge should participate in such an activity as outlined above is much more problematical.

a. If the auction could in any manner be considered as violating the gambling statutes, K.S.A. 21-4302 et seq., the judge should absolutely not participate as his or her presence and participation might well be considered an illegal activity subject to prosecution or at the least violate Canon 2A requiring the judge to avoid impropriety.

b.If the event does not under any circumstances involve participation in a game of chance or the placing of a bet, we see no reason why the judge may not participate.

We offer no opinion as to the legality or illegality of the activity described, as such is beyond the scope of our assignment and permitted charge under Rule 650(d).

JE -152
May 17, 2007

Q: A judge inquires whether he may serve on the Alumni Association Board of Directors so long as he does not solicit funds or offer legal advice.

A: Yes.

Canon 4(C)(4), 2006 Kan.Ct.R.Annot. 581, specifically allows a judge to serve as a director of an educational organization subject to the limitations set out in subsections (a) (b) and (c) which would prohibit the judge from soliciting funds or giving legal or investment advice. See also Canon 4G, 2006 Kan.Ct.R.Annot. 585 and Judicial Ethics Opinions JE 77, JE 104, and JE 134.

JE -153
June 21, 2007

Q: May a Chief District Judge assign a District Magistrate Judge to mediate domestic cases as a part of the judge's judicial duties in the judicial district they serve? May the District Magistrate Judge ethically conduct the mediations?

A: Yes. K.S.A. 2006 Supp. 23-601 *et seq*. specifically provides in 23-602(a) that:

"The Court or hearing officer may order mediation of any contested issue of child custody, residency, visitation, parenting time, division of property or other issues, at any time, upon motion of a party or on the court's own motion."

Mediation is defined by K.S.A. 2006 Supp. 23-601 and the considerations to be given in making the appointment are set forth in K.S.A. 2006 Supp. 23-602(b)(1) through (4).

We are of the opinion that given this statutory authority the Chief District Judge may properly appoint a District Magistrate Judge to perform the duties described by K.S.A. 2006 Supp. 23-601 et seq. and the District Magistrate Judge may ethically do so.

Comment: There have been substantial changes in the numbering and wording of the Canons upon which Judicial Ethics Opinion JE-41 and JE-54 were based and the current wording and definitions contained in canon 4F and the Rules Relating to Mediation found at Rule 901 through 904 are currently applicable.

(Continued on page 5)

Judicial Ethics Opinions

(Continued from page 4)

JE -154
July, 2007

Question: A judge inquires whether he may serve on the Board of Trustees of the Kansas Bar Foundation so long as he does not solicit funds or offer legal advice.

Answer: **Yes.**

Canon 4C(4), 2006 Kan.Ct.R.Annot. 581, specifically allows a judge to serve as a director of an educational organization subject to the limitations set out in subsections (a)(b) and (c) which would prohibit the judge from soliciting funds or giving legal or investment advice. See also Canon 4G, 2006 Kan. Ct. R. Annot. 585 and Judicial Ethics Opinions JE 77, JE 104, JE 134, and JE 152.

Kansas Bar Association
1200 SW Harrison • Topeka, KS 66612-1806 • (785) 234-5696 • Fax: (785) 234-3813
KBF

The Motor Vehicle Division in Topeka has changed the hours that it answers public phones to Tuesday, Wednesday and Thursday 8:10 am to 4:45 pm. Staff will still answer the management number for courts M-F, 8:00 am-4:45 pm and will take walk-in traffic M-F, 8:00 am-4:45 pm

Virginia to Issue Traffic Fines as High as $3,000

In an effort to raise money for road projects, on July 1, 2007 the state of Virginia started hitting residents who commit serious traffic offenses with huge civil penalties called "abuser fees."

The new civil charges will range from $750 to $3,000 and be added to existing fines and court costs. The civil penalty for going 20 mph over the speed limit will be $1,050, plus $61 court costs and a criminal fine that is typically about $200. The new penalties are expected to raise $65 million a year and are part of an effort to improve the state's roads without raising taxes.

A first-time drunken driver will face a $2,250 civil penalty, plus fines and court costs that typically run about $500 or more. Driving without a license? That's a mandatory $900 civil penalty, in addition to the ordinary $100 fine and court costs.

Driving as little as 15 mph over the limit on an interstate now brings six license demerit points, a fine of up to $2,500, up to one year in jail, and a new mandatory $1,050 tax. The law also imposes an additional **annual** fee of up to $100 if a prior conviction leaves the motorist with a balance of eight demerit points, plus $75 for each additional point (up to $700 a year). The points stay on your record and therefore required continued payment of the annual fee for five years for minor violations. Some violations (failing to give a proper signal, passing a school bus or driving with an obstructed view) remain on the record for 11 years.

The law forbids judges from reducing or suspending the penalties in any way.

The civil penalties apply only to Virginia residents, not out-of-state drivers. Virginians must pay in three installments over 26 months or lose their licenses. The state Legislature didn't think it could enforce the extra penalties in other states.

Such "driver responsibility programs" have become increasingly popular for two reasons: Many states find that serial offenders make up the bulk of their cases, and they simply need the money. Virginia joins New York, New Jersey, Michigan and Texas in adopting "abusive-driver laws." Legislation entitled the "Super Speeder" law is pending in Georgia.

A full analysis of the law can be found on the Virginia Supreme Court website:

http://www.courts.state.va.us/publications/hb_3202.pdf

PAST PRESIDENT'S PAGE

By Randy McGrath, Lawrence

Sports fans probably remember when former Chiefs coach Dick Vermeil retired from the Philadelphia Eagles in 1982, citing "burnout", and took 15 years off before returning to coach the St. Louis Rams. That was the first time I had heard the term "burnout" associated with the coaching profession. Well, I'm here to talk about judges' burnout. I experienced it about eight months or so ago. I have been to the abyss and back. So, what causes it, and what can you do about it? (By the way, I absolutely refuse to believe that I am the only member of the KMJA who has experienced this phenomenon).

What causes burnout for a judge? Here are some reasons:

It can be crowded dockets, and repetition. Did you ever notice that most of our arraignments are the same, as well as many of the pleas and sentences? You become robotic after a while. A plea and sentence on a no insurance, or DUI 1st or 2nd, or DWS, those are all pretty standard sentences for each of those offenses. A guilty plea and sentence is not terribly exciting, unless the factual basis is somewhat interesting, and after doing hundreds during the year, it can wear on you. I had over 200 pleas and sentences on DUI's in 2006. Those do not vary much. Neither do the arraignments. (Not guilty plea is entered, trial date is…). After doing about 60 of those some days, you feel, well, burned out. And speaking of repetition, don't we all probably give some speech at the beginning of the arraignment docket or any pro se plea docket? I do, and I give it, or some variation of it, about 250 days a year. I've been a judge for over eight years now, so that's well over 2,000 times I've given that speech to arraignment/plea dockets. Anymore I don't even listen to what I'm saying, I just put it on automatic pilot and it comes out. I think I could recite it in my sleep.

We are confined physically and by our actions. We are at the courthouse. We do not get to go look at accident scenes or go to other courts as lawyers do. We are confined to that building. We are also judges 24/7. People know us, at the grocery store on Saturday, walking to lunch downtown, wherever, we must always maintain that judicial decorum and temperament. I always remember, years ago, pulling around to the window at Taco Bell to get my food, and I heard an employee yell from the kitchen, "it's the judge." Those types of things happen frequently. They are always watching us. We are always "on," while we are in our own city.

We see the worst of society. More so than district court judges, we see the locals who have not done well in life. We see the chronic alcoholic or shoplifter, the homeless, the jobless, sometimes the mentally ill, for which nothing has done much good as far as rehabilitation. They get warehoused at the jail for a period of time when all else has failed. With that group, success stories are few and far between. It takes a toll on us emotionally. We say to ourselves, "what's our society coming to?"

Dealing with pro se defendants, which can fray the nerves of even the most patient judge. Many of our defendants, even on jailable offenses, waive their right to counsel and proceed pro se. They sign a waiver of counsel form, but I always explain the rights they are giving up, their right to hire counsel or have court-appointed counsel if indigent, that they will be fingerprinted on certain convictions, the possibility of expungement, etc. etc.. They make you work harder because you have to explain so many things to them, sometimes several times, to ensure that their plea is knowledgeable and voluntary. And if they proceed to trial pro se, it's often a chore keeping them on track and keeping their questions or testimony relevant to the case at bar. They can be exasperating. It makes you appreciate attorneys.

What can you do about burnout? Don't despair, there are remedies to help you, without having to take 15 years off as Coach Vermeil did, to-wit:

1. **Exercise.** Go for a walk during the noon hour, or in the early morning before court. Work out at the gym. It will help you relax and clear your head. I go for a walk sometimes during the noon hour and feel so much more invigorated, yet serene, in the afternoon. You will be unflappable on the bench on those days. Plus, you'll get into good physical condition as a concomitant benefit. Well, as good as we can, considering the fact that we have sedentary jobs and most of us aren't in our 30's anymore.

2. **Get a judge pro tem** to cover for you and take a day or two off. I'm great at giving this advice, although I don't follow it. It can be difficult to get a pro tem, because other lawyers may not be interested or their schedules are busy. However, when that burnout feeling starts creeping in, it's a good idea to get someone to pro tem for you and get away.

3. **Count your blessings.** When you stop to think about it, being a judge is a pretty good gig. There is a certain amount of power and privilege, as well as control over the work environment, as well as control over other lives. There is some status associated with the job. Sitting through my longest, worst docket is still better than most jobs. Look out the window and see the guy working as a roofer on that three story house. That long docket with all of the repetition and monotony does not seem so bad after all.

(Continued on page 30)

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.

JUDICIAL MISCONDUCT DURING JURY SELECTION

Faced with a two week long criminal jury trial and a room full of potential jurors that seemed upset about being there and upset about spending two weeks of their life in the courthouse, the district court judge lashed out during jury selection.

The first juror that upset the judge stated, in response to questioning, that she would not believe anything the police said. She advised that she could not take their word for anything. It is clear from statements made by the judge the next day, that she felt this particular juror, based on her demeanor in the courtroom, was simply looking for an excuse not to serve on the jury. The judge advised her that she would be excused from jury service, but then went on to state (in part):

"I'm going to excuse you from jury service, ma'am, but I'm going to require you to sit through this entire trial, so you can get an objective view of how people—of how people do testify. ..I think that you need an opportunity to be exposed more to our law enforcement personnel, and I think that because this trial will have so many that will be testifying, I want you to—I'm ordering you to sit through this entire trial. It will be considered part of your jury service, and you will be paid at the rate of a jury member…If you fail to appear on any day of the trial, that will be considered contempt of court..."

After dismissing the prospective juror, the judge looked at the prospective jurors and said, *"...Anybody else want to mess with me? Just thought I would ask...Not one person here is more important than anybody else as far as their time. I really mean it…"*

The next juror stated that her religious beliefs made it uncomfortable for her to judge anyone. She went on to say that the defendant must be guilty of something due to the mere fact that he was on trial. The judge was immediately struck by this inconsistency, and it appears she again felt this person was just trying to come up with an excuse for not serving on the jury. She made the following comments:

"I think what you're saying—-you're contradicting yourself about what you're saying, and we have had Jehovah's witnesses that do sit on juries. I believe it's your personal feelings that you simply don't want to do it, not because it's a long trial, but I believe you don't want to do it. I've got quite a few people that don't want to do it either. But you have said the magic words, so you are released from your jury service. And I feel sorry for the next person that ends up going, because I am going to hit the roof, I think."

When the prosecutor started to question another juror who had raised his hand earlier in response to a question about contact with law enforcement, the prospective juror stated that he had changed his mind about responding to the prosecutor's question.

At that point, defense counsel asked to approach the bench, and asked for a mistrial. The judge denied the motion and then proceeded to apologize to the potential jurors, giving her reasons for being upset. Voir dire continued. At the end of the day, the judge again apologized before recessing for the day. Defense counsel again asked for a mistrial and the prosecution agreed. The judge denied the motion and apologized again the next day. She allowed anyone who felt intimidated by her conduct to immediately be dismissed, no questions asked. Two people took her up on the offer. Finally, in front of the potential jurors, she apologized personally to the person she had dismissed (but required to return to observe the trial) and allowed her to leave.

The defendant was later convicted. In *State v. Gaither*, ___Kan.___ (April 27, 2007), the Supreme Court found that the judge had failed to control her temper and frustrations, declined to exercise control over her conduct and utterances, and allowed prospective jurors to embroil her in conflict. Her comments, the Court stated, constituted judicial misconduct. However, they found that she regained control over her temper, emotions, conduct and utterances after the first day of the voir dire. She apologized to the jury venire and offered to excuse anyone who felt intimidated. Her sincerity was evident when two prospective jurors accepted her offer and were excused without further questions. Her apology and offer to excuse prospective jurors purged the taint of the misconduct. Her misconduct did not prejudice the remainder of the trial or the defendant's substantial rights.

PUBLIC CENSURE OF COUNTY PROSECUTOR FOR SLOPPY HANDLING OF MONEY RECEIVED FROM "PAY AND DISMISS" PROGRAM

Thomas Black served as Pratt County attorney and as such was the chief prosecutor for the county. This was a part-time position, allowing him to maintain his private law practice and office. He developed an informal diversion program for traffic offenders known as "pay and dismiss." Prior to starting this program he received approval from the Attorney General's Office and The Pratt County judges. He first set up a charity called the Law Enforcement Fund (LEF). The county treasurer was authorized to accept contributions to the charity.

(Continued on page 13)

Legislative Updates

(Continued from page 1)

only be impounded or immobilized for the amount of time left on the lease.

Impoundment remains an option in the case of a first conviction, but it is not mandatory. In addition, all the provisions regarding an exemption if the impoundment or immobilization would result in loss of employment by the convicted person or any family member or their ability to attend school or obtain medical care do not seem to apply to the impoundment in the case of a second conviction. These only come into play on a first conviction discretionary impoundment.

MINOR DUI LAW CHANGES

Several other minor changes were made to K.S.A. §8-1567 in House Sub. For SB 35 .

1. Although K.S.A. §8-1008 (c) (2001) requires a presentence alcohol and drug evaluation prior to sentencing on a DUI, it is now reiterated in the addition of a new subsection (v).

2. Subsection (h) dealing with sentence enhancements when a child under the age of 14 is in the car amends the phrase "a child" to "one or more children." It also clarifies that the total sentence, with the 30 day enhancement, cannot exceed the statutory maximum sentence and the 30 day enhancement must be consecutive to any mandatory minimum sentence imposed for the DUI.

3. On third and subsequent offenses, it appears that the offender stays in the custody of the county sheriff to serve his or her sentence, but may be turned over to DOC if the judge orders the person into a facility designated by DOC for the provision of substance abuse treatment. The offender can only be there during the time he or she is receiving treatment and the secretary of DOC can return the person to the sheriff's custody if there is no bed space, if the person doesn't participate successfully, if the person is disruptive or if the person has a mental health condition rendering the person unsuitable for such a facility. The sheriff is responsible for the expenses of transporting the prisoner back and forth and the DOC's decision to kick the person out of the treatment facility is not subject to review.

Fourth and subsequent offenders are still turned over to DOC at the end of their jail term for a mandatory one year of post release supervision.

CHANGES RELATED TO IMPACT OF BREATH TESTS AND ALCOHOL CONVICTIONS ON DRIVER'S LICENSE

House Sub. For SB 35 passed in the closing days of the session. It makes several changes to DUI and related laws.

1. Prohibits a person with a license that has been suspended for DUI from getting a moped license. It amends K.S.A. §8-235. However, if the person's driving privilege is suspended for any reason other than DUI, a moped license is still an option. If the person's license is cancelled or revoked, a moped license is still not allowed.

2. A qualification was put in the driving while suspended statute for third or subsequent offenders. The bill amends K.S.A. 2006 Supp. §8-262(c) to provide that the mandatory 90 days and $1,500 **is only required if** the person's license was canceled, suspended or revoked for refusing to submit to a blood, breath or urine test (excluding the PBT) or for a conviction of failure to have insurance or proof thereof, being a habitual violator, vehicular homicide, involuntary manslaughter while DUI, or any murder or manslaughter crime resulting from the operation of a vehicle.

3. If a person blows between .08 and .149, or has "an alcohol or drug-related conviction," on a first occurrence his or her license will be suspended for 30 days and restricted for 335 days. On a second, third or subsequent occurrence, the person's license will be suspended for one year followed by a restriction to an interlock device for another year. A fifth offense results in permanent revocation. All this action is taken by the DMV, not the judge.

(Continued on page 9)

MUNICIPAL JUDGE REPORT

June 1, 2007

COURTS.....387

JUDGES.....255

Lawyers.....160

Nonlawyers.....63

District Magistrates.....32

Legislative Updates

(Continued from page 8)

4. However, if the person blows .150 or more, or has "an alcohol or drug-related conviction" when the breath test was .150 or more, the person's driving privileges will be suspended for one year on a first occurrence followed by a one year restriction to an interlock. On a second offense, suspend for one year followed by a two year restriction to an interlock device. On a third occurrence, suspend for one year followed by a 3 year restriction to an interlock devise. On a fourth occurrence, suspend for one year followed by a four year restriction to an interlock device. A fifth or subsequent occurrence will result in permanent revocation. All this action is taken by the DMV, not the judge.

5. If a person refuses the breath test, on a first occurrence, the person will be suspended for one year and subject to an interlock device for another year. All other refusal suspensions remain as before (to wit: 2nd = 2 year suspension; 3rd = 3 year suspension; 4th = 10 year suspension and 5th = permanent revocation). All this action is taken by the DMV, not the judge.

6. "Alcohol or drug related conviction" is defined as a conviction for DUI, vehicular battery while DUI, or aggravated vehicular homicide while DUI committed in any city or state or military reservation or entering a diversion agreement on any of those offenses. *See, K.S.A. 2006 Supp. §8-1013.*

7. If a person is under the age of 21 and blows between .02 and .149 the driver's license is suspended for one year. On a second, third or subsequent occurrence, the person's license will be suspended for one year followed by restriction to an interlock device for another year. A fifth occurrence results in permanent revocation. All this action is taken by the DMV, not the judge.

8. However, if the person is under the age of 21 and blows greater than .150, the person will be suspended for one year, followed by a one year restriction to an interlock device. On a second, third or subsequent occurrence, the person's license will be suspended for one year, followed by restriction to an interlock device for another year. A fifth occurrence results in permanent revocation. All this action is taken by the DMV, not the judge.

9. The implied consent advisory was also modified accordingly.

10. Whenever a person is subject to an interlock restriction, he or she cannot regain full driving privileges until proof is submitted that the device was installed for the full restriction period.

11. Driver's license hearings for breath test results or refusals will all automatically be conducted by telephone conference call unless the request for a hearing includes the request for an in-person hearing. Also the regular "10 day" rule applied to civil cases through K.S.A. §60-206 (2005) will be applied to all driver's license hearing notice and appeal requirements.

12. Commercial driver's license disqualification rules still apply to commercial drivers. A test refusal or a first time conviction (either in a commercial or a non-commercial vehicle) results in a one year disqualification. If the commercial driver was transporting hazardous material, the disqualification is for three years. A second test refusal or conviction (either in a commercial or a noncommercial vehicle) results in a lifetime disqualification to operate a commercial vehicle. *See*, K.S.A. 2006 Supp. §8-2,142. These sanctions are concurrent with and not consecutive to the noncommercial driver's license sanctions. The only area of confusion would be a first time offense for a commercial driver who blows over .15. Will the commercial driver's personal vehicle **and** commercial vehicle be subject to an interlock for one year after the one year disqualification/suspension period? It appears that it would.

NEW SPEEDING VIOLATIONS DECLARED TO BE NON-MOVING VIOLATIONS

House Sub. For SB 35 also sets out some new speeding tickets that are no longer moving violations. This amends K.S.A. §8-1560c and K.S.A. §8-1560d. If the speed limit is between 30 and 54 on a highway (and highway is defined as any public maintained way open for use by the public) and the person is going 6 miles or less over the speed limit, it is no longer a moving violation and cannot be used by insurance companies to adjust rates. The statute still declares that going 10 miles or less over the speed limit in any 55—70 mph speed zone is a non-moving violation. It also deletes the statement that these violations "shall not be part of the public record." They are not reported to the motor vehicle division, but they are still open public records.

MUNICIPAL COURTS AUTHORIZED TO ASSESS COST OF COLLECTION BACK TO DEFENDANT

SB 31 was amended late in the session to include a provision allowing municipal courts to use collections services to collect fines, fees and restitution (which we always felt we could do anyway), but more importantly, it allows that court to assess the cost of collection back to the defendant. It also allows any "beneficiary under an order of restitution" to make use of the court collection program to collect restitution. In addition, whenever there is an order of restitution, amounts collected by the collection agency must first go to

(Continued on page 10)

Legislative Updates

(Continued from page 9)

collection expenses and then to restitution before any court debt is collected.

UNLAWFUL HOSTING LAW INCREASED TO INCLUDE HOSTING THOSE BETWEEN THE AGES OF 18 AND 21

SB 166 amends K.S.A. 2006 Supp. §21-3610c to prohibit hosting a gathering where persons under the age of 21 are consuming alcohol. Prior to this amendment, the bill only applied to hosting those under the age of 18.

CAN'T GET FISHING OR HUNTING LICENSE IF OWE CHILD SUPPORT

HB 2393 prohibits the Kansas Department of Wildlife and Parks from issuing any license or permit for fishing, hunting or fur trading if the applicant is delinquent on child support

GOOD TIME CREDIT INCREASED

SB 14 expands good time credit available from 15% of prison sentence to 20% of prison sentence. This only applies to certain crimes and the increase only applies to crimes committed after January 1, 2008. It also allows the prison to develop a program of credit calculations for things like completing education or training programs, completing alcohol and drug treatment. This prison granted credit is limited to 60 days and must be added on to the person's post release supervision.

The bill also allows DOC to set up a grant program to reward community corrections programs that are able to decrease the probation revocation rate by 20% and develop plans that target successful reentry of offender who are considered medium or high risk for revocations.

ESTABLISHMENT OF KANSAS CRIMINAL CODE RECODIFICATION COMMISSION

SB 14 also provides for the establishment of a Kansas criminal code recodification commission. The membership of the Commission has a designated make-up. It is to submit an interim report by February 2008 and another by February 2009, with a final report and recommendation by January 11, 2010.

IMPROVED SECURITY FOR DRIVER'S LICENSE AND IDENTIFICATION CARDS

SB 9 requires employees of the Division of Motor Vehicles to be trained on document recognition and on federal rules used to determine lawful presence. It prohibits the division from issuing a driver's license or instructional permit to any person who fails to provide proof of lawful presence in the United States.

Additionally, the bill requires the applicant for a driver's license or instructional permit to submit proof of age, proof of identity and a photo identity document, as required by the division. A non-photo identity document may be used if it includes the applicant's full legal name, date of birth, address of principal residence and Social Security number.

The bill authorized the division to disclose motor vehicle records to any federal, state or local agency to assist in carrying out the functions of that agency.

It allows the division to issue a driver's license to a non-citizen if the non-citizen can provide proof of lawful residency in the United States. The license is only good for the length of time the person is lawfully residing in this country.

It requires the division to make reasonable efforts to determine if a person who has moved to Kansas from another state has terminated their license from that state. In addition, there will be no more licenses issued that state "valid without photo." A digital photo will be required on all licenses.

RESTORATION OF MAIDEN NAME AFTER DIVORCE

SB 88 authorizes a court to restore the maiden name of a party in a divorce action effective at the time of granting the decree or after the decree of divorce becomes final. The Judicial Council will develop a standardized form for use by a party seeking to restore a maiden or former name. The person will not have to pay a docket fee. In addition, the bill provides that at the time of marriage, a person may designate a new legal name which would be recorded on the marriage license. The new legal name will be effective at the time of endorsement of the official who performs the marriage ceremony. A copy of the certified marriage license will serve as proof of identity for a Kansas driver's license or non-driver's identification card.

CITIES LIMITED IN ABILITY TO POST THEIR PREMISES TO PROHIBIT CONCEALED WEAPONS

HB 2528, which was passed over Gov. Sebelius's veto, limits the ability of cities to post all but a few designated areas as off-limits for gun carriers. Cities and counties are limited to prohibiting persons, who have conceal and carry permits, from carrying a weapon into a jail, juvenile detention facility, prison, courthouse, courtroom or city hall. This bill was hotly contested by the League of Municipalities due to the inconsistency in the legislation. K.S.A. 2006 Supp. §75-7c10 specifically prohibits carrying guns (even with a proper permit) into school and professional athletic events, but does not allow a city or county to similarly prohibit possession at city and county parks and recreation sponsored athletic events. It prohibits guns at day care centers, but denies the cities the opportunity to prohibit guns at events or attractions

(Continued on page 11)

Legislative Updates

(Continued from page 10)

where as many children or more congregate, like the Deanna Rose Farmstead in Overland Park. The state fairgrounds can prohibit firearms, but Olathe's Old Settler's day celebration cannot. It also requires that all prosecutions for violating the conceal and carry law go through district court and not municipal court.

The bill also allows treatment facilities and the district court to disclose treatment records of people who have been involuntarily committed to the KBI central repository. Prior to this amendment, people who had been involuntarily committed for mental health issues or alcohol or drug treatment within the preceding 5 years were not allowed to get conceal carry permits, but the facilities and the courts were prohibited by other state laws from disclosing such information. It also adds to the prohibition not only persons convicted within the preceding 5 years of domestic violence (misdemeanor or felony) but prohibits granting permits to any person (adults or juveniles) who have been convicted anywhere, no matter how long ago, of any "crime of domestic violence" as defined by federal law.

ELECTION REFORM

HB 21128 makes a number of changes to the state election law:

1. Changes the number of votes necessary for a write-in candidate to survive the primary and make it on the general election ballot by changing the number of votes necessary from 10% of the electors who voted for the secretary of state in the prior general election to 5% of the current voter registration roles in the state, county or district in which the office is sought.

2. Requires poll agents to be registered voters, or members of the candidate's immediate family, or persons 14 through 17 years of age who meets all other requirements except being old enough to vote. Requires that poll agents carry a copy of their appointment while on duty

3. Requires that a publications that "expressly advocates the nomination, election or defeat of any candidate" must be followed by the words or statement "advertisement" or "adv." Broadcasts on radio or television must be followed by "Paid for" or "Sponsored by" followed by the name of the sponsoring organization and the name of the chairperson or treasurer. Similar requirements are in place for a materials regarding ballot questions. Failure to comply will be considered corrupt political advertising, a class C misdemeanor.

COMPREHENSIVE CRIME BILL

HB 2062 makes several amendments in the criminal area:

1. It amends K.S.A. 2006 Supp. §21-3219 to provide that when a person is justified in the use of force, a law enforcement officer may investigate and "any county or district attorney or other prosecutor" may prosecute upon a determination of probable cause.

2. Amends K.S.A. 2006 Supp. §21-3731 regarding criminal use of explosives to include more items including biological bombs and missiles. It also upgrades a violation from a level 8 to a level 6 person felony.

3. Alexa's law was created which includes "unborn child," meaning a human organism from gestation to birth, under the definition of human being for several criminal statutes (to wit: homicide, manslaughter, vehicular homicide, battery and aggravated battery).

4. Expands on several controlled substances and paraphernalia under the uniform controlled substances act and includes the proviso with regards to paraphernalia under K.S.A. 65-4152 that states that *"The fact that an item has not yet been used or did not contain a controlled substance at the time of the seizure is not a defense to a charge that the item was possessed with the intention for use as drug paraphernalia."* Increases penalties if paraphernalia is the items were possessed with intent to sell within 1,000 feet of any school property. School does not have to be in session at the time.

5. A store can be deemed to have reasonably known the items on its shelves were drug paraphernalia if they have actual knowledge or if the item is inappropriately or impractically designed for its alleged legitimate use or if any of the associated advertising material or packaging contains information that it is used as drug paraphernalia or if the local law enforcement agency or prosecution has sent written notice to the store that the item has been previously determined to have been designed specifically for use as drug paraphernalia.

6. For non-prescription drugs that contain controlled substances (i.e. Sudafed), which are kept behind the counter, the pharmacy must now get photo identification at the time of purchase and log in the purchaser's name. There are limits placed on how much of such substance a person may purchase in one month and it is a class A misdemeanor to exceed one's limits.

TOBY YOUNG BILL

SB 124 amends K.S.A. 2006 Supp. §21-3520 to include "volunteers" at the department of corrections as persons who can be guilty of "unlawful sexual relations" if they engage in consensual sexual relations, lewd fondling, or sodomy with an inmate that is over 16. It also limits the definition of "teacher" under the statute to a teacher in a public or private

(Continued on page 12)

Legislative Updates

(Continued from page 11)

school offering grades K-12.

COMPENSATING COUNTIES FOR COSTS INCURRED IN IDENTIFYING SEXUALLY VIOLENT PREDATORS

SB 52 creates the Sexually Violent Predator Expense Fund and requires the AG's office to pay counties for costs incurred in determining whether a person is a sexually violent predator. It also addresses the rights of sexually violent predators while committed to a treatment facility. Outlines who pays for what (county, AG, SRS, person, etc) including treatment, traveling to court and maintenance and care.

FREE ALCOHOL AT FUND RAISING EVENTS NOT A "SALE"

In response to AG Opinion No.2007-3, issued January 29, 2007, the legislature amended K.S.A. 2006 Supp. §41-104 to provide that the serving of complimentary alcoholic liquor or cereal malt beverage at a charitable fund raising event does not constitute "sale" of such beverages for purposes of licensure requirements. No license or temporary permit is required. *See* ,SB 30.

ADDITIONS TO "HARD 40" SENTENCE FOR SEX OFFENDERS; DISCHARGE FROM JUVENILE JURISDICTION FOR NEW FELONY CRIIMES

SB 166 closes a loophole in Jessica's Law that allowed some second-time sex offenders to be treated as first-time offenders. It also expands the list of sex offenses that qualify a second-time offender for the "hard 40" to include offenses in effect prior to the effective fate of Jessica's Law.

Also provides that a juvenile serving time in a juvenile detention facility and who commits a new felony level offense, will, upon conviction of the new crime, be taken out of juvenile detention and given a jail term for the new crime, without probation, even if it is a presumptive probation case. The defendant will be completely discharged from juvenile detention and all obligations there, except restitution, and shall forever more me treated, sentenced and imprisoned as an adult.

VIOLATING A QUARANTINE

SB 166 amends K.S.A. §47-604 to upgrade the crime of violating a quarantine from a class Am misdemeanor to a severity level 7 nonperson felony.

PROHIBITING BULLYING IN SCHOOLS

SB 68 requires district school boards to adopt policies prohibiting bullying on school property, in a school vehicle or at a school-sponsored activity. This bill also requires each school district to adopt and implement strategic plan to address bullying, including provisions for training and educating staff and students.

ADMINISTRATIVE HEARINGS ACT

On or after July 1, 2009 all state agencies, boards and commissions who have any kind of administrative hearings will utilize the Office of Administrative Hearings. This includes the Department of Revenue driver's license hearings. All hearing officers in other agencies will be transferred to the OAH.

OFFENDER REGISTRATION ACT

SB 204 adds convictions for drug trafficking, manufacture of drugs and possession of precursor chemicals (ephedrine, pseudoephedrine, anhydrous ammonia, etc) as convictions that subject the offender to registration under the Kansas Registration Act. In addition, all offenders required to register will have to report three times per year to the sheriff's office in the county they reside (prior law only required reporting once a year). They must report in the month of their birthday and then every four months thereafter. In addition, to the information they have always been required to supply when they report, offenders must now also provide a list of the license tags to their vehicles and their email addresses and online identities used on the internet.

And finally, how about this for incentive to locate violators? Each time they report they must pay the sheriff $20, which goes into a special fund that can be used solely for law enforcement and criminal prosecution and cannot be used to reduce the amount of funding otherwise available to the sheriff's office. So the more people who report, the more money for the sheriff.

TECHNICAL AND CLARIFYING CHANGES TO DISTRICT COURT POLICIES

HB 2363 deletes "terms of court" from district court documents, as it is a term no longer used at the district court level. This bill also changes the time for serving a motion for summary judgment from 10 to 21 days, amending K.S.A. §60-256(c).

ALLOWING FEES TO BE CHARGED AT LAW LIBRARIES

HB 2360 authorizes the collection of fess for the benefit and account of the law library in each county. This bill also allows the clerks of the district courts in Sedgwick and Johnson counties to impose an additional library fee, as deter-

(Continued on page 37)

Court Watch

(Continued from page 7)

Through the program a traffic offender could get his or her ticket dismissed by paying the court costs and an additional amount, determined based on the nature of the offense, to charity, usually the LEF. The offender was supposed to submit two checks, one to the county treasurer (for the "charitable" donation) and one to the court clerk for court costs.

As we can all understand, defendants did not follow instructions and many of them made their checks out to the Pratt County Attorney. He would send them back. Sometimes the person returned and paid correctly, sometimes they never heard from the person again and driver's license suspension action would be taken for failure to appear and satisfy the citation or the diversion agreement. Cases were continued and the whole thing was very inconvenient.

Black approached the county clerk, the county treasurer, and the chief judge to assist him in determining how they could take a single instrument and split the payments between the two entities. He was told it was his problem to solve.

He decided to cash the checks made out to the County Attorney and put the cash in his unsecured desk drawer in his private office, either in an envelope or identified with a sticky note. He would deliver the court cost portion of the money weekly to the court clerk for court costs and await return of the dismissal order before delivering the balance of the funds to the county treasurer to deposit in the LEF. The cash would be accompanied by a note, indicating the name of the offender and the fund receiving the contribution. He did not get a receipt for any of these payments. Sometimes he simply left them on the counter in the office. He did not maintain a separate ledger or log of cash receipts or disbursements. He periodically received a report from the treasurer's office reflecting the names of the offenders from whom money was received, the amount received from each offender, and the fund to which the payment had been credited, e.g. the LEF. The report did not specify which payments had been made in case, and Black did not reconcile the reports to his office files. This practice went on for several years.

In 2003 the county was audited. The accountant compared the traffic cases dismissed pursuant to a diversion order with the treasurer's receipts for the LEF for a 10 month period and identified 80 individuals for whom the treasurer's office did not show LEF receipts. KBI was called in and believed several thousand dollars of diversion money was unaccounted for. Black was charged with 14 counts of misuse of public funds and acquitted of all counts by a jury in May 2005.

One year later, the Disciplinary Administrator filed a formal complaint against Black alleging that he violated the rules of professional conduct by failing to adequately safe keep property and misconduct.

In *In re Black*, ___Kan.___ (April 27, 2007), the Supreme Court found that public censure was appropriate. The Court stated, *"Black still does not get it. He fails to grasp that keeping other peoples cash in an unlocked desk drawer, identified by a sticky note, and failing to get receipts for the delivery of the cash to the proper recipient or otherwise maintain a record of cash distributions falls woefully short of the professional fiduciary standard imposed on Black as a practicing lawyer."* A minority of the Court felt more severe discipline was warranted.

Editor's note: *This is simply a summary of the facts, the case is very lengthy. It should be noted that the Court was not asked to rule on, nor did it rule on, the propriety of the "pay and dismiss" program that allowed diversion payments by traffic offenders to be placed in a charity set up by the prosecutor for the benefit of law enforcement. It certainly seems to present a conflict, particularly in light of the fact that the severity of the charge dictated how much of a "donation" needed to be made and in the case of speeding, the more miles over the speed limit, the higher the donation. It is also unclear how and to whom this "charity" distributed its funds. Although Black had not received a formal written opinion on his particular situation, the Attorney General has opined in the past that there is no statutory prohibition against requiring monetary contributions to charity as a condition of* ***diversion****. See AG Opinion 93-120. However, General Stephan did warn that "***we strongly caution prosecutors to make every effort to ensure that there is no actual or apparent favoritism or prejudice."** *The fact that this particular charity appears to benefit the very group that writes the tickets (law enforcement), it would certainly appear suspect. The appearance of impropriety is just as detrimental to the image of the justice sys-*

(Continued on page 17)

Position of Judge Against Whom a Docketed Complaint Was Filed in 2006*

Supreme Court Justice	7
Chief Judge	4
District Judge	18
District Magistrate Judge	1
Municipal Judge	5
Judge Pro Tempore	1
Hearing Officer/Court Trustee	1
Retired, Taking Assignments	1

**In some instances, more than one complaint was filed against the same judge.*
Source: 2006 Annual Report, Kansas Commission on Judicial Qualifications

A STEP BACK IN TIME

CALIFORNIA CHIEF JUSTICE KILLS STATE SENATOR IN DUEL….YOUNG MISTRESS CLAIMS TO POSSESS A MARRIAGE CONTRACT WITH MILLIONAIRE OLD ENOUGH TO BE HER GRANDFATHER….ASSASSINATION ATTEMPT AGAINST U.S. SUPREME COURT JUSTICE…..U.S. MARSHALL JAILED FOR MURDER…Sound like the National Enquirer? Well, not so fast. All we need to do is take a step back in time to unravel this true crime story, with a Kansas connection. First, the cast of players in this bizarre drama:


David Terry

Former Chief Justice of the California Supreme Court, **David Terry**. Born in Kentucky, moved to Texas, fought in Texas war of independence from Mexico, lost election to become Galveston District Attorney, headed to California during Gold Rush, at age of 32 appointed to the California Supreme Court, killed a man in the opposition party with a bowie knife, appointed Chief Justice of California Supreme Court, but stepped down to **engage in a duel with Sen. David Broderick over whether Kansas should be admitted as a slave state or a free state**, killed Broderick, ended his political and judicial career, fought in the Civil War as a confederate colonel, after war went into private legal practice, as a 63 year old widower met and married Sarah Althea Hill, was killed by U.S. Marshall when he slapped U.S. Supreme Court Justice Stephen Field in the dining room of a train station.


Sarah Althea Hill Sharon

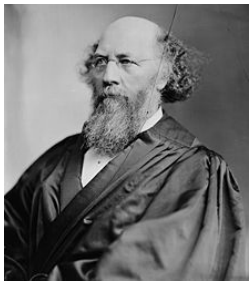
Sarah Althea Hill, born in the boot heel of Missouri and raised in a convent, went to California with her brother, lost all her money, tried to kill herself by drinking poison, and then met Sen. William Sharon. She co-habitated off and on with the Senator for a year. When he fell for someone else, she sued him for divorce alleging infidelity. She claimed to have a "secret contract of marriage" signed by the Senator. She hired David Terry to represent her. She later married David Terry. She was known to carry a loaded pistol in her satchel. After David Terry's death, spent last 45 years of her life in an insane asylum, having been involuntarily committed, her sanity hearing received almost as much press as her divorce case.


Sen. David Broderick

California Sen. David Broderick. Born in Washington, D.C., headed for California during Gold Rush, minted gold coins (and sold them for more than they were worth), member of U.S. Senate from California, avid "Free Soil" supporter, **got in a heated argument with David Terry at a party convention over whether Kansas should enter the union as a free state or a slave state, and Terry challenged him to a duel**, Broderick lost, but in death became a martyr for the abolitionists, contributing to the start of the Civil War, Broderick, California and Broderick Street in San Francisco are named after him.

William Sharon of San Francisco was a silver baron, having made millions from the Comstock Lode (albeit in a somewhat questionable manner). He served for a brief time (1875-1881) in the U.S. Senate. He was a widower and was known to have several mistresses. One of these women was Sarah Althea Hill. Sarah was 27, Sen. Sharon was 60. When their one year cohabitation ended, Althea presented a "secret contract of marriage" purportedly signed by Sen. Sharon and sued him for divorce and alimony. The case went on for years. Although he lost in the state court, he eventually prevailed in the federal and state appellate courts, albeit after his death.

David Neagle, U.S Marshall worked as a mining engineer and lawman throughout the West, was town marshall and deputy sheriff in Tombstone, Arizona, before being appointed a U.S. Marshall assigned to guard Justice Stephen Field while he rode circuit in California.



Justice Stephen Field, U.S. Supreme Court. Born in Connecticut, practiced law in New York with his brother, came to California during the Gold Rush, elected justice of the peace in Marysville and because town had no jail, instituted the whipping post (fearing if he didn't, people would be hung for minor crimes), served in California legislature, a "Free Soil" democrat (arguing Kansas should be admitted to the union as a free state), lost in an attempt to gain the nomination of his party to be President and blamed David Terry as one of the reasons for his failure, appointed to the California Supreme Court, sworn in by Chief Judge David Terry, took over as Chief Judge when David Terry stepped down in light of outrage over his killing of Sen. David Broderick (one of Field's political allies), Abraham Lincoln appointed him to the newly created tenth U.S. Supreme Court seat, presided over several legal hearings in Althea Hill's divorce proceeding, drew her anger and that of her attorney, his former colleague, David Terry, which ultimately resulted in Terry's death, one of longest serving justices, retired at the age of 80 after 33 years on the bench due to intermittent senility.

(continued page 15)

Step Back in Time

Nevada Sen. William Sharon, also known as the "King of the Comstock Lode" was a widower who turned to the beautiful Althea Hill for companionship, even though she was over 30 years his junior. He set her up in the Grand Hotel in San Francisco, which he owned, and paid her $500 per month. He lived next door at his other hotel, the Palace. The hotels were connected by an enclosed bridge, which was often transversed by the lovers. After 15 months, he claimed she betrayed his business secrets and ordered his hotel managers to throw her out. They had to take her door off its hinges and pull up her carpet before they finally succeeded. He gave her $7,500 and thought he was done with her. Two years later she produced a marriage contract she claimed they had mutually signed and brought forward letters he had written referring to her as his wife.

Conveniently, this secret contract contained a clause that it could not be revealed for two years, explaining why she hadn't brought it forward sooner. If Althea Hill could convince the Court that Sen. Sharon had secretly married her, she would be entitled to a divorce and half of his $30 million fortune. Sen. Sharon denied that she was his wife and sued her in federal court to get her to stop using his name. He claimed he was being blackmailed and vowed to spend every last penny he had fighting the suit, so as never to have to pay her a penny.

Althea hired a lawyer. She sued in state court for divorce, charging adultery and desertion, demanding alimony and half of his assets. The cases bounced back and forth and, over the course of six years, resulted in twenty published opinions, three of them from the U.S. Supreme Court. The testimony in the trials was the journalistic sensation of the day. He presented letters she had written to him suggesting very "unwifely" activities, including suggestions of multiple sex partners and hiding in the closet when he had sex with someone else. She presented letters from him threatening to harm himself if he couldn't see her. Testimony continued for almost 6 months.

The state court found that Althea had lied about some things, but found that the marriage contract was legal and binding. The court granted her $2,500 per month alimony and $55,000 in attorneys fees. Sharon immediately appealed and continued to press his federal claims. True to his promise, he spared no expense to get the marriage contract thrown out as a fraud in federal court. As his attorneys paraded witness after witness negative to her cause, she took to becoming loud and insulting in the courtroom, resulting in several findings of contempt of court. During one such tirade, she drew a pistol from her satchel, dangling it and pointing it randomly around the room. She told the federal judge, Lorenzo Sawyer, she was not going to shoot him right then, unless he thought he deserved it.

At this time in our history, the U.S. Supreme Court judges rode the circuit when the Supreme Court was not in session and helped out the district judges in their circuit. Justice

The Verdict

Stephen Field had California in his circuit and sat in with Judge Sawyer on several of the Sharon cases. He was not tolerant of Althea carrying a gun and ordered the U.S. Marshalls to make sure she came into the courtroom unarmed.

Enter David Terry, who became a part of Althea's legal team. He had a colorful past of his own, having killed two men in political disputes without any punishment, to speak of, nor any remorse. Needless to say he had a volatile temper. He was the former Chief Judge of the California Supreme Court and had sworn Judge Field into office when Field was merely an Associate Justice on the California Supreme Court. Terry immediately fell in love with Althea. He had recently lost his wife and five of his six sons, one to suicide. She was beautiful and high spirited. He felt compelled to defend her honor, at all costs.

He made the final argument for Althea, and the federal court held that the contract was a fraud and ordered it surrendered for cancellation. The court enjoined Althea from continuing to claim its authenticity. The opinion from Judge Deady (who heard the case with Judge Lorenzo and Justice Field) was stinging. He referred to the relationship as more like a brothel than a marriage. Sen. Sharon died before the decision was rendered. However, two weeks after the decision. Althea married David Terry.

Since Sharon had died, Terry did not appeal the federal decision. However, Sharon's children, representing his estate, continued to pursue the appeal of the state court decision granting Althea a divorce. The California Supreme Court eventually reduced the alimony from $7,500 to $500 per month (the same as her prior "allowance"). They also asked for a new trial and spent large sums of money to elect new California judges. After the appeal time on the federal case had run, they asked that the federal court order Althea surrender the contract to the court.

Althea was not happy. When she saw federal judge Sawyer on a train, she went up to him and pulled his hair. Terry was with her and suggested that they should throw him in the San Francisco bay and drown him. The judge asked the U.S. Marshall to have deputies present the next time the Terry's came to court.

By this time, Justice Field was back in California and he, Judge Sawyer and Judge Deady heard the motion to order Althea to surrender the contract. The judges unanimously ruled against her and while Justice Field was reading the opinion, he saw Althea fidgeting with her satchel. Among other things, she told Field in a loud voice that she felt he had been "bought." Field ordered her removed from the courtroom. She struck the U.S. Marshall in the face, refusing to leave. Terry rose to defend her honor. He struck the U.S. Marshall and a melee followed. They were finally subdued and removed from the courtroom. A loaded pistol was removed from Althea's purse and a bowie knife from Terry's

(Continued on page 16)

Step Back in Time

(Continued from page 15)

hand. Deputy David Neagle recovered the bowie knife from Terry. They were summarily found in contempt of court and jailed. Terry served 6 months and Althea one month. On a writ of habeas corpus, filed by Terry, the U.S. Supreme Court found that a judge can summarily find a person in contempt and jail him without a hearing or any opportunity to be heard.

Finally, the California Supreme Court, with a bench full of new judges, overturned the state judge's decision granting Althea a divorce, finding it was not supported by the evidence. The state and the federal court were finally in agreement. From jail, Terry made several threats to Field's life. Word got back to Washington, and his colleagues urged Field not to return to California that summer. When he refused, the Attorney General ordered the U.S. Marshal in California to give him a body guard. David Neagle was appointed.

On August 14, 1889, Field was on a train traveling between Los Angeles and San Francisco. When it passed through Fresno, where the Terry's lived, they boarded. Field saw them board. The next morning as Field was having breakfast at the train stop diner, although Neagle had advised him not to and asked that he stay on the train, Terry approached him. Althea was behind him, but when she saw Field she ran back to her room to get her satchel. Terry slapped the Justice on both sides of the face, some speculate as an invitation to duel. Officer Neagle jumped up, and shouted at him to stop and identified himself as a U.S. Marshall. What Terry did next is not clear. However, Officer Neagle believed he was about to grab his bowie knife. The 5'4", 150 pound Neagle shot and killed the 6'3", 250 pound Terry as Althea was coming into the room. She was detained, and a loaded revolver was retrieved from her satchel. No weapons were found on David Terry.

Althea immediately called for the arrest of both Neagle and Field for murder. The constable arrested Neagle and delivered him to the Stockton sheriff, Thomas Cunningham, but Justice Field was allowed to go on to San Francisco, where he stayed at the Palace Hotel (now owned by Sen. Sharon's heirs). He was eventually served there with a warrant by the sheriff and voluntarily accompanied him back to Stockton to be arrested. The Terry-backers argued that Neagle had no authority under the law to serve as the protector of a judge and use deadly force against aggressors and that Field was an accessory to murder. Neagle spent three days in jail, before the 9th Cir. Court of Appeals released him on a writ of habeas corpus. Justice Field surrendered to the authority of the Stockton sheriff very ceremoniously and then had Judge Sawyer standing by in Stockton to sign a writ of habeas corpus and order his immediate release. The locals were outraged. Just as in Althea's divorce case, the dispute was between who had jurisdiction over the case, the state court or the federal court. Much to the frustration of the state authorities, the federal government scooped up the defendants right from under their noses and took jurisdiction over the cases.

The Sheriff appealed the decision by the 9th Circuit to take jurisdiction over Neagle. It went all the way to the U.S. Supreme Court which held that the President has power, through the Attorney General, to direct a U.S. Marshall to accompany and protect a justice of the Supreme Court from a threatened assault while in the discharge of his duties. Deputy Neagle was found to have clear authority to use deadly force to protect the life of Justice Field. Since he was acting in furtherance of federal orders, state courts had no jurisdiction over him. The charges against Justice Field were quickly and summarily dismissed. A jury trial was held in federal court for David Neagle on murder charges. Neagle was found not guilty. Immediately after the verdict was read, Justice Field presented Neagle with a gold watch inscribed, "as a token of appreciation of his courage and fidelity to duty under circumstances of great peril." Shortly thereafter, Althea was committed to a mental institution where she lived out the remaining 45 years of her life.

***Editor's note*:** *And it all started over an argument regarding whether or not Kansas should enter the union as a free state. If Terry would not have killed Broderick in the duel, he would have remained Chief Justice of the California Supreme Court and probably never would have crossed paths with Althea Hill.*

Sources:

Most Notable Cases:

In re Neagle, 39 F 833 (C.C. Cal. 1889).
In re Terry, 128 U.S. 289, 9 S.Ct. 77 (1888)
Cunningham v. Neagle, 135 U.S. 1 (1889)
Sharon v. Sharon, 68 Cal. 326, 9 P. 187 (1885)
Sharon v. Sharon, 67 Cal. 185, 8 P. 709 (1885)
Sharon v. Sharon, 68 Cal. 29, 8 P. 614 (1885)
Sharon v. Sharon, 7 P. 639 (1885)
Sharon v. Sharon, 67 Cal. 185, 7 P. 456 (1885)

Articles:

Mad Memories, Time Magazine, March 1, 1937, on the occasion of Althea Hill's death, http://www.time.com/time/magazine/article/0,9171,757303,00.html

Favorite San Francisco Ghost Story About Mammy, San Francisco Museum, http://www.sfmuseum.org/hist10/mammy.html (Mammy apparently brewed a love potion for Althea Hill to try to win Sen. Sharon back, she is also ultimately the person who had Althea committed to a mental asylum).

George C. Gorham, *The Story of the Attempted Assassination of Justice Field by a Former Associate on the Supreme Bench of California*, Journal of the Supreme Court Historical Society, Vol. 30; Issue 2 (2005).

Brooks W. MacCracken., *Althea and the Judges*, American Heritage Magazine, Vol 18, Issue 4 (June 1967).

Court Watch

(Continued from page 13)

tem as actual impropriety.

CALCULATING SPEEDY TRIAL TIME

In *State v. Brown*, ___Kan. ___ (April 27, 2007), the Kansas Supreme Court upheld a prior ruling by the Court of Appeals holding that the delay from the date the defendant moves for a continuance to the original trial date is assessed against the defendant. *See*, *Verdict*, Winter 2006, pg. 11. In other words, if defendant enters a not guilty plea and the case is set for trial on October 1, the time from the not guilty plea to the trial date is charged against the prosecution. However, if the defendant requests a continuance on September 15, the time from September 15 through October 1 and to the new trial date is all assessed against the defendant. Three justices dissented to this interpretation and felt the time from September 15 to October 1 should remain charged to the prosecution, otherwise defense counsel would have an incentive to wait as long as possible to request a continuance, increasing the inconvenience to the court and parties and perhaps taking the risk that it won't be granted. However, that opinion was in the minority.

COURT OVERRULES *STATE V. JOHNSON*, 34 KAN.APP.2D 612 (2005)

In *State v. Johnson*, 34 Kan.App.2d 612 (2005) , Johnson was charged with aggravated indecent liberties with a child by soliciting the child to engage in lewd fondling or touching in violation of K.S.A. §21-3504(a)(3)(B). It was clear after trial that the evidence did not, in fact could not, support the charge due to a legal impossibility. The prosecutor charged under the wrong subsection of the statute. However, the jury found the defendant guilty of the lesser included offense of aggravated indecent solicitation of a child under K.S.A. §21-3511.

The defendant argued that the Court was without jurisdiction to enter a finding on a lesser included offense, when the primary offense is not appropriate to the facts. The Court of Appeals disagreed. Lesser included offense instructions are given precisely because the evidence may not support a conviction under the more severe offense. *See*, *Verdict*, Winter 2006, pg. 1.

In *State v. Johnson*, ___Kan. ___(April 27, 2007), the Kansas Supreme Court overruled the Court of Appeals decision. It found that **as charged in this case**, aggravated indecent solicitation of a child was a lesser offense, but not a lesser included offense. The Court did not specifically rule on whether or not a person can be convicted of a lesser included offense if the original offense is found to be defective, it simply found that based on the charges in this case the charge for which the defendant was convicted was not a lesser included offense of the one charged. Johnson goes free.

CRIMINAL DEPRIVATION OF PROPERTY IS NOT (WE REPEAT—NOT) A LESSER INCLUDED OFFENSE TO THEFT

In *State v. McKissack*, ___Kan.___(April 27, 2007), Justice Davis, writing for the Court stated that whether criminal deprivation of property is a lesser included offense of the crime of theft has been *"a source of some tension in the Supreme Court."* The Court has gone back and forth on the issue, and even in this case the Court of Appeals in its unpublished decision stated it had some difficulty grasping why the Kansas Supreme Court had held in the past that one was a lesser included offense of the other when the intent element was clearly different (to wit: intent to permanently deprive v. intent to temporarily deprive), however it was bound to follow Supreme Court precedent.

The Supremes decided it was time to "revisit" the issue. After a detailed review of the statutory changes regarding lesser included offenses that have occurred since its prior decisions and review of subsequent case law, the Court concludes that criminal deprivation of property is not a lesser included offense to theft.

ORAL AMENDMENT OF COMPLAINT

In *State v. Davis*, ___Kan. ___(April 27, 2007), the Supreme Court was faced with whether or not a defendant had properly challenged his conviction. He had filed a motion to correct an illegal sentence based upon the prosecutor's failure to memorialize in writing an oral amendment to the complaint. The Court found that a motion for correction of an illegal sentence was not the proper action and was a mere attempt to collaterally attack his conviction.

Of more interest to municipal courts, is the Court's discussion of the case law concerning the making of an oral amendment to a complaint. In this case, the prosecution had amended the complaint several times first charging that a conspiracy was hatched on January 26, then amended it to January 24, and later changed it to reflect January 24, with overt acts occurring on both January 24 and January 26. However, at trial, it became clear that the only overt act of conspiracy occurred on January 26 and the only date that could be charged was January 26.

After the prosecution rested, defense counsel moved for a directed verdict on the basis that the State had not been able to present any evidence of any acts had occurred on January 24. The State then moved, over defense counsel's objection, to amend the complaint to properly show January 26 as the only date alleged. The Court granted the prosecutor's oral motion, and to complicate matters even more, no written amendment was actually made or filed with the court. Nor was the amendment memorialized in any journal entry. The defendant was convicted. After the defendant moved post-trial, pro se,

(Continued on page 18)

Court Watch

(Continued from page 17)

to correct an illegal sentence due to the failure to file a written amendment, the court ordered the State to file a journal entry *nunc pro tunc* correctly stating the January 26 offense date in the conspiracy count. The State complied.

On appeal, the defendant argued (although not in the proper manner as later held by the Supreme Court) that since a complaint is defined by statute as a "plain and concise written statement of the essential facts constituting the crime charged", the fact that the amendment was never put in writing means his conviction should be reversed. *See*, K.S.A. 2006 Supp. §22-3201(b).

In *Davis*, the Supreme Court discussed the case law in this area at length. It reiterates that the State may orally amend any time prior to the verdict if no additional or different crime is charged and if substantial rights of the defendant are not prejudice. The mere amendment of the date does not cause a different crime to be charged.

So the next question is whether the amendment is prejudicial. The Court cites case law that holds that failure to properly memorialize an oral motion to amend the information is not, in itself, prejudicial to the defendant and does not constitute reversible error. Failure to put the oral amendment in writing does not result in a defendant being found guilty of a crime that he or she was not charged with, nor does it deprive the court of jurisdiction.

Editor's note: *The Municipal Court Procedures Act at K.S.A. §12-4113(g) (2001) uses the same language as K.S.A. 2006 Supp. §22-3201(b) in defining a complaint as a "written statement of the essential facts constituting a violation of an ordinance." In addition, K.S.A. §12-4505 (2001) allows amendments to be made to the complaint anytime before judgment is rendered "if no additional or different offense is charged, and if substantial rights of the accused person are not prejudiced." This is identical to the language in K.S.A. 2006 Supp. 22-3201(e). Therefore, it would appear that Davis and the case law cited therein, would equally apply to the amendment of complaints in municipal court. Although, since there is no transcript of municipal court proceedings, the fact of the oral amendment would have to be, at a minimum, reflected in the judge's bench notes, otherwise there is no record that it took place.*

SUMMARY DISMISSAL REQUIRED WHEN POST-CONVICTION DNA TESTING COMES BACK UNFAVORABLE TO THE PETITIONER

In *State v. Denny*, ___Kan. ___(April 27, 2007), the defendant had been convicted of aggravated sexual battery and aggravated sodomy in 1993. In 2002, he filed a motion requesting the DNA testing be performed. After several legal challenges, said testing was finally ordered in 2005 on one of the cases. The report came back that the DNA found on the items at the crime scene and on the victim belonged to the defendant. A hearing was scheduled for July 29. The defendant moved to extend the hearing and to subpoena a DNA expert to counter the "State's erroneous DNA profile." The defendant claimed to have hired an expert that disputed the State's findings. The motion was denied. A hearing was held. The defendant was not at the hearing.

At the hearing, the State moved to admit the DNA report. The defendant's attorney objected on the basis of foundation, best evidence, hearsay and chain of custody. The report was admitted. The Court dismissed all of the defendant's motions, ordered the DNA evidence to be preserved and made available to any reputable scientist who wants to evaluate it. The Court advised the defendant that if he had testing results to the contrary of the state's evidence, he could file a "Motion for New Trial Based on Newly Discovered Evidence", but the statute required him to summarily deny his current post-conviction relief based on an unfavorable DNA report.

In *Denny*, the Supreme Court found that this was the process required by the statute. Once DNA is tested post-conviction, if the results come back unfavorable to the petitioner, the Court is required to dismiss the petition and unless the petitioner is indigent, assess the cost of testing against the defendant. The Court found that the Confrontation Clause did not require the defendant's presence at the hearing and he had no statutory right to be present. In addition, the report was properly admitted into evidence. The Court found that there

(Continued on page 19)

Disposition of Docketed Complaints 2006

Dismissed after investigation	17
Letter of caution issued	7
Letter of informal advise issued	3
Public cease and desist issued	3
Formal Proceedings Filed	2
Judge Stipulated/ Resigned	7
Complaint withdrawn	1
No action-issue corrected	2
Complaints pending year-end	10

Source: *2006 Annual Report, Kansas Commission on Judicial Qualifications*

Court Watch

(Continued from page 18)

was no statutory requirement for how the court receives the DNA report. The report speaks for itself. The defendant does not have a right to present a defense. This is not a criminal prosecution. The Court was not even required to hold a hearing. The district court was correct ordering the samples saved and in telling the defendant that he could certainly have the samples tested on his own and if different conclusions were reached he could file a "Motion for New Trial Based on Newly Discovered Evidence" with supporting documentation and reports.

"PLAIN FEEL" EXCEPTION TO WARRANT REQUIREMENT

During a consensual encounter with a man behaving strangely in a public park, officers asked the man if they could conduct a pat down search for weapons. He consented. While conducting the pat down, the officer discovered a bulge in the man's coin pocket. The officer testified that he did not know what it was when he felt it. The officer, in fact, testified that weapons typically feel hard, and the small object in the man's pocket just felt like a bulge. The prosecution agreed with the defense argument that the officer could not have reasonably believed that the bulge was a weapon. Nonetheless, he reached into the pocket and removed a rolled-up baggie containing methamphetamine.

In order to seize something from an individual's pockets during a "pat down" search, the incriminating character of the item felt during the pat down must be immediately apparent to the person conducting the search. This has been interpreted to mean that the officer must have probable cause to believe that the object is evidence of a crime. This is often referred to as the "plain feel" exception to the warrant requirement.

In *State v. Lee*, ___Kan. ___ (April 27, 2007), the Kansas Supreme Court reversed an unpublished opinion of the Court of Appeals and found that the officer exceeded the scope of the search when he removed the plastic baggie from Lee's coin pocket. The incriminating nature of the bulge was not immediately apparent. In fact, it was pretty clear it wasn't the object of his search, to wit: a weapon. He had no right to go into Lee's pocket and pull out the item. The Court reinstated the dismissal by the district judge.

DOCTRINE OF TRANSFERRED INTENT

Baska v. Scherzer and Madrigal, ___Kan. ___(April 27, 2007), is a civil case involving a battery, but the facts are so similar to cases seen every day in municipal courts around the state, it may be of interest to municipal judges. It also discusses an interesting legal doctrine, called the "doctrine of transferred intent."

Celesta Baska had given her daughter Ashley, a high school senior, permission to organize a "scavenger hunt" with some friends. After the hunt, friends returned to the house for a party. Around midnight, a fight broke out between Harry Scherzer and Calvin Madrigal. Baska yelled at the boys to stop in an attempt to break up the fight. When they continued, she placed herself between the boys and was punched in the face, losing several teeth and receiving injuries to her neck and jaw. Baska reported that she was sure it was Scherzer who hit her in the face. She also believed that Madrigal punched her in the back of the head.

Just short of two years after the incident, Baska filed a law suit against Scherzer and Madrigal, alleging she was injured by their negligence. The statute of limitations for a civil negligence action is two years. It was fairly clear that neither Scherzer nor Madrigal intended to strike Baska, instead they were trying to strike each other and she got in the way.

Negligence is an unintentional breach of a legal duty. Battery is an intentional act. If Baska was unintentionally struck by the boys it was negligence and she had properly filed her action within the statute of limitations. However, if Baska was intentionally struck, it was battery and she had filed her action after the one year statute of limitations for battery had passed, so it would have to be dismissed. The court is not bound by what she calls her action, but is instead bound by what the facts support. This became the key issue in the case.

A person may be responsible for battery of another if he or she intended to strike the person or if the person knows or has reason to know that a person will be struck as a result of his or her actions. The Court quoted with approval the following "text book" definition from C.J.S. of transferred intent:

> *"If is not necessary, to constitute an assault and battery, that there be a specific intention of striking or otherwise injuring plaintiff. If defendant unlawfully aims at one person and hits another [under the doctrine of transferred intent] he is guilty of assault and battery on the person hit, the injury being the direct, natural, and probable consequence of the wrongful act. So, if one of two persons fighting unintentionally strikes a third, the person so striking is liable in an action by the third person for an assault and battery."*

The Supreme Court held that had the defendants struck each other and brought suit, they would be liable to each other for battery. Under the doctrine of transferred intent, which has been long recognized in Kansas, the fact that the defendants struck Baska instead does not change the

(Continued on page 20)

Court Watch

(Continued from page 19)

fact that their actions (punching) were intentional. The fact that Baska calls her claim one of "negligence" makes no difference. Ms. Baska's action was filed after the civil statute of limitations had passed for battery, therefore the lawsuit must be dismissed. The Court points out that this has been the law for over 100 years in Kansas, citing a case from 1863 that came to the exact same result when a stray bullet discharged by Laurant hit Bernier. *Laurant v. Bernier*, 1 Kan. 428 (1863),

The doctrine of "transferred intent" is also alive and well in the criminal realm. Under the "transferred intent" doctrine, the defendant's criminal intent towards his or her intended victim controls his or her culpability for any unintended injury that he caused. *See, State v. Garza*, 259 Kan. 826 (1996) (doctrine of transferred intent is applicable to the crime of aggravated battery). The logic of the felony murder rule is based on this doctrine, although felony murder goes one step further in that the actual harm does not need to be directly caused by the defendant as it does under the "transferred intent" doctrine. There is even a jury instruction in Kansas concerning transferred intent. PIK Crim.3d §56.09 ("The intent follows the bullet"). So even though the statute itself may not set out the doctrine in writing, it will be applied to the facts of any appropriate case as an accepted legal doctrine in Kansas.

POLICE OFFICER'S ATTEMPT TO TERMINATE A DANGEROUS HIGH-SPEED CAR CHASE THAT THREATENS THE LIVES OF INNOCENT BYSTANDERS DOES NOT VIOLATE THE FOURTH AMENDMENT, EVEN WHEN IT PLACES THE FLEEING MOTORIST AT RISK OF SERIOUS INJURY OR DEATH.

Harris's car was clocked going 73 in a 55 mph zone. An officer activated his emergency equipment and gave chase. The car did not stop and the cars proceeded down a two lane rural Georgia highway at speeds in excess of 85 mph. The car was almost boxed in several times only to escape. He ran two red lights in an attempt to escape. Six minutes and ten miles later Officer Scott (a different officer than the original 'chaser') decided to jump in and attempt to terminate the chase by employing a "Precision Intervention Technique" ('PIT') maneuver," which causes the fleeing vehicle to spin to a stop. He radioed his supervisor for permission and was told to "[g]o ahead and take him out." Instead, Scott applied his push bumper to the rear of the fleeing vehicle. As a result, Harris lost control, left the roadway, went down an embankment, overturned and crashed. Harris, 19 years old, was rendered quadriplegic.

Harris filed a law suit against the officer for violation of his constitutional rights by employing excessive force resulting in an unreasonable seizure under the Fourth Amendment. The officer responded that he had qualified immunity from liability. The defense of "qualified immunity" protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. Therefore, regardless of whether the constitutional violation occurred, the officer should prevail if the right asserted by the plaintiff was not `clearly established' or the officer could have reasonably believed that his particular conduct was lawful.

The qualified immunity test therefore, requires a two-part analysis: *"(1) Do the facts alleged show the officer's conduct violated a constitutional right? (2) Under that law, could a reasonable officer have believed the conduct was lawful (was it clearly established)?"*

The federal court of appeals (11th Circuit) held that Officer Scott's actions constituted "deadly force" and the law at the time of the crash was sufficiently clear to give reasonable law enforcement officers "fair notice" that ramming a vehicle under these circumstances was unlawful. More than 20 years ago, the high court had said an officer may not use "deadly force" to stop a fleeing suspect unless he poses a risk to the public or to the police. Therefore, he was not entitled to qualified immunity. Scott appealed and the United States Supreme Court agreed to take the case.

In *Scott v. Harris*, ___S.Ct. ___ (April 30, 2007), he Court, in an 8-1 decision (pretty rare these days) written by Justice Scalia, held that Officer's Scott's actions were reasonable. He did not violate Harris's constitutional rights. The Court did not even have to get to the second prong of the test. The case against Officer Scott was ordered dismissed on the basis of his qualified immunity to suit.

"We are loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive so recklessly that they put other people's lives in danger. It is obvious the perverse incentives such a rule would create: Every fleeing motorist would know that escape is within his grasp, if only he accelerates to 90 miles per hour, crosses the double-yellow line a few times, and runs a few red lights. The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness. Instead, we lay down a more sensible rule: A police officer's attempt to terminate a dangerous high-speed car chase that threatens the lives of innocent bystanders does not violate the Fourth Amendment, even when it places the fleeing motorist at risk of serious injury or death. "

The Court specifically discussed the helpfulness of the videotape in capturing the events. The judges viewed the tape as evidence in the case. The Court found that the videotape supported Scott's position and was contrary to the facts adopted by the 11th Circuit Court of Appeals. *"Indeed, reading the lower court's opinion, one gets the impression that [Harris], rather that fleeing from police, was attempting to pass his driving test...We are happy to*

(Continued on page 21)

Court Watch

(Continued from page 20)

allow the videotape to speak for itself." The Court then gives a web address that the public can go to and encourages readers to view the videotape. Even Justice Beyer, in his concurring opinion, stated that the videotape is really what made a difference in his opinion and he too encourages readers to watch it.

Justice Stevens wrote a scathing dissent. He viewed the videotape completely differently. In one footnote, he even poked fun at the "alarm" expressed by his fellow judges stating:

"I *can only conclude that my colleagues were unduly frightened by two or three images on the tape that looked like bursts of lightning or explosions, but were in fact merely the headlights of vehicles zooming by in the opposite lane. Had they learned to drive when most high-speed driving took place on two-lane roads rather than on superhighways-when split-second judgments about the risk of passing a slow-poke in the face of oncoming traffic were routine—they might well have reacted to the videotape more dispassionately."*

He felt that since the officer had no information other than the fact that this was a "speeder" and the officers had the car's license plate number, continuing the chase was completely unnecessary. Even if the driver was never captured, no significant harm would result. *"...rules adopted by countless police departments throughout the country are based on a judgment that differs from the Court's."* He goes on to cite the Georgia Association of Chiefs of Police brief which cites the standard policy that *"[P]ursuits should usually be discontinued when the violator's identity has been established to the point that later apprehension can be accomplished without danger to the public."* Justice Stevens would have found that whether or not a person's actions have risen to a level warranting deadly force is a question of fact for the jury and he would have let a jury decide this case.

Go to http://www.supremecourtus.gov and click on Opinions and then "Latest Slip Opinions", then to Scott v. Harris and you will see the Real Player file right next to the case title.

CONFESS OR LOSE YOUR KIDS = COERCION

In December 2002 Christopher Brown's baby was taken to a Topeka area hospital with a skull fracture, a subdural hematoma, a lacerated liver and fractured ribs. He claimed he found the child on the floor beside the crib with his three year old brother. The injuries were not consistent with this explanation so an investigation was initiated.

In the meantime, SRS took the Browns' other two children out of the home, along with the baby. Throughout the resulting child–in-need-of-care proceedings, the Browns maintained their innocence. SRS recommended that the children not be returned to the Browns until they "admit how the injuries to the children were sustained." On the day their parental rights were to be severed, Christopher Brown walked out of the courtroom (while waiting for the judge, who was late) and into the sheriff's office, sought out a detective who had been involved in the investigation, and told him he was ready to make a statement. After being *Mirandized*, Brown gave a statement admitting that on the night in question, the baby would not stop crying, was driving him "freaking crazy," and Brown "squeezed him too hard." Brown was charged with aggravated battery and abuse of a child. In a pre-trial hearing to determine the voluntariness of the confession, the district judge suppressed the confession as coerced. The prosecution filed an interlocutory appeal to the Kansas Court of Appeals.

In *State v. Brown*, ___Kan.App.2d ___(May 4, 2007), the Kansas Court of Appeals agreed with the district court and suppressed the confession. It found that the thought of losing his parental rights was likely a material factor in Brown's decision to make his statement. He was required to admit criminal conduct to reunite his family. When a parent is essentially compelled to choose between confession guilt in abusing his or her own child or losing his or her parental rights, the choice is between two fundamental rights under the constitution. The privilege to refrain from compulsory self-incrimination is guaranteed by the United States Constitution.

VOLUNTARY ENCOUNTER, FACTS EXAMINED

The following facts were found to constitute a voluntary encounter by the Court of Appeals in *State v. Young*, ___Kan.App.2d ___(May 4, 2007):

While on routine patrol, officer sees Young and Beatty in a city park in Newton. From his patrol car, he observes Beatty hand something to Young, and the two men part ways. The officer had prior contacts with Beatty and knew he was involved with illegal drugs. Based on this observation, the officer believed he may have witnessed a drug transaction.

Young started walking through the park. The officer exited his vehicle and approached Young on foot. The officer asked Young what was up, what was going on and where he was headed. He said he was coming from his apartment complex. The officer smelled a strong odor of marijuana coming from Young. The officer advised Young that he had seen him talking to Beatty and asked him if he had anything illegal on his person. He stated that he did not. The officer then asked Young if he could search him for illegal contraband. He said yes. The officer felt the outside of Young's right front pocket and felt a

(Continued on page 22)

Court Watch

(Continued from page 21)

long tube. The officer asked Young what it was. Young told him it was a pen. The officer asked if he could remove the pen. Young said he could. It was a hallowed ink tube cartridge with no actual pen in it. The officer said that based on his training and experience this type of tube was common for people to use to ingest illegal narcotics. He saw white residue inside the tube. He believed it to be cocaine or methamphetamine. The officer field tested the substance and it came up positive for methamphetamine. He placed Young under arrest.

The Court held that the mere fact that the officer was in uniform with a weapon, did not require a finding that Young was seized. Even though Young may have felt compelled to comply with the officer's requests, "*the officer took no action to lead to such a mistaken belief. The officer asked, and did not demand or require the defendant to comply…Simply approaching a citizen in a public place and asking questions does not constitute a seizure unless there is some display of authority which signals to the average citizen that he or she must comply with the officer's requests. There was no such display of authority by the officer in this case…if this encounter is not considered voluntary, it is difficult to imagine any situation that would be.*"

RIGHT TO CONFRONT WITNESSES AS PROVIDED IN *CRAWFORD*, IS NOT EXTENDED TO DEFENDANTS IN PROBATION REVOCATIONS, ALTHOUGH DUE PROCESS MUST BE PROVIDED

Johnny Palmer was on probation out of Reno county for possession of cocaine. The State filed a motion to revoke his probation for failing to report and testing positive for cocaine. Palmer's probation had been transferred from Reno county to Sedgwick county. The State offered a certified statement from Palmer's Sedgwick County community corrections officer, because he was unavailable to travel to Reno county for the hearing. The affidavit indicated that Palmer had violated his probation by ingesting and testing positive for cocaine and failing to report as directed. Relying solely on this affidavit, the district court revoked Palmer's probation.

Palmer appealed, arguing that based on *Crawford v. Washington*, 541 U.S. 36 (2004), admission of the affidavit violated his rights under the confrontation clause. Prior to *Crawford*, the Kansas Supreme Court has found sworn statements to be admissible in probation revocation hearings. This is the first time the issue has been raised in Kansas post-*Crawford*. Palmer argued that this was clearly testimonial evidence and inadmissible unless he has had a right to cross-examine the declarant.

In *State v. Palmer*, ___Kan.App.2d ___(May 18, 2007), the Court of Appeals conducted a general survey of other jurisdictions and found that the developing trend was to **not** extend *Crawford* to probation revocation proceedings. The Court went on to recognize that the rights of an offender in a probation revocation hearing are not the same as at a trial. A probation hearing derives from the Due Process Clause and analysis, while the rule in *Crawford* derives from the Confrontation Clause. The Confrontation Clause expressly only applies to "criminal prosecutions." A probation hearing is not a "criminal prosecution."

However, defendants are entitled, the Court held, to minimal due process at their hearing. In order to dispense with confrontation, the Court must evaluate (1) the explanation offered by the prosecution as to why confrontation is undesirable or impractical, and (2) the reliability of the evidence offered by the prosecution in lieu of live testimony.

Since the district court did not conduct such an analysis in this case and since there was some confusion as to whether or not the affidavit submitted was even referring to the right defendant, the Court reversed the district court's decision revoking probation and remanded the case for the court to conduct the two-factor analysis.

THE "OPEN DOOR" RULE

In *State v. Birth*, ___Kan.App.2d ___(May 18, 2007), the Court of Appeals spends some time discussing the "open door rule." This rule states that when a defendant opens an otherwise inadmissible area of evidence during the examination of witnesses, the prosecution may then present evidence in that formerly forbidden sphere. It concludes that this rule is still viable after *Crawford v. Washington*, 541 U.S. 36 (2004). Therefore, a defendant may "open the door" for inadmissible testimonial hearsay in violation of the confrontation clause if he or she elicits testimony concerning a conversation with the declarant who is unavailable.

DISSATISFACTION WITH COURT-APPOINTED COUNSEL MUST BE JUSTIFIABLE TO GET A NEW ONE APPOINTED

Dale McCormick asked the Court to appoint him a new attorney. He felt that his court appointed attorneys refused to challenge his arrest, to challenge the search warrant in the case, and to use various defense tactics that the defendant believed were appropriate. These were the second attorneys used by the defendant. The first one had withdrawn when the defendant failed to abide by his advice. The two court-appointed attorneys agreed that there had been a breakdown in communication with their client, they had a fundamental disagreement regarding trial strategies, and the defendant, without communicating with counsel, frequently filed motions directly with the court that undermined defense strategies. The Court had apparently had a hard time finding any attorney to represent the defendant due to a number of conflicts attorneys in the community

(Continued on page 23)

Court Watch

(Continued from page 22)

had with prior representation. The conflicts occurred primarily because the defendant wished to control his own representation without regard to the advice of his attorneys.

The district court refused to appoint new counsel, finding that defendant had not presented justifiable dissatisfaction with appointed counsel. Defendant chose to represent himself and the Court ordered the two court-appointed attorneys to remain as stand-by counsel. McCormick appealed his conviction and raised as one of his issues, the Court's refusal to appoint substitute counsel.

In *State v. McCormick*, ___Kan.App.2d___(May 25, 2007), the Court of Appeals found that a criminal defendant represented by counsel is entitled to control over three decisions: (1) whether to accept a plea; (2) whether to demand a jury trial; and (3) whether to testify. All other strategic decisions, including preparation, scheduling, and the *type of defense*, lie within the province of trial counsel. While a criminal defendant has the right to consult with appointed counsel and to discuss the general direction of his or her defense, the strategic and tactical decisions are matters for the professional judgment of counsel.

"By refusing to follow the advice of his attorneys and by filing motions without their knowledge or consent, the defendant was attempting to control not only the direction of the defense but the strategy and tactical decisions associated with the defense. Consequently, the irreconcilable conflict or breakdown in communication alleged by the defendant was caused by the defendant's conduct."

The district court judge was correct in denying his request.

SUBJECT MATTER JURISDICTION OVER A CRIMINAL THREAT

Because the offense of criminal threat (in this case, by way of an harassing phone call) requires a communication, which involves both the declaration of a threat and the perception and comprehension of the threat, there are two acts comprising the constituent and material elements of the offense—speaking and perceiving. Kansas has subject matter jurisdiction over a charge for criminal threat if either one or both of those elements occur in Kansas. *State v. Woolverton*, ___Kan.___ (June 8, 2007).

***TERRY* ALLOWS ONLY FOR A PAT DOWN FOR WEAPONS, NOT EVIDENCE**

Officers receive a call about a disturbance at a motel involving a white woman and a black man. The two were last seen walking from the motel. Officer Cornwell arrived and saw two people matching the description given walking near the

 (Continued on page 24)

More Poetic Justice

Federal Judge Sam Sparks of Austin has had another inspired burst of poetic talent. In *Keystone Media International, L.L.C. v. David B. Hancock* (Case No. A-06-CA-594 SS) he entered the following order:

BE IT REMEMBERED on this 25th day of April 2007 the Court reviewed the file in the above-styled cause, and specifically the defendant Hancock's Motion for Protection filed April 23, 2007, and *after reading it a second time to make sure it was not a practical joke*, the Court enters the following:

Stallions can drink water from a creek without a ripple;
The lawyers in this case must have a bottle with a nipple.

Babies learn to walk by scooting and falling;
These lawyers practice law by simply mauling

Each other and the judge, but this must end soon
(*Maybe facing off with six shooters at noon?*)

Surely lawyers who practice in federal court can take
A deposition without a judge's order, for goodness sake.

First the arguments about taking the depositions at all,
And now this—establishing their experience to be small.
So, let me tell you both and be abundantly clear;
If you can't work this without me, I will be near.

There will be a hearing with pabulum to eat
And a very cool cell where you can meet.

AND WORK OUT YOUR INFANTILE PROBLEM WITH THE DEPOSITION.

IT IS ORDERERED that the Motion to Dismiss is DISMISSED.

Signed this 25th day of April 2007.
Sam Sparks, United States District Judge

Court Watch

(Continued from page 23)

motel. The officer recognized the defendant from prior contacts. Cornwell stopped his patrol vehicle to talk to the defendant, while his partner talked to the female.

As Officer Cornwell approached the defendant, he asked him if he had any weapons on him and told him that he was going to pat him down. While patting him down, Officer Cornwell also asked the defendant if he had anything illegal on him. The defendant replied that he had marijuana in his pocket. Cornwell asked if he could search the defendant's pocket, and the defendant consented. Cornwell found a small bag of marijuana. Cornwell arrested the defendant for possession of marijuana.

In *State v. Burton*, ___Kan.App.2d ___(June 8, 2007), the Court of Appeals reversed the defendant's conviction finding that Cornwell could not articulate in his testimony any reason why he feared for his safety, justifying a pat down search of the defendant. In fact, the testimony suggested that Cornwell always pats down for weapons, regardless of whether or not he has a particularized fear for his own safety. The Court found that based on the case law, particularly *Terry v. Ohio*, 392 U.S. 1 (1968) and *Ybarra v. Illinois*, 444 U.S. 85, 93-93 (1979), *reh. denied* 444 U.S. 1049 (1980), the law does not allow a generalized "cursory search for weapons" or any search whatsoever for anything but weapons.

Since the officer was not in fear for his safety, he had no basis to do a pat down search. The request for consent was virtually simultaneous with the illegal pat-down. There was no real break between the two. Therefore, the Court could not find that the resulting statement and consent to search were voluntarily given. The evidence and statements must be suppressed as fruit of an illegal search.

MUTUAL MISTAKE INSUFFICIENT REASON TO PERMIT PLEA WITHDRAWL

Defendant pled guilty to criminal threat, a severity level 9 felony. Both he an the prosecutor believed his criminal history score was a D, which was presumptive probation. The judge advised him that the penalty range was 5 to 17 months. After being told by the parties that the defendant's criminal history score was D, the judge advised the defendant that his range would be 11 to 13 months, but that the judge did not have to impose probation. The defendant, after consulting with counsel, indicated he understood and "that is fine." After the PSI was received it was determined that the defendant was a B, making him ineligible for probation. Defendant was sentenced to 14 months in prison. Although the defendant challenged his criminal history, the Court took judicial notice that the defendant had accepted a similar PSI in a prior case without objection. The defendant could not disprove the prior PSI, the range was in the range the Court advised the defendant at the time of the plea, therefore, the defendant was not allowed to withdraw his plea. *See, State v. Schow*, ___Kan.App.2d ___ (June 15, 2007).

PASSENGER CAN CHALLENGE CONSTITUTIONALITY OF TRAFFIC STOP

Officers encountered a parked Buick with expired tags. After checking, they learned that the an application for renewal was being processed. The officers saw the car again later in the day with a seemingly valid temporary permit on it. The officers decided to pull the vehicle over to verify that the permit matched the vehicle, although they admitted there was nothing unusual about the permit or the way it was affixed. They asked the driver for identification and noticed one of the passengers was a person they knew to be a parole violator (Brendlin). They verified this and that he had a warrant for his arrest. Once backup arrived, the officer asked Brendlin to step out of the vehicle at gunpoint and announced he was under arrest. In a search incident to arrest, they found a syringe cap. After a pat down of the driver, they found marijuana and a syringe. After a search of the car, they found tubing, a scale and other things used in the manufacture of methamphetamine. Brendlin was charged with possession and manufacture of methamphetamine.

Brendlin moved to suppress all evidence found on the basis that the stop was unlawful and therefore he was unlawfully seized. In *Brendlin v. California*, ___U.S. ___(June 18, 2007), the United States Supreme Court held that when police make a traffic stop, a passenger in the car, like the driver, is seized for Fourth Amendment purposes and may challenge the stop's constitutionality. The question becomes whether a reasonable person in the passenger's situation would have felt free to leave or decline the officer's request. This was a unanimous decision. Brendlin walks.

RIGHT TO CONFRONTATION IS NOT FORFEITED BY AGE OF VICTIM

Defendant was accused of sexually molesting a three year old girl. Her statements about the abuse were videotaped and admitted during his trial. The girl was unavailable to testify at the trial due to her young age and inability to understand her duty to tell the truth. The State argued that even if the videotape of her statement was otherwise inadmissible due to its testimonial nature (see *Crawford v. Washington*, 541 U.S. 36, 158 L. Ed. 2d 177, 124 S. Ct. 1354 (2004)), the defendant forfeited any such right to confrontation due to the age of his victim. The prosecution argued that where a defendant assaults a young child who is incapable of testifying at trial, the "forfeiture doctrine" should apply.

In *State v. Henderson*, ___Kan. ___ (June 22, 2007), the Kansas Supreme Court refused to extend the "forfeiture doctrine" espoused in *State v. Meeks*, 277 Kan. 609 (2004) (where the defendant murdered the witness) to a victim that is unable to testify due to age.

(Continued on page 25)

Court Watch

(Continued from page 24)

SENTENCE PRONOUNCED FROM BENCH RULES OVER JOURNAL ENTRY

A criminal sentence is effective upon pronouncement from the bench; it does not derive its effectiveness from the journal entry. A journal entry that imposes a sentence at variance with that pronounced from the bench is erroneous and must be corrected to reflect the actual sentence imposed. *Abasolo v. State*, ___Kan. ___ (June 22, 2007). In *Abasolo*, the judge refused to change the journal entry. He believed it was actually correct because he had erroneously calculated time when he pronounced the sentence from the bench. The Supreme Court found that the court's intent at the time the sentence is pronounced is irrelevant.

LAWRENCE SMOKING BAN UPHELD

In *Steffes v. City of Lawrence*, ___Kan. ___ (June 22, 2007) the Kansas Supreme Court unanimously , found that state law had not preempted the City of Lawrence from regulating smoking. On the contrary, the court found *"the legislature has invited cities to regulate smoking in public places to the maximum extent possible."* The Court observed that "*the legislature has set a floor, but not a ceiling, for how much a city should regulate smoking."*

The Court further found that ordinance was not unconstitutionally vague. The Court stated that the ordinance conveys to a person of common intelligence *"sufficient definite warning and fair notice as to the prohibited conduct."*

"BONG HITS 4 JESUS" BANNER AT SCHOOL EVENT NOT PROTECTED SPEECH

At a school-sanctioned and school-supervised event, the high school principal (Morse), saw students unfurl a banner stating "BONG HiTS 4 JESUS," which she regarded as promoting illegal drug use. Consistent with established school policy prohibiting such messages at school events, Morse directed the students to take down the banner. When one of the students who had brought the banner to the event (Frederick) refused, Morse confiscated the banner and later suspended the student. The case made it all the way to the United States Supreme Court which in an 8-3 decision held in *Morse v. Frederick*, ___U.S. ___(June 25, 2007) that because schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use, the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending Frederick

CONDUCT SUSCEPTIBLE TO INNOCENT EXPLANATION MAY CREATE REASONABLE SUSPICION IN EYES OF TRAINED OFFICER

In *State v. Cook*, __Kan.App.2d ___ (June 29, 2007), a split Court of Appeals found that conduct susceptible of an innocent explanation nevertheless may cause a police officer, trained in drug enforcement and familiar with the drug history of the area, to harbor a reasonable and specific suspicion of illegal drug activity that needs further investigation. In this case trained officer in high crime area observes two trucks with one person getting in the other truck at a gas station for a short period of time. Officers eventually stop the truck and find stacks of money and bags of crack cocaine.

Justice Greene wrote a strongly worded dissent, alleging that the majority has created a new standard in the case of *Terry* stops, that being that the "mere hunch of a trained police officer" can rise to the level of reasonable suspicion of a stop. He went on to write:

"Let me make clear the slippery slope upon which the majority would launch our reasonable suspicion analyses: so long as the officer effecting the stop is sufficiently trained and experienced, his affirmative statement that he alone perceived that a crime had been, was being, or would be committed is sufficient to support reasonable suspicion for purposes of the Fourth Amendment of the United States Constitution, even if the objective facts would appear to reflect totally innocent conduct to a reasonable prudent person. I truly fear that this development will serve to license unbridled deprivation of the comprehensive right of personal liberty intended to be protected by the Fourth Amendment."

GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE

In *State v. Hoeck*, ___Kan.___(July 6, 2007), the Kansas Supreme Court examined its cases post *United States v. Leon*, 468 U.S. 897 (1984), and overruled several cases which it found had effectively and improperly nullified the good faith exception of *Leon*.

Leon had held that when officers are acting in reasonable reliance on a search warranted issued by a detached and

(Continued on page 26)

2007 MUNICIPAL COURT JUDGES CONFERENCE

EVALUATION SUMMARY

Ranking of Programs	**Scale 1-5**
Collateral Consequences	4.4
Trial Proceedings	4.2
Nuts and Bolts	4.0

Court Watch

(Continued from page 25)

neutral magistrate, which is ultimately determined to be unsupported by probable cause, the exclusionary rule will not bar the admission of the evidence recovered. This has become known as the "good faith" exception to the exclusionary rule. The *Leon* court did find that this reliance on a magistrate's determination does have certain boundaries. It recognized at least three situations when deference would not be accorded the magistrate's determination: (1) the affidavit is knowingly or recklessly false; (2) when the magistrate is not neutral, but is merely a "rubber stamp" for police; or (3) the affidavit does not provide the magistrate with a substantial basis for determining the existence of probable cause.

Condition number three from *Leon* is fodder for the discussion in *Hoeck*. The Kansas Supreme Court found that through language used and holdings in some of its prior cases, it could be concluded that the Kansas courts had erroneously interpreted number (3) above to mean that if there was not a substantial basis to find that there was probable cause to support the affidavit, there was no good faith exception. However, the Court in *Hoeck* said, to hold such a position would in effect nullify the good faith exception. *Leon's* third exception, as further modified in *Leon*, means that the affidavit is so lacking in **any** indicia of probable cause as to render any magistrate's belief in its existence entirely unreasonable, not simply that there was not a substantial basis to find probable cause. Therefore, the Court states that this will be the rule in Kansas, and all cases to the contrary are overruled.

ONCE CITY CHARTERS OUT OF A STATE STATUTE IT CAN AMEND REGULAR ORDINANCES THAT SUBSTITUTE FOR SAID STATUTE WITHOUT ADOPTING A CHARTER ORDINANCE FOR EACH AMENDMENT

The City of Wichita was the subject of a class action law suit as a result of its method of amending the amount of court costs assessed by way of a city ordinance. The City had adopted a charter ordinance exempting it from the provisions of K.S.A. §12-4112, which prohibits cities from assessing court costs. It then adopted a regular ordinance setting the amount of court costs to be assessed. As that amount was changed from time to time, the City simply amended the ordinance and did not adopt another charter ordinance. This practice was challenged in *Farha v. City of Wichita*, ___ Kan. ___ (July 13, 2007).

The plaintiff's argued that City must include the "substitute provisions" (to wit: the specific schedule of court costs) enacted by the City in the body of the charter ordinance itself, therefore necessitating a new charter ordinance each time a change was made in the "substitute provisions." Likewise, whenever the state statute from which the city exempted itself, was amended, the plaintiff's argued that City must adopt a new charter ordinance exempting it from same.

In *Farha*, the Supreme Court first reiterated that the Kansas Code of Procedure for Municipal Courts is not uniformly applicable, and therefore cities are free to charter out of its provisions.

Next, it held that the City's practice was proper. As long as the charter ordinance sets out the statute from which the city was exempting itself, that it was adopting substitute provisions and where they could be found, the City had complied with the law.

The fact that the state statute is later amended, does not effect the validity of the substitute provisions adopted by the City. The City's charter ordinance chartered out of K.S.A. §12-4112 "and any amendments thereto."

This case is very helpful as a resource if you want a complete discussion of home rule powers of cities in Kansas.

REQUEST FOR COUNSEL MUST BE MADE AFTER COMPLETION OF BREATH TEST TO BE EFFECTIVE

Defendant was arrested for DUI. He was given the Miranda warnings. He refused to perform field sobriety tests and asked to speak to an attorney. He was then taken to the station for a breath test, which he agreed to take. He did not request an attorney again after the test. He was not provided with the opportunity to speak with an attorney.

In *State v. Tedder*, ___Kan.App.___(July 20, 2007) the Court of Appeals reiterated prior case law to find that there is no constitutional right to consult with an attorney prior to submitting or refusing a breath test. Asking a defendant whether he or she will submit to a test does not constitute custodial interrogation. The request for counsel must be made after completion of the breath test before there can be a violation of a defendant's statutory right to converse with an attorney.

THE IMPLIED CONSENT NOTICE PROVISIONS ARE MANDATORY NOT DIRECTORY

Defendant was arrested for DUI. When he was taken to the station for a breath test the officer read him an outdated implied consent advisory. The advisory read was the one used when the 5 year decay of DUI convictions was in place. The defendant agreed to take the test.

In *State v. Kogler*, ___Kan.App.___(July 20,2007), he asked the Court to support the suppression of the breath test results due to the erroneous implied consent notice. The Court found that the advisory did not give the defendant adequate notice of the consequences of taking or refusing the test because it stated that the defendant only needed to be concerned about convictions in the preceding 5 years, when in fact driver's license sanctions would be based on convictions over the defendant's lifetime. Even though the

(Continued on page 27)

Court Watch

(Continued from page 26)

State argued that the error was harmless because the defendant had no prior convictions, the Court found that the notice provisions were mandatory and had to be *substantially* complied with regardless of whether the effect was harmless.

REQUEST FOR JUDICIAL REVIEW OF DRIVER'S LICENSE ACTION MUST CONTAIN THE PETITIONER'S MAILING ADDRESS OR THE COURT HAS NO JURISDICTION TO REVIEW THE AGENCY ACTION

Pursuant to K.S.A. 8-259(a), a person whose driver's license has been suspended by the Kansas Department of Revenue may obtain review of the suspension order by the district court. The review is to be in accordance with the Act for Judicial Review and Civil Enforcement of Agency Actions. Said Act requires that that the request for review contain the petitioner's mailing address. If it does not, the district court has no jurisdiction to review the agency action according to *White et al. v. Kansas Department of Revenue,* ___Kan. App. _____ (decided September 15, 2006, approved for publication July 13, 2007).

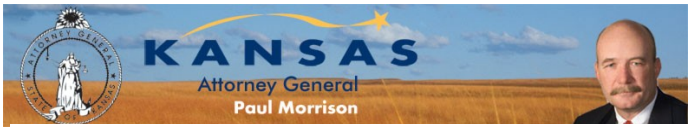
PROFFER STATUTE UNCONSTITUTIONAL AS IT APPLIES TO CRIMINAL CASES

K.S.A. 2006 Supp. §22-3437 allows the prosecution to submit an intent to proffer lab test results in a criminal case. The defense is required to object to the proffer within 10 days and state reasons for the objection or the lab results are admitted. This statute is often used in courts throughout the state for submission of the blood test results in DUI cases, since they are all tested in Topeka.

In *State v. Laturner*, ___Kan. App.2d ___(July 27, 2007) the Kansas Court of Appeals held that K.S.A. 2006 Supp. §22-3437 is unconstitutional as it applies to criminal cases in light of *Crawford v. Washington*, 541 U.S. 36 (2004). The Court presents an extensive review of how such results are handled in other states post-*Crawford*. It finds that lab test results prepared for prosecution of the case are testimonial. Therefore, the defense must be given an opportunity to cross-examine the person conducting the test. To admit it without cross-examination undermines the defendant's Sixth Amendment right of confrontation as explained in *Crawford*. The Court left intact the application of the statute in civil cases.

THE CONFRONTATION CLAUSE GUARANTEES AN OPPORTUNITY FOR EFFECTIVE CROSS-EXAMINATION

An 11 year-old victim of aggravated indecent liberties was called to testify at the preliminary hearing. About two-thirds of the way through cross-examination she began crying so violently that she was unable to continue. Due to the documented psychological effect on her of testifying, she was deemed unavailable at trial. The question in *State v. Noah*, ___Kan. ___(July 27, 2007) was whether **partial** cross-examination is sufficient under *Crawford v. Washington*, 541 U.S. 36 (2004). The Court noted that while *Crawford* requires an opportunity for cross-examination before hearsay can be admitted, it provides no guidance for how much is required to afford the defendant adequate cross-examination. The Court found that this was not sufficient cross-examination and in the future a case-by-case determination would have to be made. However, the Court emphasized that it was **not** saying that cross-examination had to be allowed in whatever way and to whatever extent the defense might wish.



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

AG OPINION NO. 2007-12
JUNE 19, 2007

TAMPERING WITH A LANDMARK

The crime of tampering with a landmark (K.S.A. 21-3724) requires proof that a person willfully and maliciously removed or altered a monument. A land surveyor does not act with malice when the land surveyor, in an effort to obtain approval of a subdivision plat by the county surveyor (as required by K.S.A. 58-2001) places an existing corner monument in concrete. Given the lack of guidance from the Kansas appellate courts, the dearth of legislative history, and the apparent diversity of opinion in the land surveying community regarding K.S.A 58-2001, we have no basis upon which to provide an opinion whether this statute requires placing existing corner monuments in concrete.

Editor's note: *K.S.A. 21-3724 is identical to POC 6.9 .*

AG OPINION NO. 2007-15
JULY 6, 2007

USE OF PROCEEDS OF SALE OF FORFEITED ITEMS

Forfeiture funds may be used to purchase additional law enforcement vehicles and equipment as well as providing additional law enforcement education and training but only if such purchases are for additional and special purposes and not to replace old vehicles or cover other normal operating expenses. Such proceeds cannot be used to fund capital improvement costs to a county building and should never be considered a source of revenue to meet normal operating expenses of the sheriff's office or county.

Court Watch

NUTS and BOLTS

Question: Can parents be charged as accessory's to their minor child's curfew violations?

Answer: Probably not, unless your city has adopted an ordinance making them responsible.

While there are some provisions in the traffic code holding adults responsible for the actions of minors (See, STO 197/ K.S.A. 8-263 providing criminal responsibility to any person who "causes or knowingly permits" —so those two phrases must mean different things—his child or ward to drive a vehicle when not authorized to do so) there are no similar provisions for non-traffic-related offenses. *See also*, K.S.A. §8-222 (2000) which sets out liability for damages caused by allowing a person under the age of 16 to operate one's car.

However, this is not a new concept in the realm of non-traffic cases. K.S.A. §21-3205 (POC 1.2) provides for the criminal liability of the offenses of another if one intentionally aids, abets, advises, hires, counsels or procures another to commit a crime. K.S.A. §60-3331(b) (2005) provides that a parent is civilly liable for the actions of their child who commits a theft. K.S.A. §38-120 (2000) provides that a parent can be responsible for injury or damages caused by their child. Therefore, there does not seem to be anything that would prohibit a city from adopting an ordinance similar to K.S.A. §8-263 making a parent criminally responsible for "causing or knowingly permitting" their child to violate curfew.

In fact, the City of Wichita has such an ordinance. W.M.C. §5.52.020** states:

> *Except in circumstances set out in Section 5.52.010 (b), it shall be unlawful for the parent, guardian, or other adult person having the care and custody of a minor under the age of eighteen, to permit such minor to loiter, idle, wander, stroll, or play in or upon the public streets, highways, roads, alleys, parks, play grounds or other public grounds, public places or public buildings, places of amusement or entertainment, eating places, vacant lots or other place unsupervised by an adult having the lawful authority to be at such place during the following periods of time:*
>
> > *(1)For minors age 15 and under between the hours of 11:00 p.m. on any day and 6:00 a.m. of the following day, except on Fridays and Saturdays when the hours shall be twelve midnight to 6:00 a.m. the following day;*
> >
> > *(2) For minors age 16 and 17, between the hours of twelve midnight on any day and 6:00 a.m. on the following day, except weekends when the hours shall be one a.m. to 6:00 a.m. on any Saturday or Sunday.*

The penalty for parents is set out in W.M.C. §5.52.030(b):

> (*b) Any parent, guardian, or person having the care and custody of a child who shall permit or by insufficient control allows such child to violate the provisions of this chapter after receiving written notice that such child has previously violated such provisions shall be subject to a mandatory minimum fine of $50 and a maximum fine of $500, plus costs for the first offense and a mandatory minimum fine of $100 and maximum fine of $500, plus costs for a second or subsequent offense, with a request to the appropriate court that consideration be given to community service for the offending juvenile as an alternative to any set fine.*

**This is provided solely as an example and is not offered as a suggested ordinance.

Question: When a municipal judge retires, does he or she still have the authority to marry people?

Answer: No.

K.S.A. 2006 Supp. §23-104 sets forth persons authorized to officiate at weddings. It states:

> *(b) The following are authorized to be officiating persons:*
>
> *. . .*
>
> *(3) any judge or justice of a court of record;*
>
> *(4) any municipal judge of a city of this state; and*
>
> *(5) any retired judge or justice of a court of record.*

Since it does not state any "retired" municipal judge of a city of this state, it must be assumed that retired municipal judges are not authorized to officiate at weddings.

Question: Can a municipal judge require a court appearance for a speeding infraction alleging an excessive speed, e.g. 30 mph over the speed limit, as a mandatory court appearance?

Answer: No.

Since it is classified as an ordinance traffic infraction, the person must be allowed to simply mail in a scheduled fine. *See*, K.S.A. §12-4305, K.S.A. §12-4113 (definition of "ordinance traffic infraction"), K.S.A. §8-2116 and K.S.A. §8-2118.

(Continued on page 29)

Nuts and Bolts

(Continued from page 28)

Question: Are municipal judges required to notify the KBI when they order defendants into alcohol and drug treatment in light of the provisions in the conceal and carry permit law that denies a permit to persons who have been committed to alcohol and drug treatment?

Answer: No.

The Personal and Family Protection Act, also known as the conceal and carry law, provides that a person may not be issued a firearm license if he or she has been ordered by a court to receive treatment for an alcohol and substance abuse problem pursuant to K.S.A. §59-29b66. *See*, K.S.A. 2006 Supp. §75-7c04(7). K.S.A. §59-29b66 involves involuntary commitments for alcohol and drug abuse under the probate code and requires district courts to notify the KBI of such commitments. There is no similar provision requiring reporting by either the district court or the municipal courts when such treatment has been ordered as part of a criminal sentence or as a condition of probation, parole or diversion.

The PFP Act does provide that if a person has, within the preceding 5 years, been convicted or placed on diversion in any court for a violation of the uniformed controlled substance act (in municipal courts, that would most likely be possession of marijuana) or has been convicted or placed on diversion for DUI two or more times (in any court) or has been convicted of domestic violence, then the person is ineligible for a concealed firearm permit. *See*, K.S.A. 2006 Supp. §75-7c04(5). It also disqualifies any person convicted of or placed on diversion for a felony. *See*, K.S.A. 2006 Supp. §75-7c04(4). The reporting of these convictions to the KBI would "catch" many of the people municipal judges order into treatment. However, there are still first time DUI offenders that are ordered into treatment or persons convicted of other unlisted non-felony crimes that may be ordered into either alcohol and drug treatment or mental health treatment as part of their sentence or probation, parole or diversion, that are not ineligible to carry a firearm under the law. Such action occurs at all jurisdictional levels (city, state and federal).

Question: Is the Court required to provide an interpreter for a non-English speaking defendant when it is a "fine only" case?

Answer: Yes.

K.S.A. §75-4351 (as it applies to municipal court cases) states that when person's primary language is not English a qualified interpreter **shall** be appointed for **any** court proceeding involving such person **and** such proceeding may result in the confinement of such person or the imposition of a penal sanction against such person or prior to any attempt to interrogate or take a statement from a person who is arrested for an alleged violation of any city ordinance. Defendant's are not obligated to request an interpreter before one is provided. The duty rests with the court.

Blacks Law dictionary equates the terms "penal sanction" and "criminal sanction" and states that it includes fines and restitution. "Penal" is defined as "of, relating to, or being a penalty or punishment, esp. for a crime." Therefore, given its common meaning, penal sanction would include fines, restitution or jail. Penal sanction must mean something different than "confinement" because the statute uses the two terms separately ("may result in confinement...or imposition of a penal sanction").

Even if this statute did not exist, some. courts around the country have found that a defendant's constitutional right to confront witnesses, present a defense, testify in his own behalf, right to counsel and right to due process of law may be violated if he or she is not able to understand the proceedings due to a language barrier. *See also*, Rydstrom, Jean, *Right of Accused to Have Evidence or Court Proceedings Interpreted*, 36 A.L.R.3d 276 (1971).

K.S.A. §75-4352 further states that any interpreter so appointed will be paid out of court funds. It goes on to state that *"[a]t no time shall the fees for interpreter services be assessed against the person whose primary language is one other than English or who is deaf, hard of hearing or speech impaired."*

Question: How long must we keep old records?

Answer:

50 years: All misdemeanors including, reckless driving, driving while suspended, no driver's license, failure to stop at an injury accident, eluding a police officer and transporting an open container.

Everything else: Your discretion, although may want to make sure you coordinate with your city's record retention policy and keep in mind that the Department of Revenue, Division of Vehicles keeps convictions on a person's record for at least 3 years.

You do not have to save the original (even those you have to keep for 50 years). You can reproduce it on microfilm or digital imaging and destroy the original. *See*, Kansas Supreme Court Administrative Order 138, K.S.A. §12-122 and K.S.A. §12-123.

(Continued on page 30)

Nuts and Bolts

(Continued from page 29)

Question: I have not adopted a community service program because I've been told it will subject the city to civil liability if the worker is injured or injures someone else. Is that true?

Answer: Not exactly.

K.S.A. §60-3614 states:

> (a) If an adult offender or juvenile offender has been sentenced to perform community service work by the court, and such offender is performing such services for a governmental entity, private not-for-profit corporation, or charitable or social service organization, such governmental entity, private not-for-profit corporation, or charitable or social service organization or any employee or volunteer of such entities shall not be liable for damages in a civil action for injuries suffered by such offender or for acts or omissions by such offender unless such governmental entity, private not-for-profit corporation, or charitable or social service organization or any employees or volunteers of such entities actions constitute willful or wanton misconduct or intentionally tortuous conduct. The provisions of this section shall not apply to damages arising from the operation of a motor vehicle as defined by K.S.A. 40-3103, and amendments thereto.
>
> (b) As used in this section, "community service work" means public or community service performed by a person (1) as a result of a contract of diversion or immediate intervention entered into by such persons as authorized by law, (2) pursuant to the assignment of such person by a court to a community corrections program, (3) as a result of suspension of sentence or as a condition of probation pursuant to court order, (4) in lieu of a fine imposed by court order or (5) as a condition of placement ordered by a court pursuant to K.S.A. 38-1663, and amendments thereto.

There is also a provision in K.S.A. 2006 Supp. §44-511(b)(6)(B) that states that under the worker's compensation laws, the average gross weekly wage of any person performing community service work is deemed

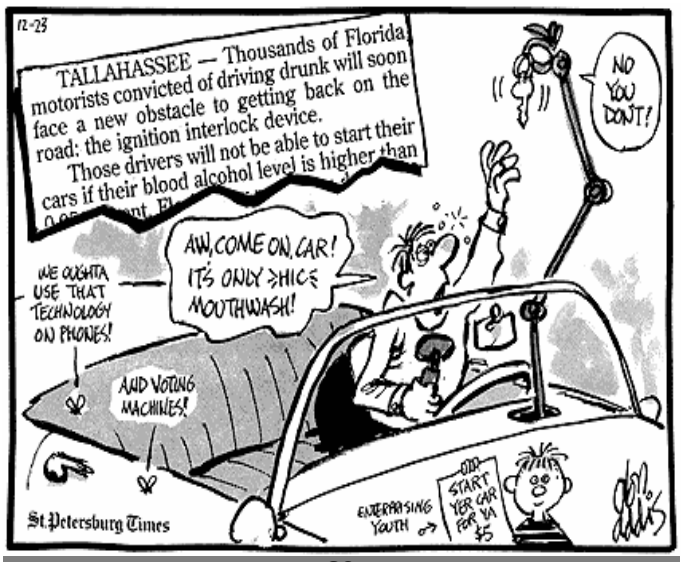
Past President's Page

(Continued from page 6)

4. **Think of the successes**. Sure, there are failures and frustrations. But instead of thinking of the habitual offender whom you see every three months of your career, think of all the ones who have passed through, never to be seen again. Think of the ones who took that weekend in jail as a wakeup call, and made appropriate changes, or the defendants who completed the diversion program, got their degree, and got a good job. In a college town like mine, I've seen many go through the system, some eventually go to law school or medical school, and their criminal experience soon became a youthful indiscretion in the rear view mirror. Think of the ones who did great on the community service work and the report came back where the administrator of the program raved about their work and attitude. And, if we are doing it right, just think of all the people who came before us, probably with it being their first contact with the legal system, who received due process.

5. **Talk with another judge, attorney or friend**. Get together or e-mail someone you trust and can confide in. I have friends who are district court judges with whom I have talked about these issues. They know what it feels like. KMJA members are also a good source. Or, talk to an attorney friend about your burnout symptoms. However, if it's an attorney, the better practice would be to limit close attorney friends to those who do not practice before you.

So, address your malaise before it gets the best of you. If that frayed nerve feeling exists for too long you will be more susceptible to impulsiveness, rash judgments, irritability, improper statements from the bench, and eventually a violation of the Code of Judicial Conduct. As always, I am interested in any experiences KMJA members have had with burnout. E-mail me at rmcgrath@ci.lawrence.ks.us if you have any comments. I would love to hear them.



Technology Corner-What's New?

TRACKING SYSTEM HELPS PARENTS KEEP TABS ON TEEN DRIVERS

Reprinted from Kansas City Star, June 16, 2007

Parents trying to keep track of their teenage drivers are about to get a little more help — from the heavens.

Safeco Insurance later this month will roll out a new product called Teensurance that relies on a global positioning system device attached under the dashboard to pinpoint a teen's car at any moment. If your teen is out past curfew, on an interstate highway against your expressed orders, or is burning rubber down side streets, for example, the tracking device will notify you immediately on the Internet, your home or cell phone, or other mobile devices.

Teensurance is the latest example of a series of high-tech products that use global positioning satellites to help create a safer environment for teen drivers.

"New technology is giving parents the opportunity to have safer drivers," said Loretta Worters, a vice president at the **Insurance Information Institute**, a trade group.

Car crashes are the leading cause of death for 16- to 20-year-olds in the United States. About 6,000 teens die from crashes every year, according to the **National Highway Traffic Safety Administration**. In addition, newly licensed 16-year-olds have a higher accident rate than any other age group. That was what prompted Safeco's program to give parents more assurance about their youngsters' driving behavior. Starting June 27, the service will be available to Safeco's 4.3 million customers in 44 states, including Kansas and Missouri. The cost will be $14.99 a month, or about $180 a year in additional premiums. That price is guaranteed for two years.

In return, the insurer will install under the car's dashboard a beacon-type device about the size of a deck of cards. Customers then open an online account, where they set up driving limitations with their teen on such things as speed, distance, location and curfew.

For example, a parent could request to be notified immediately if their teen takes the car more than 30 miles away from home, or if the driver exceeds 70 mph for more than 30 seconds. Safeco hopes these instant alerts will prompt parents and teens to discuss driving habits when the alerts are still fresh in everyone's mind.

The Teensurance service includes a 24/7 roadside assistance, and if the vehicle has automatic door locks, parents can unlock the car remotely if the keys get locked inside. Safeco said it will not see individual driving information, so the system can't be used to set specific customer rates. However, Safeco said it may use the broad data to determine whether Teensurance customers have fewer accidents than those not in the program, which could lead to lower premiums for young drivers.

When testing the service, Safeco found that despite some initial concerns over privacy issues, teens said they gained their parents' trust faster to gain additional driving freedoms. Worters said Teensurance can promote communication between young drivers and parents. She also predicted that this technology will catch on.

Indeed, **American Family Insurance** recently introduced the Teen Safe Driver Program, which features the DriveCam, a video surveillance system that captures driving behavior such as swerving, hard braking, sudden acceleration and collisions. The film clips are sent wirelessly to the insurer's technology partner, where the material is analyzed and scores are assigned for risky behavior. A report on the teen driver is then sent to the parents.

The service is available free for one year to customers in Indiana, Minnesota and Wisconsin so far.

In April, **AIG** began testing a GPS program in six states and expects to introduce it nationally soon.

Besides insurance companies, other companies, such as **Alltrack USA**, **Brickhouse Security** and **Millennium Plus**, sell GPS driver tracking technology online.

For $209, Alltrack sells Travel Eyes, which features what the company calls "passive tracking."

(Continued on page 32)

Technology Corner

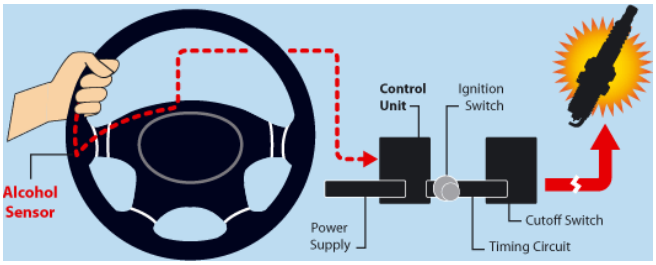
(Continued from page 31)

Rather than sending parents immediate alerts, this GPS device gathers driving information that can be downloaded at a later time.

JAPAN V. DUI

Reprinted from Parade Magazine, June 24, 2007

Japanese carmakers have been developing ways to reduce the number of accidents involving drivers under the influence of alcohol. Toyota is testing a car (set to debut in 2009) whose engine shuts down if the driver is drunk. It features sensors on the steering wheel that measure the alcohol level in the driver's sweat. Wearing gloves? A dashboard camera checks for dilated pupils, and a computer monitors for erratic steering. Meanwhile, Nissan is working on a built-in Breathalyzer that a driver must blow into before starting up. A similar device already is used in the U.S. for some DUI offenders.



STAR CHASER

Police vehicles shooting laser GPS tracking devises at fleeing cars? Sound like something from a science fiction movie? Check out www.starchase.org to find out about some of the newest technology in police work. The LAPD is beta testing the system which actually fires a GPS device from the police vehicle and attaches it to fleeing cars. The police car can then back off and track the car on the computer, without participating in a high-speed and dangerous chase.

NEW INDIGENT TABLES ADOPTED

Effective July 1, 2007 the State Board of Indigent Defense Services adopted the 2007 Federal Poverty Guidelines. The new income guidelines for appointment of counsel are:

Size of Family Unit	**Amount Allowed**
1	**$10,210**
2	**13,690**
3	**17,170**
4	**20,650**
5	**24,130**

Add $3,480 for each additional family member

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

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

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

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

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

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

Federal Poverty Guidelines can be found at: http://aspe.hhs.gov/poverty/07poverty.shtml

2007 KMJA Conference Highlights

Judge Brenda Stoss, *Salina* and Judge Steve Ebberts, *Topeka* present the finer points of judicial ethics.

Judges enjoy the night out activity at the Hutchinson Cosmosphere.

UPDATES FROM THE DMV

Following are the questions and answers received from Marcy Ralston, Chief, Driver Control, Department of Revenue, Division of Vehicles at our spring conference.

1. ***What is the status of hardship licenses in Kansas?***

   There are no hardship licenses in Kansas.

2. ***Are we to mail in to the DMV any traffic diversions other than DUI?***

   No.

3. ***When will DMV require all municipal courts to do electronic filing of abstracts of tickets?***

   July 1, 2007.

4. ***If a DUI offender is convicted or pleads guilty, but then absconds prior to sentencing, should we still send in the conviction?***

   Yes. Under the "sentence" section simply put "failed to appear for sentencing."

5. ***Is a moped license still a possibility for a person who has a suspended driver's license?***

   Yes. However, only if the license is suspended for something other than DUI. If it is cancelled or revoked a moped license is not an option. *See*, K.S.A. §8-235(d) (Amended by House Sub. SB 35, Section 1). *See also, page 1, supra*.

6. ***Do you have an updated list of moving violations?***

   See, K..A.R. 92-52-9 and K.A.R. 92-52-9a

7. ***Defendant is in Court and tells the judge her driving privileges are suspended and asks the judge to give her restricted privileges so she can drive to work. The Court did not order the suspension for this defendant, so the judge tells the defendant she will need to contact Driver Control in Topeka to see whether restricted privileges are possible. Is this correct or can the judge make some order?***

   This is correct. The judge has no authority over a division-ordered suspension or a suspension by some other court.

8. ***A defendant is convicted under STO 195 (driving in violation of restrictions) and the judge orders suspension of driving privileges for 30 days and tells the defendant it is effective immediately and that the defendant will receive notice from Driver Control. The defendant does not receive a notice from Driver Control, so calls and is told by the Driver Control that the driver's license is not suspended. The defendant then calls the Court and wants clarification on the status of driving privileges. What should the defendant be told?***

   DMV currently has a backlog of 5 months in entering suspension orders. Therefore, in the situation presented, the suspension ordered by the judge will have already run by the time the DMV gets it on the persons record several months later. DMV is down 10 employees and backlogs cannot be avoided. Similarly, in the case where the DMV sets the period of suspension, (for example, MIP), it will be 5 months or more before the suspension will be placed on the driver's record.

9. ***When you suspend, why don't you give the driver a few days notice? For example, send the notice 3-4 days before the suspension takes effect?***

   Driver's should know a suspension is coming well before they get the letter. It is not a surprise. On a failure to appear suspension, they have already received a 30 day letter. On a breath test suspension, they have already received the implied consent advisory. On an MIP suspension, they have already been convicted by a judge and advised they are going to be suspended. On an insurance suspension, they are sent a letter asking for insurance information and advising that they will be suspended if they don't respond. Additional notice is not necessary.

(Continued on page 35)

Top Six Most Common Complaints Filed with the Kansas Commission on Judicial Qualifications in 2006

1. *Prejudice/Bias (51)*
2. *Denied Fair Hearing (39)*
3. *Delay in Decision Making (24)*
4. *Inappropriate Conduct (21)*
5. *Injudicious Temperament (18)*
6. *Inaprop. Personal Comment (16)*

Source: 2006 Annual Report, Kansas Commission on Judicial Qualifications

Updates from the DMV

(Continued from page 34)

10. When is a court allowed or mandated to suspend or restrict a driver's license and when will the DMV do it if we don't.

See chart below. All other suspension action is taken directly by the DMV with no court involvement other than reporting the offense.

11. If defendant states he/she obtained a driver's license, ID or permit under an alias name and/or DOB—what action is taken by DMV when so informed by the court? What if false DL or permit is suspended?

DMV now has a fraud unit, which will investigate. If is fraudulent, and they can verify it is fraudulent, the division will cancel the driver's license or identification card.

12. Can the municipal court get prior MIP/MIC diversions and convictions on accused persons?

The DMV has records of convictions, but it does not keep diversion information on MIP/MIC offenders.

13. When a driver's license is suspended for MIP and the defendant has an out-of-state license, who sends the suspension notice, Kansas or the licensing state?

For an out-of-state licensee, the conviction is forwarded to the person's licensing state for appropriate action.

(Continued on page 36)

Statute	Charge	Action Taken on Driver's License	Mandatory/ Discretionary	Who takes the Action
8-291 STO 195	Violation of any Restrictions (includes learner's permit)	First offense: suspend for at least 30 days but no more than 2 years Second Offense: suspend for at least 90 days but no more than two years.	Mandatory	Court. If court does not, DMV will send judge letter advising him or her that a suspension order must be entered. Judge sets dates of suspension.
41-727 POC 5.8	Minor in Possession of Alcohol	First Offense: 30 days Second Offense: 90 days Third or more: 1 year	Mandatory	Court. If court does not, DMV will send judge letter advising him or her that a suspension order must be entered. However, DMV sets the dates of suspension.
8-1566 STO 29 8-1568 STO 31 8-1606 STO 27	Reckless driving Eluding Fail to report an injury accident	90 day suspension for non-commercial vehicle; 1 year for commercial vehicle May restrict for up to one year in lieu of suspension for non-commercial drivers	Mandatory	Mixed. DMV suspends for 90 days and DMV sets dates of suspension, however 8-254(b) provides that the court may restrict in lieu of the suspension for a minimum of 90 days and a maximum of one year if the violation was in a non-commercial vehicle. Judge would set dates and terms of restriction. DMV will accept a *nunc pro tunc* during term of suspension if Court wants to lift the suspension and enter a restriction.
8-1599 STO 106	Transporting an Open Container-Second Offense	Suspend or restrict for one year	Mandatory	Court. If court does not, DMV will send judge letter advising him or her that a suspension order must be entered. Judge sets dates of suspension or restriction.
8-2117(a)	Any traffic offense* committed at a time when the person was under the age of 18	Suspend or restrict for up to one year	Discretionary	Court. Court may suspend or restrict for up to one year. Judge sets dates of suspension or restriction and is required to take driver's license from juvenile and forward it to DMV.
*"Traffic offense" is defined as any violation of the uniform act regulating traffic or any city ordinance that mirrors a provision of the act or any city ordinance that is not mirrored in state law but regulates the traffic on the roads.				

Updates from the DMV

(Continued from page 35)

14. When does the Court take the driver's license and send it to you?

With the exception of MIP, if you are taking any court-ordered action against the driver's license, send it in to DMV. *See*, K.S.A. §8-253.

15. Why are clerks told that suspensions should list all charges against a defendant? Why not suspend on the most serious charge only, to reduce the cost of reinstatement?

Courts are free to list whatever they want on the suspension form, however, K.S.A. 2006 Supp. §8-2110 states that when the municipal court notifies the division of vehicles of failure to comply with a traffic citation, "*the court shall assess a reinstatement fee of $50 for each charge on which the person failed to make satisfaction regardless of the disposition of the charge for which such citation was originally issued.*"

16. How long after issuance of a citation does a court have to obtain an administrative suspension for failure to appear?

DMV has no time period. Likewise, K.S.A. 2006 Supp. §8-2110 does not mandate a time limit. It simply states "*Upon receipt of a report of a failure to comply with a traffic citation...the division of vehicles shall...suspend the license of the violator until satisfactory evidence of compliance with the terms of the traffic citation has been furnished the informing court.*"

17. What actions are reportable?

All traffic convictions are recordable, although not all are moving violations. K.S.A. §8-2115(b) (2001), requires the municipal judge forward all convictions and bond forfeitures for violations of ordinances that mirror the provisions of the uniform act regulating traffic (movers and non-movers) to the DMV within 10 days of the conviction or bond forfeiture. Failure do so constitutes "misconduct in office" and can result in removal from office. For non-moving violations, the DMV assigns a 999 code which alerts it that said conviction is not to be placed on the person's driving record.

18. What about inattentive driving (STO 104), which has no equivalent statutory violation in the uniform act regulating traffic?

Since it does not have any counterpart in state law, you are not required to report inattentive driving convictions to the state. If you do send it in, and the person is an out-of-state driver, the DMV will forward the conviction on to the driver's licensing state.

19. What are the new rules for teen driver's licenses?

There are no new rules.

20. How does DMV handle learner's permit violations and convictions?

These would be handled the same as a violation of restrictions under K.S.A. §8-291 (STO 195), since the person is operating contrary to the restrictions placed on the instruction permit. The Court would be required to order a mandatory minimum 30 day suspension on a first conviction, mandatory minimum 90 day suspension on a second offense.

21. Regarding 14-15 year olds with no license, what action does DMV take if they apply for a license after they have been convicted of driving without a license?

Driving without a license is a moving violation, but it is not a suspend-able violation, so there would be no action taken. However, if the person has three or more traffic offenses prior to applying for a regular license at 16, he or she may be denied a license or granted only a restricted license until reaching the age of 17. *See*, K.S.A 2007 Supp. §8-237(g).

If the person has a farm permit and commits any violations of the farm permit, the person will lose the farm permit and will not be eligible to get any kind of driver's license for one year or until the person is 16, whichever is longer. *See*, K.S.A. §8-296(e) (2001).

22. After a DUI arrest, when does the mandatory suspension and/or restriction period start?

If no administrative hearing is requested, it is effective 30 days after service of the DC-27 (usually the date of arrest).

If a hearing is requested, it is effective 30 days after the hearing has been held if the suspension is upheld.

In both cases, if the last of the 30 days is a holiday or a Saturday or Sunday, the following business day will be considered the "30th" day. *See*, H.Sub. for SB 35, §4 and K.S.A. §8-1002.

DMV will send the person a letter setting out the start of the suspension and/or restriction period.

Legislative Updates

(Continued from page 12)

mined by the trustees of the law library, not to exceed $4.00 in all cases.

ENGLISH DESIGNATED OFFICIAL LANGUAGE OF KANSAS

HB 2140 designates English as the official language in Kansas for all public documents and official public meetings. No state agency or local government will be required to provide documents in a language other than English, but the may use other languages at the agency or the local government's discretion. It authorizes the use of Braille in signage and documents, as well as communication in American Sign Language to accommodate persons with disabilities. It requires local entities such as political subdivisions, community-based agencies, migrant worker groups and refugee resettlement programs designated by the State Board of Regents to offer English language classes; English language training, citizenship classes for non-native speakers; and to seek assistance from listed groups in expanding awareness of the available classes and training.

It does stress that governmental officers or employees may use a language other than English to comply with federal law (for example, the U.S. Constitution) and to protect the rights of parties and witnesses in civil or criminal action in a court in in an administrative proceedings. Therefore, it should be stressed that this new law in no way changes a court's responsibility to make sure that litigants and witnesses understand the proceedings and can meaningfully participate therein.

VERDICT PUBLICATION DEADLINES

Have an idea for an article? The Verdict welcomes all submissions from members. Or, if you would like to write an article, but don't know a topic, call Judge Arnold-Burger for some ideas. Publication deadlines for the next year are as follows:

Summer 2007 Issue: July 15, 2007
Fall 2007 Issue: October 30, 2007
Winter 2008 Issue: January 15, 2008
Spring 2008 Issue: April 15, 2008

ABA Judicial Division Traffic Court Seminar
October 9-12, 2007
Hotel Deca, University District
Seattle, Washington

IMPROVE THE OPERATION OF YOUR TRAFFIC COURT

Traffic courts affect more citizens than any other court. That's why every year, the ABA Judicial Division Committee on Traffic Court provides traffic court judges with first-rate educational programs and resources to help improve their court operations. We are continuing that tradition this year with our 2007 Traffic Court Seminar featuring several new and exciting presentations including Pre-Trial/ Pre-Sentence Release Issues, Court Security, Traffic Court and the Sovereign Citizen, along with a mock DUI trial. Additional course offerings are Pro Se Litigants, Sentencing Hard-Core Drunk Drivers, Judicial Ethics, Video-tape Evidence in DUI and Traffic Cases, Alcohol in the Human Body and Commercial Driver's License Law. Also new this year is the Technology Panel, including Passive Alcohol Sensors, Electronic Ticket Books, Black Box/Event Data Recorders and Electronic Monitoring.

Join judges and traffic court personnel from around the country to discuss the latest improvements in scientific evidence, technology, and traffic court law. You do not have to be a judge to attend!

More information about this program contact Eugenia Taylor at taylore@staff.abanet.org

Unpublished Opinions

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

AMENDMENT OF COMPLAINT TO CITE A DIFFERENT STATUTE, AFTER PROSECUTION HAS RESTED, IS PROHIBITED

Unpublished Opinion

Michael Wentz passed two vehicles at once on the highway and was not able to get back over into his lane until he had crossed the double yellow "no passing" lines (even though he had completed most of the passing maneuver in the broken line "ok to pass" area). He was stopped and charged with a violation of K.S.A. §8-1518 (identical to STO §40). This statute basically says you can't pass unless you can do so safely. The prosecution rested. During closing argument, Wentz argued that he had not violated the statute. When after questioning by the judge, it became apparent that K.S.A. §8-1520 (identical to STO §42), which also involved passing, may have been the more appropriate statute to charge, the prosecutor moved to amend to that statute. The Court allowed the amendment. Wentz appealed.

In *State v. Wentz*, Slip Copy, *unpublished*, 2007 WL 1413136, (Kan.App), decided May 18, 2007, the Court of Appeals found that since the amendment charged a different statute, it was improper.

The Court made clear its distaste for the prosecutor's action by harkening back to an 1897 case and quoting with approval the following language: *"The allowance of an amendment introducing a new and distinct cause of action after the issues had been joined and the trial begun* ***would be a questionable practice.***" [Emphasis added] Quoting, *State v. Krause*, 58 Kan. 651 (1897).

The Court points out the great lead way prosecutor's have in pre-trial amendments. Even amendments made in the middle of trial have been freely allowed in the caselaw, for example changing the date of an alleged offense to conform to the evidence. However, the Court seemed to draw the line in this case.

> *"We believe the specific language of K.S.A. 2006 Supp. §22-3201(e) controls. Although the K.S.A. §8-1518 and K.S.A. §8-1520 deal with substantially the same prohibited acts, they are different and are different crimes. It is possible if both statutes had been described under a single unlawful passing statute but in different subsections, the amendment might have been possible. However, that is not the case. We note that care should be given in deciding on a charge that is made against a person in criminal matters."*

Editor's note: *K.S.A. 20096 Supp §22-3201(e) is virtually identical to K.S.A. §12-4505 (2001), so the same ruling could be expected with regards to amendments in municipal court cases.*

EVIDENCE FOUND SUFFICIENT TO SUPPORT DUI CONVICTION

Unpublished Opinions

1. Defendant on motorcycle cut in front of another driver on the highway and hit an exit sign. Road conditions were excellent and it was a warm sunny day. There were no obstructions in the roadway which would have caused the collision. The driver he cut off stopped to render assistance and smelled alcohol on the defendant's breath. He also observed a can of beer in a brown sack about 6 inches from the motorcycle. Police officer noticed defendant's eyes were blood shot, also noticed the strong odor of alcohol, and that the defendant had trouble communicating and keeping his balance. He also saw the beer can in the sack, although no one ever tied the sack to the defendant. Defendant refused all dexterity tests and all breath or blood tests. *State v. Barbee*, Slip Copy, *unpublished*, 2007 WL 1529685 (Kan. App.), decided May 25, 2007.
2. Defendant was asleep in his vehicle at an intersection and the car was running and in gear. His responses to the police officer were labored, he was unsteady on his feet, and he performed poorly on the dexterity tests. The officer noticed the odor of consumed alcohol coming from his breath, his eyes were bloodshot and his speech slurred. Defendant admitted he had been drinking and refused the breath test. *State v. Thompson*, Slip Copy, *unpublished*, 2007 WL 1309603 (Kan. App. May 4, 2007).
3. Defendant was seen drinking from what appeared to be a brown beer bottle while driving. Before stopping the vehicle, police observed it driving northbound in what would normally be the southbound lane of a parking lot and stop in the middle of a driving lane in front of a drinking establishment at night. *City of Overland Park v. Hersh*, Slip Copy, *unpublished*, 2007 WL 1667120 (Kan.App. June 8, 2007).

(Continued on page 39)

Unpublished Decisions

(Continued from page 38)

4. Defendant cut off another driver in traffic. He smelled strongly of alcohol. A beer can rolled out of his car. He failed two field sobriety tests, had watery and bloodshot eyes, slurred or indistinct speech, and was unsteady on his feet. He had a visible head injury. He refused a blood draw at the hospital, once the nurse attempted to, but could not, hit a vein. *State v. Smith*, Slip Copy, *unpublished*, 2007 WL 1747891, (Kan. App. June 15, 2007).
5. Defendant stopped one lane over and two car lengths behind officer at stop light, even though he could have pulled forward to be side by side with officer. The officer did not immediately proceed through the light and the defendant held back until the officer moved his vehicle. He then drove very slowly until he was parallel to the officer, at which time he turned into a parking lot. When the defendant pulled into a parking lot, the officer circled around and also pulled into the lot. He parked a short distance away, parked the car and approached the driver on foot. He was not blocking the defendant's travel at all and did not have his emergency lights on at any time. As he approached the driver was waiving the keys to the car out the window and saying "The keys aren't in the ignition." He obtained identification and found the defendant's license was expired. He smelled the odor of consumed alcohol and the officer admitted to drinking at a nearby bar and admitted he shouldn't have been driving. He was arrested for DUI after the field sobriety tests and eventually tested at .140 at the station.

   In *State v. Bluma*, Slip Copy, *unpublished*, 2007 WL 2043581 (Kan. App., July 13, 2007) the Court found that the initial encounter with the defendant was voluntary, so it didn't matter that he had not observed a traffic violation prior to the contact. It only developed into reasonable suspicion and probable cause as the encounter progressed.

EVIDENCE FOUND INSUFFICIENT TO SUPPORT DUI CONVICTION

Unpublished Opinions

Defendant and his wife were traveling on separate motorcycles. Defendant's wife failed to use her turn signal once in a 10 block area. The officer stopped defendant's wife. Defendant also stopped. The officer asked the defendant to move along or go wait in a nearby parking lot, but defendant refused. The officer called in backup to deal with defendant. The backup officer smelled alcohol on the defendant's breath and the defendant admitted drinking. The defendant was coherent and cooperative and the only thing he noticed was the odor of alcohol. The original officer eventually gave defendant's wife a warning on the traffic infraction and told her she was free to go. The original officer then approached the defendant to talk to him "about obstruction and future charges if he were ever in that situation again."

The original officer asked for and received defendant's driver's license, which he kept. The defendant admitted to him that he had three beers. The officer did not smell any odor, did not observe bloodshot eyes, slurred speech, or any unsteady footing. The officer admitted that the only evidence he had was the defendant's admission to drinking. The officer asked the defendant to submit to a PBT. He did and the result showed a .11 alcohol concentration. He then asked him to take field sobriety tests. The officer was not satisfied with the results and arrested him, gave him the implied consent, and he blew .l0 at the station. Defendant was ultimately charged with a second time DUI.

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

DELAY IN EXECUTION OF WARRANT MAY CONSTITUTE WAIVER OF PROBATION VIOLATION

Unpublished Opinion

In March 2000 Brown was sentenced to 24 months probation and ordered to pay restitution on a worthless check charge. In November 2000, the State moved to revoke his probation for failure to comply with virtually every term of probation. He failed to appear at the hearing and in January 2001 a warrant was issued for his arrest.

One year later, in January 2002, he received a traffic ticket in Alaska and was arrest on his outstanding Kansas warrant. Alaska authorities contacted Kansas and gave them 90 days to commence proceedings to have him returned or he would be released. Ninety days later he was released, having been told that Kansas would not seek his return.

A year and a half later, in June 2003, Brown received another ticket in Alaska. He was again advised of the Kansas warrant, but was not arrested because he was told that Kansas did not seek to arrest him. In 2005, Brown was a passenger in a car pulled over in Jefferson County, Kansas. He was informed of his warrant for a probation violation, but he was not finally arrested and taken into custody on the warrant in February 2006.

Brown filed a motion to dismiss his probation violation or discharge him from probation. In response, the State was able to show several unsuccessful service attempts.

In *State v. Brown*, Slip Copy, *unpublished*, 2007 WL 1965013 (Kan. App. July 6, 2007), the Court of Appeals found that the State had waived the defendant's probation violation by failing to extradite him from Alaska, in light of the fact that the cost of extradition could have been assessed against Brown. To add to this, when the state failed

(Continued on page 40)

Unpublished Decisions

(Continued from page 39)

to hold him in custody after his arrest in Jefferson County it effectively sealed its waiver of any violation of the conditions of his probation.

TERMS OF DIVERSION REGARDING TRIAL ON STIPULATED FACTS APPLY ON APPEAL
Unpublished Opinion

Defendant was placed on a diversion on a non-DUI case. The diversion contained a provision that if he failed to complete the diversion, he would proceed to trial only on the stipulated facts. He was found to have violated his diversion by the magistrate judge. The magistrate judge then found him guilty on the stipulated facts. The defendant appealed to the district court and argued since it was a *de novo* review, he was not bound by the stipulated facts, but could get a full trial.

In *State v. Wood*, Slip Copy, *unpublished*, 2007 WL 1964965 (Kan.App. July 6, 2007), the Court found that on appeal, the case is heard as if originally filed in the district court. Therefore, the terms of the diversion would still apply on appeal, and the case would be tried on stipulated facts. The Court found that if the defendant's argument was adopted, then the diversion agreement would serve no purpose, because the provisions would be erased on appeal. The Court further found that the defense was not allowed to put on "new" exculpatory evidence, since per the terms of the diversion, the defendant cannot put on any evidence.

PBT INADMISSIBLE - DEFENDANT MISINFORMED THAT SHE WAS REQUIRED BY LAW TO SUBMIT TO IT
Unpublished Opinion

Defendant moved to suppress the results of the PBT and argued that the officer did not have probable cause to arrest her for DUI. Prior to giving her the PBT, the officer erroneously told the defendant that she was required by law to take it. The result showed over .08. In *City of Lenexa v. Gross*, Slip Copy, *unpublished*, 2007 WL 2043580 (Kan. App. July 13, 2007) the Court found that the defendant did not freely and voluntarily consent to the breath test, she merely submitted to lawful authority. Therefore, the test results were properly suppressed.

DUCKING HEAD IN CAR WHILE POLICE DRIVE BY IS NOT SUFFICIENT TO JUSTIFY A STOP
Unpublished Opinion

KCK officers were patrolling a high crime area in a marked police car. As they drove past a Grand Am, the driver ducked his head down to one side. The officers believed this to be some sort of furtive movement and stopped the car. Inside the car they found drugs and scales.

In *State v. Green*, Slip Copy, *unpublished*, 2007 WL 2043578 (Kan. App. July 13, 2007), the Court found that this ducking motion by the driver, without any other accompanying suspicious circumstances, was not the "reasonable suspicion" necessary to justify a stop of the vehicle. It was nothing more than an unparticularized suspicion or hunch.

Judge Pierron filed a dissenting opinion chiding the majority for citing *"no case which requires police officer to know precisely why a suspect is behaving suspiciously before they can inquire."*

LAWRENCE DANGEROUS ANIMAL ORDINANCE IS NOT UNCONSTITUTIONALLY VAGUE
Unpublished Opinion

In *City of Lawrence v. Gragg*, Slip Copy, *unpublished*, 2007 WL 2080504 (Kan. App. July 20, 2007), the Court of Appeals upheld the district court ruling that based on the Lawrence animal control ordinances, the court lawfully ordered the defendant's dog destroyed. The city ordinance is not unconstitutionally vague.

CITY MAY FILE CIVIL ACTION SEEKING ABATEMENT OF NUISANCE WITHOUT FILING CRIMINAL CHARGES IN MUNICIPAL COURT
Unpublished Opinion

The City of Kanorado filed a civil action in district court pursuant to K.S.A. §60-908 to abate a common nuisance on the property of Lauren Hellman. Hellman argued that such action was improper. He argued that the city was required to exhaust its "administrative remedies" by first filing a criminal action in municipal court concerning the specific ordinance violations. The Kansas Court of Appeals disagreed in *City of Kanorado v. Hellman*, Slip Opinion, *unpublished*, 2007 WL 2080469 (Kan. App. July 20, 2007). A civil nuisance claim is sustainable without evidence of illegality.

"*BLAH, BLAH, BLAH*" IN RESPONSE TO BREATH TEST REQUEST = REFUSAL
Unpublished Opinion

Defendant was involved in a one car accident and was given a blood test at the hospital. The officer asked the defendant if he would consent to the test and he responded with profanity. Once he read the defendant the implied consent advisories and placed a copy on his chest, he asked him again if he would consent to a test. The defendant responded "blah, blah, blah" followed by silence. The officer indicated he would take that as a "yes" and proceeded to have blood drawn.

In *State v. Fritzemeier*, Slip Copy, *unpublished*, 2007 WL 2080481 (Kan.App. July 20, 2007), the Court found that virtually any words or conduct indicating anything but un-

(Continued on page 41)

Unpublished Decisions

(Continued from page 40)

equivocal consent has been deemed a refusal. The defendant's response was therefore a refusal and the results of the test are inadmissible at trial.

PRIOR CONVICTION USED TO ENHANCE CURRENT SENTENCE MAY NOT BE COLLATERALLY ATTACKED UNLESS THE PRIOR WAS OBTAINED IN VIOLATION OF RIGHT TO COUNSEL

Unpublished Opinion

Defendant, when faced with sentencing on a third time DUI, challenged his 1973 DUI conviction. After the state produced the journal entry of conviction showing that he had an attorney who entered a plea of guilty on his behalf, the defendant argued that said plea was invalid because he was not advised of his rights before entering the plea.

In *State v. Rudy*, Slip Copy, *unpublished*, 2007 WL 2080478 (Kan. App. July 20, 2007), the Court cited *Custis v. U.S.*, 511 U.S. 485, 487 (1994), wherein the U.S. Supreme Court held that a defendant does not have the right to attack prior convictions used to enhance the current sentence, unless those convictions were obtained in violation of his right to counsel. In addition, it cited *State v. Delacruz*, 258 Kan. 129 (1995) for the proposition that the time to attack a prior misdemeanor conviction is on direct appeal. Finally, the Court held that even assuming the defendant didn't have counsel at all in 1973, the fact remains that he was not incarcerated. An uncounseled misdemeanor conviction that does not result in incarceration may be included in a defendant's criminal history for enhancement purposes.

SMURFING

In *State v. Maness*, Slip Copy, unpublished, 2007 WL 2080395 (Kan. App. July 20, 2007), the Court found that the mere fact that two persons entered a store, separated , purchased two boxes of cold pills (Sudafed) and returned separately to a car with Oklahoma tags was insufficient to justify an investigative detention of the occupants. The defendant's conviction for unlawful possession of pseudoephedrine was vacated and dismissed with prejudice.

Of interest in this case was the explanation of a criminal tactic known as "smurfing." The Wichita detective in this case described such behavior as follows:

Two people, usually people from small towns, out-of-state like Oklahoma, come to a big town and go to several different stores and purchase products that contain pseudoephedrine in small amounts. While "smurfing," multiple individuals enter the store and separate to make purchases of the ingredients separately and in small quantities to avoid suspicion. A number of cases in Wichita of people from Oklahoma buying pseudoephedrine products rose after Oklahoma restricted the sales of certain products.

In this case, even though the evidence was suppressed and the charges dismissed, the officers found several maps in the seat of the car with handwriting with some locations marked with asterisks, apparently various locations of Target or Walgreens stores, lithium batteries, a substantial quantity of Sudafed-based products, and receipts from various Wichita stores for said products.

Accepting Nominations for Barbara Award

The KMJA Board of Directors is currently accepting nominations for the Michael A. Barbara Award. The award was established in 1995 to honor Judge Barbara for his commitment to the KMJA. Besides being a former District Court Judge and author of the *Kansas Rules of Evidence with Evidence Objections*, Judge Barbara often offered his expertise at the KMJA annual conference by providing interesting and entertaining training sessions.

This year the award was presented posthumously to Beverly Batt of Wichita for her commitment to the KMJA over the years. Previous recipients have included Sen. Jay Emler, Lindsborg, Denise Kilwein, Office of Judicial Administration, the late Fred Benson, Karen Arnold-Burger, Overland Park, George Catt, Lawrence, Joe Cox, Topeka, Tom Buffington, Marquette, James Wells, Topeka, Lee Parker, Andale, and Pat Caffey, Manhattan.

The award is given to a member or a non-member who has provided exemplary service to the KMJA.

Please send your nominations to KMJA President, Ken Lamoreaux so that we can have a plaque and comments prepared for the April 2008 conference.

The Verdict

Summer 2007 Issue 40

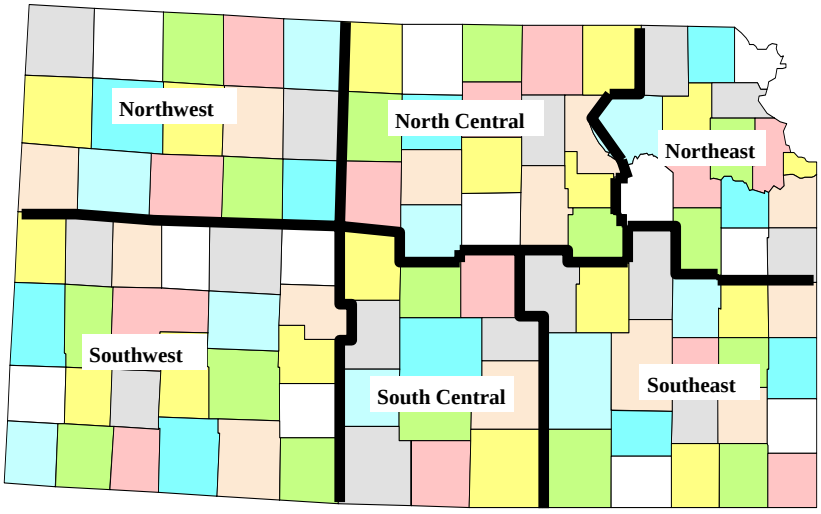
C/O Overland Park Municipal Court
12400 Foster
Overland Park, KS 66213
(913) 327-6852 ► Fax-(913) 327-5701
karen.arnold-burger@opkansas.org

All KMJA dues should be sent to:

Kay Ross
610 S.W. 9th
Plainville, KS 67663

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

KMJA MEMBERSHIP REGIONS



Interested in serving on the KMJA Board of Directors? At the April 2008meeting the following positions will be up for election:

President-Elect
Secretary
Treasurer
North Central Director
Southwest Director

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

President
Ken Lamoreaux
785-363-2443

BOARD OF EDITORS

THE VERDICT

Editor.....Karen Arnold-Burger (OP)
Correspondents...
.....John McLoughlin (Cimarron)
.....Bryce Abbott (Wichita)
.....Pat Caffey (Manhattan)
.....Randy McGrath (Lawrence)
.....Bob Nicholson (Paola)
.....Cathy Lucas (Sublette)

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

KMJA BOARD OF DIRECTORS

President.....Ken Lamoreaux (Waterville)
President-Elect.....John McLaughlin (Cimarron)
Secretary.....Brenda Stoss (Salina)
Treasurer.....Kay Ross (Plainville)
Past-President.....Randy McGrath (Lawrence)

Directors:

Northwest District.....Dorothy Reinert(Atwood).....2009
Southeast District.....Timothy Fielder (Gerard).....2009
North Central District.....Scott Condray (Concordia).....2008
Southwest District.....Charles Hull (Rolla).....2008
South Central District.....Greg Keith (Haysville).....2010
Northeast District.....James Campbell (Ottawa).....2010

MUNICIPAL JUDGES' TESTING AND EDUCATION COMMITTEE

Tom Buffington.....Marquette
Jay Emler.....Lindsborg
Karen Arnold-Burger.....Overland Park
James Wells.....Topeka
Lee Parker.....Andale

MUNICIPAL COURT MANUAL ADVISORY COMMITTEE

Jay Emler.....Lindsborg
Dorothy Reinert.....Atwood
Patrick Caffey.....Manhattan
Karen Arnold-Burger.....Overland Park
Bette Lammerding...Marysville
Connie Sams.....Ottawa
Tom Buffington.....Marquette
James Wilson.....Mulvane