The Verdict

The Official Publication of the Kansas Municipal Judges Association

Issue 48 Summer 2009

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 a **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*.

INCREASED PENALTIES FOR BATTERY ON AN LEO WITH INJURY, AMENDMENTS TO DOG FIGHTING AND COCKFIGHTING LAW, DL SUSPENSION FOR SELECT STATE-CHARGED DRUG OFFENSES, AND MORE

S. Sub. HB 2060, the omnibus crime bill, contains several changes.

- **"Criminal threat"** under K.S.A. §21-3419 and "aggravated criminal threat" under K.S.A. §21-3419 have been expanded to include a threat that results in the lock down or disruption of any activity in a building, not just evacuation.
- The **dog fighting** statute, K.S.A. §21-4315 and the **cockfighting** statute, K.S.A. §21-4319, have been expanded to include possession of dog fighting or cockfighting paraphernalia (A misdemeanor) and unlawful attendance at a dog fight or cockfight (B misdemeanor), in addition to the existing prohibition against conducting a dog fight or cockfight (level 10 felony). An arrest for possession of dog fighting paraphernalia will

(Continued on page 14)

A STEP BACK IN TIME

The struggling economy, bank insolvency, mortgage foreclosures are the top stories in the media today. Well, to quote an old country song, this ain't our first rodeo. The Great Depression brought about several legal challenges that could have been taken off the front pages today. Here are just a few.

In *State v. Miller*, 131 Kan. 36 (1930), J.G. Miller was convicted of violating banking laws (24 counts). He was the director and president of Midwest State Bank of Fort Scott and was accused of accepting deposits when he knew the bank to be insolvent. He was also charged with mak-

(Continued on page 3)

SPOTLIGHT ON: FRED W. JOHNSON

The newest member of the KMJA Board of Directors is Fred W. Johnson, *Oswego and Altamont*.

Judge Johnson was born in Coffeyville and grew up in Pittsburg. His father was a chiropractor and his mother a homemaker. He is the oldest of five boys. One brother followed him into the legal profession and is an attorney, working at UMKC Law School.

After graduating from Pittsburg High School, Fred headed stayed close to home and received a B.A. in History and an M.S. in Political Science from Pittsburg State University. It was then on to Topeka where he attended Washburn Law School. He graduated in 1979 and became Assistant County Attorney in Labette County. In 1982 he entered private practice in Parsons, and shortly thereafter also opened an office in Oswego. His practice is primarily in Oswego today, where he also serves as the Labette county counselor. He has an active probate, banking and real estate law practice. *"No criminal or*

(Continued on page 2)

Spotlight on: Fred W. Johnson

(Continued from page 1)

domestic relations," he is happy to point out. He has served as city attorney for many of the neighboring cities over the years, as well.

Judge Johnson has been married thirty-seven years. His wife is a high school counselor, who will be retiring in August. She plans to consult in the education arena after retirement. They have a son who will be graduating with a degree in history from the University of Arkansas and is considering law school. (Like father, like son?).

Golf and restoring antique cars are Judge Johnson's passion's off the bench. He restored a 1957 Chevy for his son, a 1969 Chevelle for himself, and a MG Midget for his wife. *"I like to work on muscle cars."*

Altamont, where he has served as municipal judge for over 30 years, has court two times per month. Oswego has it once per month. He enjoys being a judge because *"it is the grass roots level of judicial administration. You deal with the very basic concepts of our justice system and that is the best part."*

In looking forward to his term as Southeast Area Director, he sang the praises of the KMJA:

" I've always found the conferences to be informative in that they focus on both the larger and the smaller courts. The ability to have discussions with judges from all levels has been extremely helpful."

Judge Johnson's first duty will be to attend the Board meeting in Abilene in August.

Updates from O.J.A.

ANNOUNCING NEW JUDGES!!

Since our Spring 2009 issue, the following new municipal judges have been appointed or elected:

-Ron Elsasser	Clifton
-Annie Bauer	Canton
-Alan Streit	Rossville

▲▲▲▲

2009 CONFERENCE

The 2009 Conference was held April 27-28 at the Wichita Marriott Hotel; 162 judges attended the conference.

The conference programs received high ratings from conference participants. Participants were asked to rate the programs from 1 to 5, with a 3 being a "Good" rating and a 5 being an "Excellent" rating.

All programs received high ratings:

The highest ranked program was the *DMV Update* (Ralston) which received a rating of 4.4. The program *Issues Related to Non-English Speakers and Non-citizens in Municipal Court* (Arnold-burger and Kelly) also received a high rating of 4.3. the *Nuts and Bolts* panel discussion and the *Procedural Fairness* (Leben and Burke) and *Ethics* (Johnson) programs received a 4.2 rating.

The conference night out was held at the Uptown Theater. The evening included a buffet dinner, and the play "Smoke on the Mountain."

Please mark your calendars and plan to attend the 2010 Conference which will be held April 26-27 at the Wichita Marriott Hotel.

▲▲▲▲

ANNUAL CASELOAD REPORTS

Your annual report is due July 15, 2009. Please call Denise Kilwein (785-296-2256) if you have questions regarding the report.

FEE INCREASE ALERT

Effective July 1, 2009 the fee for municipal court appeals will be $84.50. In addition, reinstatement fees increase to $69 for all fees paid July 1, 2009 or after.

Step Back in Time

(Continued from page 1)

ing false entries in the bank books and making a false report to the bank commissioner.

An examination by the bank commissioner had found that the bank was *"entirely too lax in taking security."* The bank was admonished to secure the paper better in the future. The bank was declared to be "overloaned" and the officers were ordered to reduce their indebtedness. The stockholders were required to infuse more money into the bank. Evidence presented of insolvency included witnesses attesting that notes held by the bank with an aggregate face value of about $122,000 (about $1.5 million in today's dollars) were reasonably worth only about $6,000 (about $71,000 in today's dollars). Real estate carried on the banks books and valued at $14,574, was worth less than $600. The bank was rendered insolvent by a shortage of nearly half a million dollars in its statement of amounts due from other banks and a shortage of more than a million and a half dollars ($18 million in today's dollars) in bonds which it should have had in its vault. In the end, a few of the counts were reversed and remanded due to the failure to allow evidence of what the president had told his subordinates about accepting deposits, but most of the charges were affirmed.

In an interesting twist in the *Miller* case, a day or two after the verdict, the courthouse burned down and all the records were destroyed. The parties had to reconstruct the records for the appeal.

From 1933 to 1937 the Kansas Legislature made several attempts to extend periods of redemption in foreclosure actions by the Moratorium Acts. The first one, enacted in 1933 was an automatic legislative extension of the period of redemption for 6 months followed by authorization for the Governor to grant a further extension for up to six months. However, the Supreme Court found this gubernatorial extension to be an unlawful delegation of legislative power and declared the entire act unconstitutional. *See*, *Oakland State Bank v. Bolin*, 141 Kan. 126 (1935) and *Langworthy v. Kadel*, 141 Kan. 250 (1935). In 1934 the legislature expanded the authority of the district court to grant equitable extensions of redemption periods and in 1935 another purely legislative extension of redemption was enacted. The last change came again in 1935 allowing the district court to extend the periods of redemption to January of 1937. It was to apply only to mortgages made prior to March 21, 1933. All of the acts allowed the court to impose reasonable rent charges upon the mortgagor while in possession. In addition, the preamble or the body of each piece of legislation mentioned that extensions were to be granted based upon existing "emergencies."

The Verdict

In *Kansas City Life Ins. Co. v. Anthony, et al.,* 142 Kan. 670 (1935) the Court questioned the use of the word "emergency" when in fact the "emergency" had been extended over four years. And it found that the 1935 Act was also unconstitutional because it attempted to amend or nullify court judgments that were rendered before the passage of the Act. The Court cited a similar redemption extension act that the legislature passed during another economic downturn in 1893 which it held could not be imposed on cases in which a judgment had already been entered. *See, Greenwood v. Butler*, 52 Kan. 424 (1893). One of the dissenting justices in *Anthony* was so frustrated that he ended his dissent as follows:

"The press of other work makes it impossible for me to write more extensively upon the subject, even if I thought it would serve any useful purpose to do so."

Many foreclosure and redemption cases were decided by the Kansas Supreme Court in the mid-1930's.

In 1933, the Legislature adopted the Emergency Fee and Salary Act. This had the effect of temporarily reducing the salaries of certain county officers and employees for two years. This resulted in lawsuits by several officers and employees. For example, in *Foster v. Board of Com'rs of Harper County*, 143 Kan. 361 (1936) the Sheriff sued because his pay was reduced by the act by 50%. He was getting a dollar a day for every prisoner in the jail. The Act reduced it to 50 cents. In *Cunningham v. Smith et al*., 143 Kan. 267 (1936) the Reno County Sheriff was upset because his salary of $3,499.92 per year and mileage of 10 cents per mile, was reduced to $2,800 per year and 5 cents per mile. The Court set out the circumstances prompting the legislation:

"At the time of the meeting of the Legislature in 1933, because of a general financial depression, there was a decided disposition to limit governmental expenditures. One way to do that was to reduce salaries of public officials. Recognizing that county officials, under normal circumstances, were not overpaid, the Legislature did not desire to reduce their fees and salaries permanently, and hence enacted chapter 186, Laws 1933, as a temporary measure, fixing a specific time limit for its operation. It is a matter of common knowledge that it was conformed to for the time it was in effect, and immediately upon its expiration, and since, county officers have been paid fees and salaries in harmony with the general statue pertaining thereto. There has been no serious misunderstanding about it, either so far as the Legislature, the county officers, or the general public was concerned."

The Supreme Court found the Act to be constitutional in both cases.

Step Back in Time

(Continued from page 3)

In 1935 the Legislature adopted an act relating to the public relief and assistance of the poor and unemployed. The legislation allowed counties to levy taxes and issue bonds for programs aimed at the relief for the poor and unemployed. The amount of money that could be raised through issuance of bonds was limited by the statute to a fraction of a percent of the assessed valuation of the county. The money collected had to be kept in a separate fund and used only for "relief of the poor."

Another statute was in place that limited the amount of bonded indebtedness a county could acquire to one percent of the total assessed valuation (with some stated exceptions). Wyandotte County declined to register their bonds with the state because it would put them over the state limit of one percent of total assessed valuation. The State filed a writ of mandamus to get a decision on whether the overall limit still applied when relief bonds were issued, or if the relief bonds were in addition to the statutory limit. In *State ex rel. Stanley v. Robb*, 143 Kan. 527 (1936) the Supreme Court held that the relief bonds did not have to be used in calculating the general limit and ordered Wyandotte County to register the bonds. The opinion does set out a nice history of the reason the special legislation was necessary:

> *Prior to 1933 the expenses of the poor relief in a county were paid by moneys derived from taxation. If that were insufficient, warrants were issued, later paid by moneys raised by taxation, or by bonds authorized to be issued to fund outstanding obligations of a county. In 1933 the Legislature, by a series of acts, undertook to put the financial affairs of counties and other subdivisions of the state on a better financial basis. It enacted the "cash basis law" … by which such governmental units were required to balance their respective accounts and prohibited from overdrawing them, and a new "budget act" … requiring all anticipated expenditures to be classified in advance and means of payment prescribed. Realizing these statutes might handicap a county in the relief of the poor, the number of which had increased greatly by reason of severe general financial depression, the Legislature authorized poor relief bonds to be issued under certain circumstances … and at the special session of the Legislature later in that year another act for that purpose was passed ... In enacting these statutes the Legislature did a futile thing if the limitation of bonded indebtedness prescribed by R.S. 10-301, is to apply to such bonds. In enacting these statutes, the Legislature was prescribing laws making it possible for the several counties of the state to perform the duties imposed upon them by our Constitution (art. 7, § 4), which reads: "The respective counties of the state shall provide, as may be prescribed by law, for those inhabitants, who, by reason of age, infirmity, or other misfortune, may have claims upon the sympathy and aid of society.""*

Id. at 528.

The Verdict

To cope with the consequences of the depression, the U.S. Congress passed the National Industrial Recovery Act which involved grants of money to the states (about $3.3 billion in 1930's dollars) to spur industrial recovery and initiate public works and construction projects. Since the legislature had adopted a cash-basis law for municipalities to control their indebtedness, the legislature adopted another law to help cities take advantage of the federal recovery project pie. It allowed municipalities to issue revenue bonds to pay the cost of constructing, reconstructing, repairing, improving and extending publicly owned utilities. The city of Pittsburg issued revenue bonds to improve its water works system. The state auditor refused to register the bonds and the city filed suit. The auditor argued that the statute was unconstitutional because it incorporated provisions of the National Industrial Recovery Act and thereby improperly delegated Kansas legislative authority to the President and U.S. Congress.

In *City of Pittsburg v. Robb*, 143 Kan. 1 (1936), the Supreme Court issued a writ of mandamus ordering the state auditor to register the bonds. It found the state legislature had maintained sufficient control over the process.

The impact of the depression showed up in divorce cases, too. In *Davis v. Davis*, 145 Kan. 282 (1937), Courtney Davis paid child support of $200 per month and alimony of $100 per month from the date of the divorce decree in June 1929 until November 1930 when *"He, like many other oil men, was financially ruined during the depression." Id.* at 284.

In *Kaw Valley State Bank v. Chumos*, 138 Kan. 714 (1933) the issue was whether a sheriff's sale should be confirmed when the property (25 acres in Shawnee County) was assessed in 1930 at $12,690, but had decreased in value by the time of the sale to less than $4,000 "due to the current depression and conditions of property." The bank was the only bidder and purchased the real estate for $2,000 (half the amount of its judgment).

> *"The bank was overtaken by adverse economic conditions. When it brought suit, the bank acted under compulsion of the banking department, which required defaulted paper to be liquidated, in the ultimate interest of depositors and creditors...It was prohibited from bidding more than the amount of debt, interest, and costs, and, if the lot were not disposed of within five years, it had to be charged off out of earnings or surplus…[T]here is no suggestion in the record that defendant has had any disposition to evade his obligation. He, too, was overtaken by adverse economic conditions, and could not meet installments as they fell due. He paid what he could as he could, and after he was sued he continued to pay. ..The time was within a period when it was difficult for any one to borrow money, and when valuable unencumbered real estate was practically unsalable, even at great sacrifice."*

(Continued on page 5)

Step Back in Time

(Continued from page 4)

The Supreme Court held the sale was not made in conformity with equity.

J.C. Lantz of Arkansas City struck it rich drilling for oil. In 1919, he purchased a million dollars worth of Liberty Bonds. Kansas had a statute imposing a property tax on such bonds. Lantz paid the tax under protest and appealed the issue to the Kansas Supreme Court. The Court found the statute to be unconstitutional. It set out the history of the law and economic strife in the country 25 years earlier:

"*At the time the statute was enacted the country was only beginning to recover from severe financial panic and business depression. Problems of currency and finance were agitating the country, and monetary heresies were rife. The paper-money volcano still smoked and threatened eruption. The bondholder, who clipped coupons while others toiled, was not popular. The national banking system, built upon government bonds, was under severe criticism. The long duel between gold and silver had commenced, and it was assumed it would be necessary to issue bonds to procure gold to make the resumption act effective. To maintain faith in the integrity of the government, interest on bonds, not specified as payable in gold, was paid in gold, which reached the price of 115 in 1876, and this fact served to increase resentment toward bondholders, as an unduly favored class. Tax evasion in this state by converting money into bonds of the United States was negligible. The tax dodger resorted to greenbacks, which were exempt from taxation until 1894, and the Legislature of Kansas believed it had discovered a method of reaching bondholders, by taxing money invested in bonds. The legal effect was to penalize investments in bonds of the United States.*"

Lantz v. Hanna, 111 Kan. 461, 463 (1922).

A plethora of reported cases can be found in the 1930's dealing with securities fraud, foreclosures, receiverships, will contests regarding the depressed value of property, and bank reorganizations. No doubt, similar cases will come to the forefront during this economic downturn. To quote 19th century French journalist Alphonse Karr, "*The more things change, the more they are the same.*"

The Verdict

Treasurer's Report

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

INCOME:

Balance as of 04/21/08……....$16, 373.84	
Income from dues…….……...$ 5,725.00	
Bank interest…….…...$ 103.62	
K.M.J.A. Outing Fees……..$ 480.00	
Total Income 04/21/08 to 04/21/09 ….$ 6,308.62	
TOTAL INCOME TO DATE……..$	**22,682.46**
TOTAL EXPENSES TO DATE……....$	**8,756.57**
BALANCE ON HAND 04/21/09…….…. $	**13,925.89**

District Judge Hal Flaigle receives the Michael Barbara Award for excellence in judicial education from KMJA President, John McLoughlin at the 2009 Annual Conference in Wichita.

The Verdict

BANKRUPTCY AND MUNICIPAL COURTS: K.I.S.S. (Keep It Simple Saylor)

By Hon. Lloyd Swartz, Topeka
Former Bankruptcy Trustee

The intersection between the world of bankruptcy and the world of municipal court can be very daunting. The purpose of this short article is to provide an overview of that intersection and how the municipal court side of the equation is impacted.

A start is to understand what is required when a party before a municipal court issues this declaration: "I just filed bankruptcy."

Bankruptcy is a federal law, found in the United States Code, (hereafter USC). The USC is divided into major sections or books by Title numbers. For instance all of the bankruptcy code is found in TITLE 11 U.S.C. Within the Title you will find various chapters and within the chapters you will find specific code sections.

When you examine Title 11 you will find the following chapters:

Chapter 1 – GENERAL PROVISIONS
Chapter 3 – CASE ADMINISTRATION
Chapter 5 – CREDITORS, THE DEBTOR, AND THE ESTATE
Chapter 7 – LIQUIDATION
Chapter 9 – ADMUSTMENT OF DEBTS OF A MUNICIPALITY
Chapter 11 – REORGAINIZATION
Chapter 12 – ADMUSTMENT OF DEBTS OF A FAMILY FARMER OR FISHERMAN
Chapter 13 – ADJUSTMENT OF DEBTS OF AN INDIVIDUAL WITH REGULAR INCOME
Chapter 15 – ANCILLARY AND OTHER CROSS-BORDER CASES

For purposes of this overview it is important to understand that chapters 1, 3 and 5 are general chapters that are used to establish rules for the administration of a case filed under one of the other chapters, ie, chapters 7, 9, 11, 12 or 13.

When a party files for protection under Title 11 the United States Bankruptcy Court will issue a "notice of filing" to all listed creditors.

I believe a fair set of questions to ask of a defendant when they state they have filed a bankruptcy, is (1) what type of bankruptcy did you file? and (2) what is the bankruptcy case number?

It is possible to track a bankruptcy filing through an electronic system set up by the Federal Courts. Most likely your city attorney should have access to such on line information. If all else fails you can call and ask if the person has filed a bankruptcy in the District of Kansas by calling the Clerk of the U.S. Bankruptcy Court for the District of Kansas.

Once you have a case number and type you can precede with greater certainty of your actions.

As a municipal court it is important to think not of the filing of the bankruptcy but rather the type of bankruptcy. It is safe to suggest that almost all of those appearing before a municipal court judge will either elect a Chapter 7 or Chapter 13. For this reason I am going to focus on these two types of Bankruptcy. Chapter 11 and Chapter 12 are just different forms of reorganization and most everything I share about Chapter 13 will apply in principal.

The first question most often asked when a notice of bankruptcy or knowledge of bankruptcy arises is; what are the limits on what we do?

This is controlled by 11 USC 362 which is commonly referred to as the automatic stay. While the automatic stay is very broad it does have exceptions. For example, under 11 USC 362 (b) states: "The filing of a petition …. does **not** operate as a stay – (1) …. of the commencement or continuation of a criminal action or proceeding against the debtor;" *emphasis added.*

A municipal court is therefore excluded from the automatic stay with regards to criminal actions. This would include pending warrants, hearings on the merits of a case, and collection actions regarding fines and costs. (I will speak later about restitution and I do not include restitution in my reference to costs either here or later.)

The second question generally addresses the effect of filing on amounts due to a municipal court. This is where the type of bankruptcy filed is important.

If a defendant files a bankruptcy under chapter 7 it is a liquidation case and they tend to result in a discharge fairly rapidly. A discharge in chapter 7 is described in 11 USC 727.

(Continued on page 7)

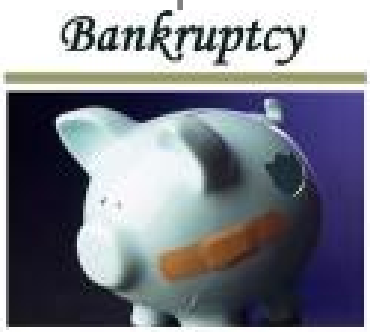
Bankruptcy in Municipal Courts

(Continued from page 6)

If a defendant files a bankruptcy under chapter 13 they are proposing a 3 to 5 year repayment program. Generally a defendant/debtor will create a class for repayment of criminal fines and costs and propose to pay these during the term of the chapter 13. You can determine if this is the case by reviewing the Chapter 13 Plan (a copy is sent with the "notice of filing").

I do not believe you are required to file a claim and thereby participate in the plan if you choose not to do so. I also believe it is a good policy to file claims and participate in the proposed repayment programs. Please appreciate my bias having served for 11 years as the Chapter 13 Standing Trustee for Topeka and Kansas City Bankruptcy Courts.

This is simply the best way to get paid fines and costs without incurring additional expense to do so. You can always send unpaid fines and costs to collection or set off, however it is not likely a district court is going to find any assets not tied up in the bankruptcy estate to satisfy your debt. While you can put the person in jail, if it is otherwise appropriate to do so, this does not result in payment of the fines and costs.



So my rule of thumb is; all fines and costs arising prior to the filing of a chapter 13 should be paid through the filing of a priority claim in the bankruptcy case. New fines and costs will be set up for a direct payment as would be true for all other non-bankruptcy cases.

The next area of concern arises under the discharge granted in bankruptcy. If the defendant/debtor receives a discharge under a chapter 7 or 13 does it affect fines and court costs? NO. That is the simple answer, but let me get more specific.

11 USC 523 sets forth exceptions to discharge and the language under 11 USC 523 (a) states "A discharge under section 727,1141, 1228(a), 1228(b) or 1328(b) of this title does not discharge an individual debtor from any debt - ….(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, **and is not compensation for actual pecuniary loss**, (**THIS IS THE AREA OF CONCERN FOR RESTITUTION**) other than a tax penalty - …." *Emphasis added*

Thus costs and fines are not discharged under the bankruptcy code. The issue of restitution is not as clear. I was surprised when I asked a current bankruptcy practitioner about this question to discover a 1981 case still appears to be the law in this jurisdiction.

In the bankruptcy decision *In re: Barnett*, 15 B.R. 504 (1981) the Court addressed restitution as it related to insufficient fund checks and actions by county attorneys to collect through criminal action. The summary found in Westlaw seems to say it all:

> *"Debtor filed motion seeking order to show cause why county attorney could not be held in contempt for violating automatic stay provided by Bankruptcy Code for filing three criminal complaints against debtor after debtor filed Chapter 13 petition and plan. The Bankruptcy Court, James A. Pusateri, j., held that: (1) civil remedy of restitution, even if arising out of criminal proceeding on insufficient fund checks, is prohibited; (2) county attorney could criminally prosecute debtor; and (3) county prosecutor did not have notice a bankruptcy petition had been filed, was not in violation of automatic stay and was not in contempt."*

This case dates back to the good old days when I was serving as the Standing Trustee in Chapter 13. The clear discussion by Judge Pusateri ran to a practice of county attorneys of using criminal prosecution as an alternative to a small claims action for collection on a NSF check. They did not enter significant criminal penalties. Rather if you paid the NSF check the case would be closed. Oft times a creditor, upon getting notice of a bankruptcy, would then go to the county attorney and press for the criminal action to collect the check, when such actions were not otherwise commonly done in that district.

While not on point specifically for restitution in most municipal court cases, I believe it is not a long stretch to suggest that restitution can not stand up to the effect of the automatic stay and discharge occurring in the bankruptcy case.

Thus it appears that as to fines, costs and all matters related to prosecution of criminal complaints, a municipal court may proceed. There is a caution not to assume this includes restitution. Do not allow yourself to be used as a collection court of last resort. Further, it is a good practice to file claims in Chapter 13 cases to allow for an organized repayment of fines and costs as a priority claim through the bankruptcy. I might note it does not create any issue should you also choose to file a claim in an asset chapter 7 case, and if in fact there are funds available, your claim should be paid ahead of general unsecured creditors.

If all else fails there are a number of attorneys across the state that can assist the city and the municipal court to make sure they are acting within the law. It never hurts to ask for assistance if you feel it is beyond the scope of your expertise.

Justice Carol A. Beier New KMJA Liaison

With the promotion of Justice Robert Davis to the position of Chief Justice, the Court has appointed a new liaison to the Kansas Municipal Judges Association, Justice Carol A. Beier.

Justice Beier was born in Kansas City, Kansas, on September 27, 1958. She attended Benedictine College in Atchison and the University of Kansas, Lawrence, where she obtained a B.S. in Journalism in 1981. Before law school, she worked as an editor at The Kansas City Times. Justice Beier received her law degree from the University of Kansas in 1985. She graduated from the University of Virginia School of law, Graduate Program for Judges in 2004, with an LL.M., Masters of Law in the Judicial Process.

Before joining the Court on September 5, 2003, she had served as a judge of the Court of Appeals since February 2000.

Justice Beier spent eleven years before joining the Court of Appeals at Foulston & Siefkin, L.L.P., in Wichita, where her trial and appellate practice focused on commercial disputes. Justice Beier also spent one year teaching and directing two student clinical programs at the University of Kansas School of Law. Prior to joining Foulston & Siefkin, Justice Beier practiced in Washington D.C., first as a staff attorney at the National Women's Law Center through the Women's Rights and Public Policy fellowship program of the Georgetown Law Center, and then at Arent, Fox, Kintner, Plotkin & Kahn, where her practice focused on white collar criminal defense. Immediately after law school graduation, Justice Beier had served as a clerk to then Judge James K. Logan of the U.S. Court of Appeals for the Tenth Circuit.

Justice Beier is a member of the American Judicature Society, the National Association of Women Judges, the Kansas Bar Association, the D.C. Bar, the Kansas Women Attorneys Association, and the Wichita Bar Association. She has been appointed to serve on the Kansas Children's Cabinet She is a past officer and board member of the statewide and city women's bars and has chaired and served on numerous bar committees and on the boards of several community organizations. Justice Beier is the author of several legal publications and is a frequent presenter for legal and lay audiences.

Justice Beier is married to Richard W. Green and has three children.

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 to District Court Judge Hal Flaigle of Wichita for his 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, Betty Lammerding, Marysville, and Beverly Batt.

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, Brenda Stoss, so that she can have a plaque and comments prepared for the April 2010 conference.

MUNICIPAL JUDGE REPORT

June 1, 2009

COURTS.....388

JUDGES.....260

Lawyers.....159

Nonlawyers.....60

District Magistrates.....41

PROVED GUILTY, AFTER ALL

By Laura Bauer
Reprinted from Kansas City Star
April 7, 2009

Kansas inmate Charles Hunter insisted he was an innocent man, that the system got it wrong. So did Charles Williams, a Texas prisoner convicted of three rapes that happened two decades ago. Just do DNA testing, both pleaded with prosecutors and advocacy groups. Science would set them free, just like it had some 230 inmates before them. Only one problem. Science didn't prove Hunter and Williams innocent last month. It proved their guilt.

In an era of DNA exonerations, where headlines scream of wrongful convictions and photos highlight vindicated inmates leaving prison, these aren't the results destined for a made-for-TV movie. Not as much is heard about the inmates who plead for DNA testing—and get it—knowing full well they're guilty.

"We're obviously not going to put out a press release when we ask for DNA tests for somebody and it comes back nailing them." said Rob Warden, executive director of the Center on Wrongful Convictions at Chicago's Northwester University School of Law. *"it's not news when the criminal justice system operates the way it's supposed to."*

Such cases have played out quietly across the country since 1989, though, when David Vasquez was released from a Virginia prison a free man. In the last five years, The Innocence Project out of New York exonerated 43% of the inmates who DNA it tested. But almost as many inmates—42%—had their convictions confirmed. The tests couldn't exclude them. Still, few talk about the ones whose DNA can't be excluded and stay behind bars.

But last month, prosecutors in Kansas and Texas did. Each prosecutor sent out news releases telling the public that DNA confirmed the convictions of Hunter and Williams. In both cases, results could not exclude the two men as matches. And in both cases, advocates or prosecutors had spent hours investigating and thousands of dollars on testing.

"I had faith the justice system had done the right thing in 1979," Douglas County District Attorney Charles Branson said in his release detailing Hunter's results. *"My faith was upheld, Hunter was our rapist."*
In Texas, Dallas County District Attorney Craig Watkins sent out his own release, telling the public that DNA pointed to Williams in not just one rape, but all three. Watkins said at the time that he'd like to see Williams punished for wasting everyone's time. On Monday, Texas legislators were scheduled to hear testimony on a bill that would level sanctions on such inmates.

"Charles Williams is yet another example of an inmate attempting to slip through the cracks of the system, but with modern-day DNA technology there are no cracks," Watkins said. *"Once again, this just proves that post-conviction DNA testing works both ways."*

Knowing the truth

When Hunter was charged with breaking into the homes of four Lawrence women and raping them, DNA testing wasn't an available tool for law enforcement. It was 1979 and Hunter was 16. Although he initially told authorities he was involved in the crimes, Hunter later proclaimed his innocence and insisted for the next 30 years that he was wrongly convicted. At one point, he reportedly said an inmate named "Marvin" raped the women.

Jean Phillips, director of the Defender Project at the University of Kansas, said her staff had contact with Hunter over the years and *"nothing really told me he didn't do it."* But when The Innocence Project contacted her, she agreed to be local counsel.

"*They said, 'We don't know, he may have done this,'"* Phillips said. *"'But we're going to do this because we don't know.'"*

And that is when post-conviction DNA testing is vital, said

(Continued on page 12)

Disposition of Judicial Docketed Complaints 2008

Formal proceedings filed	**2**
Dismissed after investigation	**30**
Caution	**6**
Private cease and desist	**2**
Public cease and desist	**3**
Informal Advice	**2**
No Action-Resolved	**1**
Complaints pending year-end	**6**

Source: 2008 Annual Report, Kansas Commission on Judicial Qualifications

By Jerry Markon ,Staff Writer
Reprinted from the Washington Post
Monday, May 25, 2009

Threats against the nation's judges and prosecutors have sharply increased, prompting hundreds to get 24-hour protection from armed U.S. marshals. Many federal judges are altering their routes to work, installing security systems at home, shielding their addresses by paying bills at the courthouse or refraining from registering to vote. Some even pack weapons on the bench.

The problem has become so pronounced that a high-tech "threat management" center recently opened in Crystal City, where a staff of about 25 marshals and analysts monitor a 24-hour number for reporting threats, use sophisticated mapping software to track those being threatened and tap into a classified database linked to the FBI and CIA.

"I live with a constant heightened sense of awareness," said John R. Adams, a federal judge in Ohio who began taking firearms classes after a federal judge's family was slain in Chicago and takes a pistol to the courthouse on weekends. *"If I'm going to carry a firearm, I'd better know how to use it."*

The threats and other harassing communications against federal court personnel have more than doubled in the past six years, from 592 to 1,278, according to the U.S. Marshals Service. Worried federal officials blame disgruntled defendants whose anger is fueled by the Internet; terrorism and gang cases that bring more violent offenders into federal court; frustration at the economic crisis; and the rise of the "sovereign citizen" movement -- a loose collection of tax protesters, white supremacists and others who don't respect federal authority.

Much of the concern was fueled by the slaying of U.S. District Judge Joan H. Lefkow's husband and mother in their Chicago home in 2005 and a rampage 11 days later by an Atlanta rape suspect, who killed a judge, the court stenographer and a deputy. Last year, several pipe bombs exploded outside the federal courthouse in San Diego, and a drug defendant wielding a razor blade briefly choked a federal prosecutor during sentencing in Brooklyn, N.Y. In March, a homicide suspect attacked a judge in a California courtroom and was shot to death by police.

"Judges today have dangerous jobs, and that danger has many dimensions," said David Sellers, a spokesman for the administrative office of the U.S. Courts. *"They are worried about security and safety 24 hours a day."*

Although attacks on federal court personnel have not increased, the explosion of vitriolic threats has prompted a growing law enforcement crackdown aimed at preventing them. The U.S. Marshals Service, which protects judges and prosecutors, says several hundred require 24-hour guard for days, weeks or months at a time each year, depending on the case.

"We have to make sure that every judge and prosecutor can go to work every day and carry out the rule of law," said Michael Prout, assistant director of judicial security for the marshals, who have trained hundreds of police and deputies to better protect local court officials, an effort that began last year with Northern Virginia and Maryland officers.

"It's the core of our civil liberties," Prout said.

State court officials are seeing the same trend, although no numbers are available. *"There's a higher level of anger, whether it's defendants or their families,"* said Timothy Fautsko, who coordinates security education for the National Center for State Courts in Williamsburg and said

THREATS SOAR

(Continued from page 10)

"Some deputies went to church more in a week than they had in their lives," Gonzales said.

Roll said that *"any judge who goes through this knows it's a stressful situation"* and that he and his family were grateful for the protection.

The stress nearly overcame Michael Cicconetti, a municipal court judge in Painesville, Ohio, after police played a tape for him of a defendant in a minor tax case plotting to blow up the judge's house. *"I hear a man's voice talk about putting a bomb in the house, and another voice says, 'What if there are kids involved?' and the first man says, 'They're just collateral damage,' "* the father of five recalled.

Cicconetti evacuated his family for a terrifying week in which they were under guard and stayed at friends' houses. "I couldn't go to work for two weeks. I was too shaken up. I couldn't think," he said. For months, the judge was nervous every time a car drove by his home. His children were afraid to go to bed; their grades dropped.

The judge now has a security system in his home -- and a stun gun within reach in court.

Sibley Reynolds, a state court judge in Alabama who prosecutors said was threatened last year by the son of a defendant convicted of stealing about $3,000 from a humane shelter, packs the real thing -- a Colt automatic pistol. He keeps it under his robe, in his waistband.

"I don't go anywhere without my security with me," Reynolds said.

Court officials could not say how often judges arm themselves. But the marshals have installed home security systems for most federal judges since the Lefkow incident, and many are removing their photos from court Web sites and shielding their home addresses. Senior U.S. District Judge Thomas F. Hogan in the District said judges who have handled terrorism matters are hesitant to travel to the Middle East, or to South America if they've had drug-trafficking cases.

U.S. District Judge Wayne Andersen in Chicago said he has *"stopped even mentioning publicly that I have children. Normally, parents want to be visibly associated with their kids. Judges now think everything is on the Internet."*

The Judicial Conference of the United States, the policymaking arm headed by the Supreme Court chief justice, will soon distribute a DVD with security tips. It will be called Project 365, for security 365 days a year.

"Judges today are far more security-conscious than they ever have been," said Henry E. Hudson, a federal judge in Richmond who is working on the DVD. *"I don't think it's at the point where it's interfering with their judgment and dedication to their jobs."*

Most Common Complaints Filed with the Kansas Commission on Judicial Qualifications in 2008

1. Prejudice/Bias (43)
2. Delay in Making Decision (29)
3. Denied Hearing/Fair Hearing (27)
4. Disagreement with Ruling (19)
5. Improper Election Conduct (17)
6. Improper Influence (15)
7. Inapprop. Personal Comment (12)
8. Conflict of Interest (12)
9. Injudicious Temperament (11)
10. Ex Parte Communication (11)
11. Administrative Inefficiency (11)

Source: 2008 Annual Report, Kansas Commission on Judicial Qualifications

"Indeed, Bailey's actions in raising issues in his brief that were not set out in his notice of appeal is like a head fake in basketball. For example, in applying this maneuver, an offensive player fakes his or her head (to indicate an intention to go in one direction without actually doing so) just to get the defender to hesitate or to go in the direction of the fake and then the offensive player very quickly snaps his or her head back and goes the other way. Like a head fake in basketball, Bailey's notice of appeal, when compared to the later issues raised in his brief, is an act of misdirection."

State v. Bailey, Slip Copy, 2009 WL 1393859 (Kan.App., May 15,2009)

DNA Testing Proves Guilt Too

(Continued from page 9)

Eric Ferrero of The Innocence Project, which was created in 1992. *"The simple truth is, until you do DNA testing you don't know if someone's guilty or innocent in these cases,"* Ferrero said. "*You lean fairly quickly in this work not to focus on how guilty or innocent somebody might seem.. The goal in each individual case is to learn the truth."*

Sometimes, advocates discover there's no evidence to test. It's been lost or it's too old to get a complete profile. Tests an also be inconclusive. DNA testing can costs thousands of dollars in each case, not to mention the countless hours of work. The amount of money needed for testing depends on how much evidence needs to be analyzed. Sometimes projects pay the bill for testing, other times prosecutors ca use grant money.

Warden, of the Center on Unlawful Convictions, said when he group first filed motions to do DNA testing in old cases, he figured the inmates' requests alone was one sign they might be innocent. The center's goal is to identify and rectify wrongful convictions. *"I thought nobody would even want DNA testing if it wasn't going to exonerate them,"* Warden Said. *"We were rudely awakened."*

Of the 20 post-conviction DNA cases his center has been involved with, 17 inmates were exonerated. The remaining three couldn't be excluded as a match. *"As a result of those experiences, we won't file a DNA motion for anybody without giving them a stern warning."* Warden said. *"We say, 'You don't want to do this unless you are absolutely certain it will exonerate you.'"* After the warning a few inmates have "gracefully backed out." Warden said. Including one man who said he didn't want the testing because prosecutors may have planted his DNA to make him look guilty. Phillips has counseled KU students who handled cases where tests didn't exonerate the inmate. "*I tell them you shouldn't feel bad."* Phillips said. *"You should feel good, because the criminal justice system got it right and ultimately isn't that what we all want?"*

Of the 235 post-conviction DNA exonerations to date Dallas County in Texas leads the country with 19. In at least as many cases, though, DNA tests could not exclude inmates confirming their convictions. The office conducted an audit of inmate requests for DNA testing and came across the case of Charles Williams, who was convicted of rape in 1991. He said he was innocent, but his request for testing had been denied previously. *"It seemed like one where a test would confirm his guilt or exclude him,"* said Mike Ware, head of Dallas County's conviction integrity unit. DNA not only confirmed his guilt in that one assault, but in two others he had been charged with, prosecutors said. *"Yes, it's a waste of time and money to do testing on someone who is guilty and knows they are guilty."* Ware said. *"But at the same time, we do confirm their guilt and we have a further understanding of the truth."*

A last resort

But, why ask for DNA testing when you know you are guilty? Maybe it's a last resort, *"grasping at a final straw,"* Warden said. Like former Illinois death row inmate Willie Enoch, who claimed his innocence in a 1983 murder and pushed for DNA testing, and yet it came back confirming his conviction. "*Here he was, facing execution shortly,"* said Warden who had some involvement in Enoch's case. "*I think he thought there's a chance it won't be testable. If it's not testable, that could be argued in the future."* Or maybe inmates *"just hold out hope,"* Phillips said.

Miguel L'Heureux, a KU graduate, worked under Phillips' supervision at the Defender Project in 2004. During his second year of law school he investigated the case of Kansas vs. Oliver Smith. Smith was convicted in 1989 of raping and killing a woman whose husband he knew. The case included some of the first DNA testing for the state of Kansas. But the DNA available at the time wasn't nearly as advanced as it is now, and Smith insisted he was innocent. L'Heureux and the Defender Project were able to persuade a judge to allow evidence to be retested. *"We really though we had a good case,"* said L'Heureux, who worked hundreds of hours on the case. *"It was something we believed in….I had come to believe he (Smith) was wrongly convicted."* In 2007, the test results came back. Smith couldn't be excluded. And L'Heueux, now practicing attorney in the Chicago area, still remembers that *"sinking feeling in my gut. Why would someone push for DNA testing when they're guilty?"* L'Heureux asked. *"I don't really know the answer to that. Perhaps when you're facing a lifetime of prison, you come to terms with that by creating a new realty. You make yourself innocent."*

Position of Judge Against Whom a Docketed Complaint Was Filed in 2008*

Chief Judge	3
District Judge	16
District Magistrate Judge	5 (2 law trained)
Municipal Judge	3 (2 law trained)
Judge Pro Tempore	1 (lawyer)
Senior Judge	2
Retired District Judge	2
Judicial Candidates	2
Retired, Taking Assignments	1

**In some instances, more than one complaint was filed against the same judge.*

Source: *2008 Annual Report, Kansas Commission on Judicial Qualifications*

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.

ARIZONA V. GANT AND SEARCHES OF VEHICLES INCIDENT TO THE ARREST OF OCCUPANT

Gant was arrested for driving on a suspended license, handcuffed, and locked in a patrol car before officers searched his car and found cocaine in a jacket pocket in the backseat. The United States Supreme Court held in 1981 in *New York v. Belton*, 453 U.S. 454 (1981) that police may search the passenger compartment of a vehicle and any containers therein as a contemporaneous incident of a recent occupant's lawful arrest. In *Arizona v. Gant*, 556 U.S. ___ (April 21, 2009), the Supreme Court held, 5-4, that *Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle. The Court did hold, however, that if there is reason to believe that evidence of the offense of arrest might be found in the vehicle, police may search the vehicle and containers therein, even if the occupant is secured away from the vehicle. The Court pointed out that in many cases, as when a recent occupant is arrested for at traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence.

In this case, Gant was secured. He was not within reaching distance of his vehicle at the time of the search. And his crime, driving on a suspended license, did not lend itself to any justifiable basis to search the car.

"Under our view, **Belton** *and* **Thornton** *permit an officer to conduct a vehicle search when an arrestee is within reaching distance of the vehicle or it is reasonable to believe the vehicle contains evidence of the offense of arrest. Other established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand. For instance,* **Michigan v. Long**, *463 U.S. 1032 (1983), permits an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is* "dangerous" *and might access the vehicle to "gain immediate control of weapons."* Id., *at 1049 (citing* **Terry v. Ohio**, *392 U.S. 1, 21 (1968)). If there is probable cause to believe a vehicle contains evidence of criminal activity,* **United States v. Ross**, *456 U.S. 798, 820-821 (1982), authorizes search of any area of the vehicle in which the evidence might be found…***Ross** *allows searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search authorized is broader. Finally, there may be still other circumstances in which safety or evidentiary interests would justify a search.* Cf. **Maryland v. Buie**, *494 U.S 325, 334 (1990) (holding that, incident to arrest, an officer may conduct a limited protective sweep of those areas of a house in which he reasonably suspects a dangerous person may be hiding). These exceptions together ensure that officers may search a vehicle when genuine safety or evidentiary concerns encountered during the arrest of a vehicle's recent occupant justify a search. Construing* **Belton** *broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis."*

The decision had some unlikely alliances. The majority consisted of Stevens, Scalia, Souter, Thomas and Ginsburg. Dissents were filed by Breyer and Alito, with Roberts and Kennedy joining in various parts of the same. Justice Alito made a strong case that the criteria the Court uses to determine whether to overrule existing law were not present in this case.

Editor's Note: *The Kansas Supreme Court followed the reasoning in* Gant *and struck down K.S.A. §22-2501(c) as unconstitutional in* State v. Henning et al., *___Kan. ___ (June 26, 2009).* See*, page 32,* supra.

OFFICER MAY ARREST FOR "NO PROOF OF INSURANCE" CHARGE

Jeremy Cox was stopped in Yates Center for a window tint violation. He was unable to provide proof of insurance so the officer arrested him for that charge. During the subsequent pat-down search the officer found methamphetamine in his pocket. He moved to suppress on the basis that an officer is not allowed to make an arrest for a no insurance violation. K.S.A. §40-3104(c) makes it a misdemeanor to fail to display upon demand evidence of insurance. The statute goes on to state that the law enforcement officer "*shall issue a citation to any person who fails to display*" such evidence. Cox argued that this language limited the officer to writing a ticket. The arrest was unlawful, therefore the search incident to the arrest was unlawful and the methamphetamine should be suppressed.

The Court of Appeals disagreed. It held that K.S.A. §22-2401 allows an officer to arrest a person for any crime committed in the officer's view except traffic and tobacco infractions. "No proof of insurance" is not a traffic or tobacco infraction. In addition, another section of K.S.A. §40-3104, subsection (e), states that no person shall be convicted of "no proof of insurance" if such person "*produces in court, within 10 days of the* ***date of arrest*** *or of issuance of a citation evidence of financial security for the motor vehicle operated which was valid at the* ***time of arrest*** *or of issuance of the citation."* Therefore, it opined, the statute anticipates either an arrest or the issuance of a citation.

(Continued on page 16)

Legislative Updates

(Continued from page 1)

also be enough to seize the animal under K.S.A. §21-4316.

- K.S.A. §21-4603d was amended to provide that if a person is **convicted of unlawful possession of a controlled substance or a controlled substance analog** (in violation of **state** law) in which the trier of fact makes a finding that the unlawful possession occurred **while transporting the substance in a vehicle** upon a highway or street, the **judge must order the defendant's license suspended for one year**. The person is required to surrender the license to the court and the court is required to send it into the DMV, which is required to hold on to it until the suspension ends. In lieu of suspension, the judge may enter a restriction for up to a year. The judge sets the conditions and duration of the conditions, but it can't be for more than a year. The person still has to surrender their driver's license to the court, who sends it to the DMV with a copy of the order. The DMV will then send the person a restricted driver's license with the conditions listed. The person must also carry a certified copy of the judge's order at all times he or she is operating a vehicle. The judge is required to give the driver a certified copy of the order. If the person violates the restriction, the judge who entered the suspension, must revoke the person's license for at least 60 days, but not more than a year. **THIS APPEARS TO ONLY APPLY TO DRUG POSSESSION CHARGES FILED BY THE STATE, BOTH MISDEMEANOR AND FELONY.**
- The Bill appears to prohibit assignment to community corrections for level 9 and 10 nondrug crimes and level four drug crimes where a nonprison sanction is imposed, and require solely probation for up to one year. (K.S.A. §21-4611(c)(3)).
- Battery against a law enforcement officer which results in bodily harm to the officer (felony) is now presumptive imprisonment which must be served consecutively to any other terms of imprisonment and is not subject to any departure or appeal. (K.S.A. 2008 Supp. §21-4704 (new q)).
- K.S.A. 2008 Supp. §21-4705 was amended to provide that if the trier of fact makes a finding that an offender carried a firearm to commit or in furtherance of a drug felony and additional 6 months must be added to the offender's sentence **and** if the trier of fact determines that the firearm was discharged, an additional 18 months imprisonment must be added. These sentences are to be presumptive prison with no departure or appeal.
- In reviewing criminal histories in state cases, K.S.A. §21-4715 was amended to provide that if an offender challenges a criminal history that has previously been established by a preponderance of the evidence, the burden shifts to the offender to prove his or her criminal history by a preponderance of the evidence.

ELUDING STATUTE AMENDED

K.S.A. §8-1586 was amended by HB 2060 to define "appropriately marked" police vehicle or bicycle and allows the officer to order a vehicle to stop even if he or she is not in a vehicle or on a bicycle.

Editor's Note: *This will require an amendment to STO §31.*

CONFIDENTIALITY OF INFORMATION REGARDING DOMESTIC VIOLENCE VICTIMS

S. Sub. HB 2099 expands the open records act to provide that the name, address, location or other contact information of alleged victims of stalking, domestic violence or sexual assault are confidential and not subject to disclosure by any public agency. The clean-up bill, SB 336, expanded this to include information regarding the victim of **any** crime.

GOLF CARTS AND WORK-SITE UTILITY VEHICLES

HB 2152 defines and regulates the operation of golf carts. It makes it unlawful to operate a golf cart on any highway (within or outside a city), any public street within a city unless authorized by the city, or on any street where the speed limit is greater than 30 mph. The golf cart can cross over such streets or highways. Where permitted, they can only be operated between the hours of sunrise and sunset.

Likewise, work-site utility vehicles cannot be operated on any interstate, federal or state highway or within the corporate limits of a city unless authorized by the city. They cannot be operated between the hours of sunrise and sunset unless they are equipped with headlights.

SB 336 also amends the definition of "golf cart" and micro-utility truck.

Editor's Note: *This will require amendment of the STO definitions and will require adding some new sections, or similar changes to city ordinances.*

APPEAL FEE RAISED

SB 336 (Sec. 14) raises the fee for a municipal court appeal from $73.50 to $74.50. The fee is scheduled to go down to $72.50 beginning July 1, 2013. It allows the Supreme Court to raise it to $84.50 ($10) to cover costs of non-judicial personnel. The $10 additional required a separate Supreme Court Order to effectuate, and Justice Davis has entered such an order.

DIRECT SHIPMENT OF WINE

SB 212 allows in-state and out-of-state wineries to directly

(Continued on page 15)

Legislative Updates

(Continued from page 14)

ship wine to consumers 21 years of age or older in the state of Kansas, but not more than 12 cases of wine to any one consumer or address per calendar year.

Additionally, this legislation allows a drinking establishment to store wine on the premise which had been sold to a customer for future consumption and allow the consumption of alcoholic liquor at special events when a temporary liquor permit has been issued for such event. Special events are defined as picnics, bazaars, festivals, or similar community gatherings approved by city ordinance or county resolution. People at the special event may not remove any alcoholic liquor from within the boundaries of the special event, nor can they possess any alcoholic liquor that was not sold on the premises. This amends K.S.A. 2008 Supp. §41-719. It also allows licensure for sales at a *bona fide* farmer's market approved by the Director of ABC.

Finally, it allows the governing body of a city or county to request, at any time with reasonable cause, that the Director of ABC hold a hearing to determine if a club or drinking establishment license should be revoked or suspended.

Editor's Note: *K.S.A. 2008 Supp. §41-719 is the "consumption in public" statute. This may require local amendments if your city has such an ordinance.*

JUDICIAL BRANCH SURCHARGE

SB 66 allows the Kansas Supreme Court to establish a surcharge of up to $10 per fee for costs for non-judicial personnel. This surcharge would be the only surcharge that the Kansas Supreme Court could charge during the time period from July 1, 2009 through June 30, 2010. Garnishments, hearings in aid of execution, orders of sale, bond forfeiture, reinstatement fees, marriage license fees, appeal fees, most docket fees and filing fees, **reinstatement fees** and expungements would be subject to the surcharge. This will require a separate Supreme Court Order to effectuate. *See also*, SB 336 (§4) **This does NOT effect the state-mandated municipal court costs ($19.00, plus .50 judicial assessment).** Justice Davis has entered an order imposing these increases.

CONTROLLED INSURANCE PROGRAMS ACT

HB 2214 contains provisions significantly expanding benefits that must be available for alcohol and substance abuse treatment.

HIGHWAY PATROL TROOPERS MAY RUN FOR CITY COUNSEL

HB 2158 amends K.S.A. 2008 Supp. §74-2113 to allow highway patrol officers to hold office as a member of a city governing body if the trooper was appointed or elected in a nonpartisan election.

DEFINITION OF CORRUPT POLITICAL ADVERTISING EXPANDED

HB 2158 also expands the definition of corrupt political advertising under K.S.A. 2008 Supp. §25-4156 to include telephone calls or internet or email ads advocating for a position or candidate which is not proceeded by the statement "paid for" or "sponsored by" followed by the name of the chairperson or treasurer of the organization responsible therefore. SB 336 (Sec. 12) further defines "telephoning or causing to be contacted by telephone."

FALSE CLAIMS ACT

SB 44 creates a civil cause of action for perpetrating a specified fraudulent claim on the state government or affected political subdivision under the newly created Kansas False Claims Act.

PRIOR BAD ACTS EVIDENCE

SB 44 also amends the rules of evidence (K.S.A. §60-455) to allow the admission of prior bad acts evidence in cases other than sex offenses to show the modus operandi or general method used to perpetrate similar but totally unrelated crimes. In sex offense cases, the law was also amended to allow evidence of the defendant's other acts of sexual misconduct as long as it is relevant and probative. It requires the prosecutor to notify the defense of intent to use such evidence and turn over witness statements at least 10 days prior to trial.

AUTOMATED EXTERNAL DEFIBRILLATOR

SB 102 deletes the definition and requirement that only a "qualified person" may use an automated external defibrillator. Now, any person using an automated external defibrillator in good faith to render emergency care or treatment will be held harmless from any civil damages as a result of such care or treatment.

CHILD IN NEED OF CARE

SB 134 limits the court's jurisdiction over a child in need of care to the child's 18th birthday or June 1 of the school year during which the child turns 18 if the child is still in high school. The legislation also authorizes SRS to have custody of a child 15 years or younger, a 16 or 17 year old child if the child has no identifiable parental or family resources, or a 16 or 17 year old child if the child shows signs of physical, mental, emotional, or sexual abuse.

SECURITY FREEZE ON CREDIT REPORT

HB 2292 deletes a requirement in the Fair Credit reporting Act that the consumer placing a security freeze on his or her consumer report must be a "victim of identity theft" and the

Court Watch

The motion to suppress was properly denied. *See, State v. Cox*, ___Kan.App.2d ___(April 24, 2009).

COURT REJECTS SHAME SENTENCE; COURT MUST ALLOW ESSENTIAL ACTIVITIES WHILE ON HOUSE ARREST

Leroy Schad pled no contest to aggravated indecent solicitation of a child. The victim was his 9 year-old granddaughter. His conviction carried presumptive prison. However, he successfully argued and received probation. The Court found that there was little chance of recidivism and there was appropriate treatment available. He was placed on probation for 60 months, but required to be on house arrest for the entire 60 months. He was advised that he could not leave his house for any reason except to meet with his probation officer, participate in treatment and drive to medical appointments. He was told he could not even leave to go to the grocery store. Finally, he was ordered to place signs on all four corners of his property, with letters at least 4" tall, stating that a "Sexual Offender Lives Here." He was also required to put stickers on his car that said "Sexual Offender." He was also not to have contact with any children under the age of 16, including his grandchildren.

On appeal, Schad argued that the signage condition of his probation (1) impermissibly restricts his right to privacy without bearing a reasonable relationship to the rehabilitative goals of probation, the protection of the public, and the nature of the offense and (2) that the probation conditions constituted cruel and unusual punishment.

The Court of Appeals found it did not have to reach the constitutional issues, because statutorily the judge did not have the authority to impose such conditions.

It pointed out that the purpose of probation is rehabilitation. The trial court had already indicated that Schad had little chance of reoffending. The signage requirement would only work against his rehabilitation. He lived in Hudson, Kansas, population 133, with 68 housing units. Everyone in town already knew of his conviction. Because he was a registered sex offender, he was required to notify local authorities of his whereabouts as well as the schools and local day care facilities. Anyone could find out by searching the web, that a sex offender lived at his address. The Court found it doubtful that anyone moving into town would have in problem finding out he was a sex offender. Therefore, the requirement to post signs was not reasonably related to the rehabilitative goal of probation or to the protection of the victim and society. The signage merely served to make Schad the object of condemnation and ridicule. They were simply punitive and not rehabilitative. The Court compared this to the situation of Chuck Conner's character in the 1965 television show *Branded.* It even cited the lyrics to the theme song in its opinion. Since the conditions were not expressly or implicitly authorized in K.S.A. §21-4610(c), the judge exceeded his authority in imposing them and the Court struck them from the probation order.

The Court also struck the "no grocery shopping" condition of Schad's house arrest. K.S.A. §21-4603(c) provides a nonexclusive list of the house arrest sanctions a court may impose. It states that a court may deprive the defendant of nonessential activities or privileges. By specifying "nonessential" privileges, the Court reasoned that the legislature did not intend that a person on house arrest be deprived of essential activities to his or her survival. Grocery shopping is such an essential activity. Because there was nothing in the record to establish that Schad had other means to obtain food for himself, the Court remanded that condition for further consideration by the trial court.

See, State v. Schad, ___Kan.App.2d ___(April 24, 2009).

US SUPREMES OVERRULE KANSAS SUPREMES AND FIND THAT STATEMENTS ELICITED IN VIOLATION OF SIXTH AMENDMENT MAY STILL BE ADMISSIBLE FOR IMPEACHMENT PURPOSES

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

When the government deliberately elicits incriminating statements through an informant acting as their agent, the cases are clear that a violation of the defendant's right to counsel has occurred. Cases are clear that these statements cannot be used in the prosecution's case in chief. The issue in *State v. Ventris*, 285 Kan. 595 (2008) was whether or not the statements could be used for impeachment. The Court held that a criminal prosecution commences when the complaint is filed and a warrant is issued. Sixth Amendment right to counsel attaches at that point. Therefore, once the prosecution has commenced, defendant's statements made to an undercover informant surreptitiously acting as an agent for the State are not admissible at trial for any reason, including the impeachment of the defendant's testimony. The Court included a very thorough and in depth discussion of this issue.

Justice McFarland wrote an equally lengthy and in-depth dissent. She argued that the decision was contrary to the

(Continued on page 18)

Legislative Updates

(Continued from page 15)

related requirement for having a police report.

KANSAS COURT OF APPEALS

SB 66 delays the continued expansion of the court of Appeals until January 1, 2011.

TOWING ORDINANCES

HB 2152 amends K.S.A. 2008 Supp. §8-1103 to require that any city ordinance or county resolution authorizing the towing of vehicles must specify (1) the maximum rate such wrecker or towing service may charge for such services and storage fees; (2) that an owner of a vehicle towed shall have access to personal property in such vehicle for 48 hours after such vehicle has been towed and such personal property shall be released to the owner; and (3) that the wrecker or towing service shall report the location of such vehicle to local law enforcement within two hours of such tow.

NEW RULES IMPOSED ON HOME INSPECTORS

Sen. sub for HB 2260 imposes some stringent rules on persons that provide home inspections (in conjunction with home sales and appraisals). It prohibits convicted felons or persons required to be a part of any criminal registry from becoming registered to do home inspections. It also requires each inspector to post a $10,000 surety bond each year. It prohibits an inspector from inspecting for a fee any property in which the inspector has any personal or financial interest unless said interest is disclosed in writing to the client and the client acknowledges receipt of the same. It requires the Home Inspections Registration Board to adopt standards of practice and a code of ethics. It is a misdemeanor to perform a home inspection unless properly registered/licensed under the act.

AGGRAVATED ENDANGERMENT OF A CHILD CANNOT BE EXPUNGED

SB 66 amends K.S.A.2008 Supp. §21-4619 to add aggravated endangerment of a child to list of crimes that cannot be expunged.

KANSAS ADMINISTRATIVE PROCEDURE ACT (KAPA) AND KANSAS JUDICIAL REVIEW ACT (KJRA)

SB 87 amends both the KAPA and the KJRA.

●It adds a new section to the KAPA to authorize the presiding officer to omit the name, address, or other contact information of an alleged victim of crime from any required notice, order, or public record when it is alleged that the health, safety, or liberty of the alleged victim would be jeopardized by the disclosure of such information;

●It amends the Kansas Open Records Act by adding to an existing exception the provision that a public agency would not be required to disclose the name, address, or other contact information of an alleged victim of crime;

●Adds a new provision to clarify the computation of time in KAPA actions. Days are counted as calendar days, not business days, although the last day can't be a Saturday, Sunday or legal holiday.

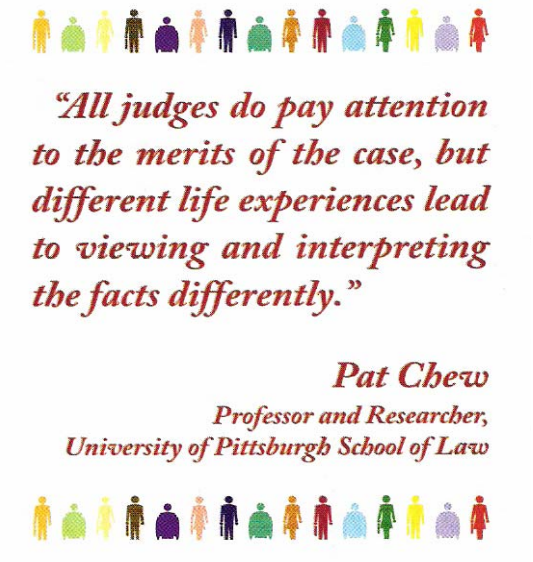
There are many more minor and clarifying changes. Those attorneys who do a lot of administrative hearing work are encouraged to read the bill in its entirety.

CAMPAIGNING IN CITY BUILDINGS

SB 336 amends K.S.A. 2008 Supp. 25-4169a to prohibit campaigning for state or local office (including passing out flyers or political fact sheets) in any city building or structure unless all candidates for said office are similarly allowed to campaign in said building or structure.

CLEAN-UP BILL

SB 336, passed during the veto session, cleans up several bills adopted during the regular session. For example, it amends the Kelsey Smith Act to allow the KBI to adopt regulations regarding obtaining and disseminating information received from wireless providers. It clarifies that the Supreme Court can also raise the driver's license reinstatement fee by up to $10. It amends the DUI law, as well as several others that were missed in the first go-round, to make reference to the new location of the drug laws in chapter 21. It amends the definition of micro-utility trucks and adds a definition for golf carts. It extends the increase in municipal court appeals fees and other state docket fees to 2013. It expands the confidentiality of the names and addresses from victims of domestic violence and sexual assault to **any** crime.



Court Watch

(Continued from page 16)

weight of authority of other jurisdictions that have considered the issue. She concluded that *"Today's decision seriously undermines the truth finding process of the adversary system by allowing criminal defendants to pervert the shield provided by the Sixth Amendment 'to a license to testify inconsistently, or even perjuriously, free from the risk of confrontation with prior inconsistent utterances.'"*

The case was appealed by the State to the U.S. Supreme Court, where Justice Scalia, writing for the 7-2 majority, sided with former Chief Justice McFarland. The Court found that whether otherwise excluded evidence can be admitted for purposes of impeachment depends on the nature of the constitutional guarantee that is violated.

For example, the Fifth Amendment guarantees that no person shall be compelled to give evidence against himself, and so it is violated whenever a truly coerced confession is introduced at trial, whether by way of impeachment or otherwise. The Fourth Amendment exclusionary rule is a deterrent sanction and inadmissibility is not automatic; a balancing test is used.

Violation of the Sixth Amendment right to counsel occurs when the improper interrogation takes place, regardless of whether the evidence is sought to be introduced at trial. So in this case, the violation occurred and the issue is the scope of the remedy. According to Justice Scalia,

"Our precedents make clear that the game of excluding tainted evidence for impeachment purposes is not worth the candle. The interests safeguarded by such exclusion are outweighed by the need to prevent perjury and to assure the integrity of the trial process...It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can...provide himself with a shield against contradiction of untruths."

Therefore, the informant's testimony, even though obtained in violation of the Sixth Amendment, was admissible to challenge Ventris's inconsistent testimony at trial. *Kansas v. Ventris*, ___ U.S. ___ (April 29, 2009). Justice Stevens filed a dissent, joined by Justice Ginsburg.

PROSECUTION CAN CHARGE BOTH CHILD ENDANGERMENT AND DUI (WITH A CHILD UNDER THE AGE OF 14 IN THE CAR)

Nicole Cott was stopped for DUI. She had her 4 year old son in the car with her. She pled no contest to the charges, but was later allowed to withdraw her plea. In response, the prosecutor dismissed the charges and later refiled them adding a count of aggravated endangerment of a child and following too close. The district court dismissed the endangerment charge ruling "the more specific §8-1567(h) would trump K.S.A. §21-3608a."

Court Watch

The Kansas Court of Appeals disagreed and reversed the dismissal in *State v. Cott*, 39 Kan. App. 2d 950 (2008). *See, Verdict*, Summer 200, p. 18. The Supreme Court got its chance at the case this Spring, and upheld the Court of Appeals ruling in *State v. Cott*, ___Kan. ___ (May 1, 2009).

K.S.A. §8-1567(h) provides a one month sentence enhancement if a person convicted of DUI had a child under the age of 14 in the car at the time of the offense. K.S.A §21-3608a(1) makes it a felony to intentionally cause or permit a child under the age of 18 "to be placed in a situation in which the child's life, body or health is injured or endangered." The Court found that the two statutes are aimed at preventing different types of behavior and there is no evident legislative intent to preclude the State from holding the defendant responsible under both statutes when facts are presented to support both crimes.

CONVICTION FOR CRIMINAL POSSESSION OF FIREARM ON SCHOOL PROPERTY DOES NOT REQUIRE THAT SCHOOL BE IN SESSION

Kristin Toler was charged with possessing a Beretta 9 mm handgun on the grounds of Shawnee Mission West High School. It is undisputed that school was not in session and no students were around. It was 4:25 a.m. and she was allowing her dog to walk off leash and putting some items in her car trunk, when the police noticed the gun in her athletic bag. The sole issue in *State v. Toler*, ___Kan.App.2d ___ (May 1, 2009) was whether one could be convicted of criminal possession of a firearm on school property (K.S.A. §21-4204(a)(5)), if school was not is session. The district judge dismissed the charge due to the fact that school was not in session and the State appealed. The district judge looked to K.S.A. 2008 Supp. §65-4161 and K.S.A. 2008 Supp. §65-4163 which deal with possession of drugs within 1,000 feet of school property. Both of these statutes specifically state that school does not need to be in session, nor do any children have to be around to be in violation of the statute. Since K.S.A. §21-4204 did not have such a provision, the district court judge opined that the legislature intended that school be in session for a person to be convicted of possession a firearm on school property.

The Court of Appeals disagreed. It found that the statute is clear and unambiguous. The absence of the language contained in the drug offenses does not establish any legislative intent regarding the firearm statute. K.S.A §21-4204 provides express exceptions to the prohibition against firearms on school property and it does not include a defense based upon the fact that school is not in session or children are not present on school property. To hold otherwise would mean that a sniper arriving on school grounds to initiate a school shooting would not actually violate the statute until a student arrived on the property or until classes were in session.

(Continued on page 19)

Court Watch

(Continued from page 18)

DUTY OF TOW COMPANY TO NOTIFY VEHICLE OWNER

Pursuant to K.S.A. §8-1101 *et seq.*, any law enforcement officer in Kansas may have a motor vehicle towed when left unattended for more than 48 hours or when any unattended vehicle interferes with the public highway vehicle operations. The person who provides the tow serve at the direction of law enforcement acquires a first and prior lien on the vehicle for the value of the services rendered. If the tow service knows the name of the owner of the vehicle, then the tow service has 15 days to notify the owner that the vehicle is being held subject to satisfaction of the lien. Any vehicle remaining in the possession of the wrecker or towing service for more than 30 days may be sold to pay the reasonable towing and storage fees. However, before any vehicle is sold the tow service shall request verification from the Kansas Department of Revenue, Division of Vehicles of the last registered owner and lienholders. Notice of sale shall be mailed by certified mail to any such registered owner and any such lienholders and published in the newspaper in the city or county where the sale is advertised to take place. The statute does not require the tow service to conduct a title search outside of Kansas.

Citifinancial Auto, Inc. v. Mike's Wrecker Service, Inc., ___Kan.App. ___ (May 1, 2009), involved the sale of a $12,000 Mustang out from under the lienholder. The Mustang was titled in Nevada and Citifinancial's lien was listed on the title. The car was found in a parking lot in Manhattan without tags. Police directed that it be towed. When Mike's asked the Kansas Department of Revenue for the identity of the owner and lienholder, the DMV responded "no record found." Mike's published notice in the Manhattan Mercury of its intent to publically auction the Mustang to satisfy the $870 storage fees. Neither the owner nor the lienholder received notice. Mike's purchased the Mustang at its own auction for $500. The district court granted summary judgment for Citifinancial, finding that Mike's failed to make a reasonable effort to notify the lienholder. The court held that Mike's could have easily gotten a CARFAX report and discovered the lienholder. Mike's appealed claiming it had complied with all the requirements of the law. The issue was whether a tow service that complies with the statute (which Mike's clearly did) owes a due process obligation to an out-of-state owner and any lienholders to notify them of an intended sale, in addition to published notice.

The Court of Appeals found that although the statute provides a statutorily created self-help remedy that allows one party to take the property of another party, such a taking does implicate due process rights. Thus, to avoid a due process violation of the rights of the owner and lienholders, notice must be reasonably calculated, under all the circumstances, to apprise them of the sale. The Court of Appeals found that the record was not sufficient to determine if Mike's efforts were reasonably calculated to notify Citifinancial of the sale. It remanded the case to make further findings, specifically regarding the reliability of CARFAX, information the Manhattan PD may have had regarding ownership through NCIC records, etc. However, it certainly held that notice beyond that specifically listed in the statute may be necessary.

REVOCATION OF PROBATION FOR FAILURE TO PAY FINES

Sidney White was on probation for theft and forgery charges. He had to serve 60 days in jail, with 32 months in jail underlying, before he was placed on probation. A condition of his probation was payment of $813 in fines and costs. The district court revoked his probation for not paying his fines.

In *State v. White*, 41 Kan.App.2d___(May 8, 2009), the Court held that it is not permissible to automatically revoke an indigent defendant's probation and imprison him merely because he cannot pay the fine or make restitution in accordance with the conditions of probation. *See, Bearden v. Georgia*, 461 U.S. 660 (1983). The sentencing court must make several determinations before revoking the probation in such a situation. The probationer's conduct in failing to pay must be considered by the court. The court looks at whether the probationer willfully refused to pay or whether the probationer made a bona fide effort to acquire the resources to pay. If the probationer has the means to pay, but willfully refuses to pay or refused to make a bona fide effort to acquire the resources to pay, imprisonment is permissible. If the court finds that the failure to pay was not willful or the probationer has made a bona fide effort to pay, the court must consider alternative measures of punishment instead of imprisonment. Alternatives may include reduction of fine imposed, extension of time, or performance of community service.

In *White*, the Court did not make any of the necessary findings to substantiate imprisonment. Therefore, the case was reversed and remanded.

SENTENCE ENHANCEMENT CANNOT BE BASED ON UNCOUNSELED MUNICIPAL COURT MISDEMEANOR CONVICTION, EVEN IF NO JAIL TIME WAS ACTUALLY SERVED

Galen Youngblood was convicted in Newton Municipal Court of possession of marijuana. He subsequently was charged and convicted of possession marijuana in the Harvey District Court. As a second time offender, he received an enhanced sentence as a level 4 felony. The issue in *State v. Youngblood*, ___ Kan. ___ (May 8, 2009) was whether or not Youngblood's sentence could be enhanced based on the municipal court conviction, since there was insufficient proof that he had knowingly and intelligently waived his right to counsel in Newton Municipal Court.

(Continued on page 22)

A New Court Model Going On-Line In Wichita--- The Mental Health Court

By Hon. Bryce A. Abbott, Wichita

But the insane criminal has nowhere any home: no age or nation has provided a place for him. He is everywhere unwelcome and objectionable. The prisons thrust him out; the hospitals are unwilling to receive him; the law will not let him stay at his house; and the public will not permit him to go abroad. And yet humanity and justice, the sense of common danger, and a tender regard for a deeply degraded brother-man, all agree that something should be done for him - that some plan must be devised different from, and better than any that has yet been tried, by which he may be properly cared for, by which his malady may be healed and his criminal propensity overcome.

Jarvis, American Journal of Insanity, 1857

The Wichita Municipal Court is expanding its programming to include a Mental Health Court. It is expected to begin operation in August of 2009 and is primarily a diversion style program.

Mental Health Courts are situated at the intersection of the criminal justice, mental health, substance abuse treatment, and other social service systems. They are centered in what is commonly referred to as therapeutic jurisprudence. Why, you may ask, do we think such a Court is necessary?

In a report published in early 2006, the National Alliance on Mental Illness stated, *"Kansas is behind the curve in the decriminalization of mental illnesses."* In late 2006, the City of Wichita Municipal Court and Sedgwick County took a leadership role in the state and began to address this concern with the collaborative implementation of a mental health diversion program called the Sedgwick County Offender Assessment Program (SCOAP.) Building on 10 years of collaboration, the City of Wichita Municipal Court and COMCARE of Sedgwick County, the community mental health center, are now implementing those leadership efforts through the planning and implementation of a City of Wichita Mental Health Court (MHC). Grant funds will be utilized to develop and implement a mental health court that refers offenders for mental health assessment and supervises treatment for a minimum period of one-year with the goal of reducing recidivism for the mentally ill offender population.

The Sedgwick County jail has been described by one study as a place *"primarily [for] persons with mental health problems… homeless, prostitutes, drunks and drug users."* (Institute for Law and Policy Planning [ILPP], 2003). Faced with repeated cycles of costly jail expansions, tax increases and subsequent overcrowding; local attention has been drawn to the use of local jail space as a primary sanction for offenders, particularly for non-violent offenders who comprise over 70% of the local jail population (ILPP, 2003). Between 2000 and 2004, the "national rate of growth for incarceration was 10.4%, while in Sedgwick County, the incarceration growth rate was 17.3%" (ILPP, 2003) resulting in the need for multiple jail expansions. The average daily population of the Sedgwick County jail in 2005 was 1284, serving Sedgwick County's primarily urban population of 450,000. It is projected that the jail will need approximately 8 additional beds per month to accommodate its current population growth (ILPP, 2003). The Bureau of Justice Statistics on Mental Health Problems of Prison and Jail Inmates indicates that over half of those incarcerated in jails across the country had a mental health problem (James & Glaze, 2006). Local studies support the finding that individuals with mental illness are over represented in the local jail when compared to the general population (Craig-Moreland & Birzer, 2005). To further understand and develop plans for addressing the increasing jail population, a Criminal Justice Coordinating Council (CJCC) was formed in 2003 and included key stakeholders from the local criminal justice systems. The CJCC's mission is to "provide the community with a comprehensive continuum of custodial care and community-based correctional programs, treatment and supervision… innovative criminal justice practices, policies and processes through effective multi-system local and state partnerships" (CJCC, 2005).

A study commissioned by the CJCC to further understand the overrepresentation of the mentally ill in the local jail found that 1,280 individuals eligible for services at COMCARE, the local mental health authority and substance abuse treatment provider, were booked into the Sedgwick County jail, representing over 2,000 arrests (Craig-Moreland & Birzer, 2005). At the time of booking: 41% were receiving substance abuse treatment or co-occurring disorders treatment, 17% were receiving community based supportive services for those with severe and persistent mental illness, and 29% were receiving traditional outpatient mental health services.

Further analysis of the 1,280 bookings showed that 33% of the individuals were booked more than one time during the year. Of those individuals, 20% were booked more than twice, 8% were booked three times, and 5% were booked four or more times. An analysis of charges, counting the most serious offense only, indicated that:

- 38% were charged with public order crimes
- 34% were charged with property crimes
- 15% were charged with drug crimes
- 13% were charged with violent crimes

The majority of the public order and property crimes represent nonviolent misdemeanor charges such as trespassing, disor-

(Continued on page 21)

Wichita Mental Health Court

(Continued from page 20)

derly conduct, public nuisance, and loitering, with a large number of warrants for failure to appear. A random sample of those staying in the jail 200 days or more showed that 62% had documented mental illness and substance abuse problems. Of those in the jail 200 days or more, 88 % had a history of 5 or more arrests. Approximately 70% of those individuals were booked through the City of Wichita Municipal Court for misdemeanor offenses, 27% were booked through the 18th Judicial District Court, with the remaining 3% booked from other jurisdictions.

Adjudicating approximately 100,000 cases annually, the City of Wichita Municipal Court presides over a large percentage of those individuals detained at the Sedgwick County jail. The aforementioned studies reflect the opinion of the Court that many of those who show up repeatedly on the dockets are those non-violent offenders with mental illness whose treatment needs are not adequately addressed. These are offenders who come back through the system for additional "petty" crimes or eventually graduate to the District Court system with felony offenses. In short, these are the most time consuming, needy, highly medicated and expensive people seen at the jail. They are over –represented in the jail system because:

- They are arrested more often
- They stay longer after arrest
- They are less likely to make bail
- They are less likely to mount an adequate defense
- They are likely to serve longer sentences after conviction
- They are more likely to fail on conditional release

To address the problem of overrepresentation of the mentally ill in the local jail, the Sedgwick County Offender Assessment Program (SCOAP) was implemented in 2005. Citing public safety and rising jail costs as key issues for local government, the Sedgwick County Board of County Commissioners voted in 2006 to fund SCOAP at a cost of $1.2 million dollars for part of 2006 and to fund the program for 2007 at a cost of $1.6 million dollars. In the discussion preceding the vote, the County Commission noted that SCOAP was a first step in developing a mental health court. COMCARE of Sedgwick County, Kansas's largest community mental health center began operating SCOAP in August 2006 in collaboration with the City of Wichita Municipal Court. With 33 full and part-time employees, SCOAP provides timely mental health screening and assessment, medication management, and intensive case management. The intensive portion of SCOAP treatment averages a 90 day period, during which participants have access to case management services 3 times per week or as frequently as needed to maintain their functioning in the community. Assessment and case management services are available 24 hours a day, 7 days a week through SCOAP. A psychiatrist is available "on call" at all times. Case management services will include coordinating treatment, providing individualized support accompanying individuals to court and treatment appointments as needed, and brokerage of other community resources such as housing, food, and employment resources. When fully implemented, SCOAP will also have a pre-booking alternative assessment site for law enforcement officers to bring those charged with "nuisance" crimes to be assessed for SCOAP. The building will also house a 4-bed crisis stabilization unit designed for 1-2 stays while participants are engaged in medication management and case management.

The target population for the MHC is offenders appearing in Municipal Court who are arrested and whose psychological problems contribute significantly to their arresting behavior. Eligibility criteria for SCOAP and mental health court include adults who:

- Were previously or are currently diagnosed with a major mood or psychotic disorder;
- Manifest signs of their disorder at the time of arrest, confinement, or court hearings;
- Are charged with misdemeanor, nonviolent offenses through the Wichita Municipal Court and;
- Are living in Sedgwick County

It is expected that a majority of the participants will have co-occurring substance use problems. Through individualized treatment planning, substance abuse treatment needs will be addressed through COMCARE Addiction Treatment Services. It is estimated that the MHC will serve 100 consumers at any given time in addition to the 100 consumers served by SCOAP.

While treatment beds continue to decline and the barriers to civil commitment continue to increase, community-based services are available. They include crisis intervention, medical services, housing services, counseling services, transportations services and treatment services. For the first time we will have a system in place that brings all of these services to one place in an effort to reduce the number of jail days that the mentally ill consume on an annual basis in Wichita. They are expensive prisoners. They require far more supervision. Some of the medications commonly prescribed for treatment of mental illness can run $400-$600 per day. With more and more County Governments seeking to charge municipalities for use of the jail it only makes sense to try and move these cases to a different venue designed to provide a greater array of supervision and services at a lower cost. Many will argue that it is not a function of the court system to provide this type of programming. Persons with persistent mental illness are already in your communities and in your courts. Without intervention and services they will continue to be in your court and in your jail.

Albert Einstein once said *"The definition of insanity is doing the same thing over and over again and expecting different results".* It is time to try a different approach.

Court Watch

(Continued from page 19)

Although the municipal judge testified that it was his practice to inquire about waiver of counsel before the plea, the written waiver in the file was not signed until 3 weeks after the conviction and sentencing. The Court properly chastised the municipal court for such a process.

"With respect to municipal courts which are not courts of record, Gilchrist recognized the impracticability of a requirement that every waiver of counsel be recorded, but strongly urged municipal courts to obtain a written waiver...The opinion went so far as to provide a suggested waiver of counsel form...The benefit of such a practice is poignantly illustrated here. If the written waiver form had been executed at the plea hearing, we could be assured that Youngblood had received the advice to which he is due, e.g., that he had a right to have an attorney represent him in defending the case and that if he could not afford an attorney and he was found indigent, one would be appointed for him. … A post-sentencing written waiver will not legitimize an invalid pre-plea waiver."

However, the Supreme Court overruled the Court of Appeals unpublished decision in *State v. Youngblood*, Slip Copy, 2008 WL 1868619 (Kan. App. April 25, 2008) to the extent that it held that an uncounseled misdemeanor conviction that does not result in incarceration may be considered for enhancement purposes. *See, Verdict*, Summer 2008, p. 32. Youngblood's uncounseled misdemeanor conviction did not result in any incarceration. Although he was sentenced to 6 months in jail, he was granted probation. No jail time was served.

Justice Johnson, writing for the majority, embarks on an in-depth analysis of the cases from the U.S. Supreme Court and the Kansas Supreme Court regarding denial of the Sixth Amendment right to counsel and holds that the denial of the right to counsel renders the uncounseled misdemeanor conviction in municipal court unconstitutional under the Sixth Amendment, regardless of whether or not any jail time was actually served. Therefore, the conviction cannot be collaterally used in district court for sentence enhancement.

Editor's Note: *Municipal Judges are referred to the Municipal Judges Manual, Chapter 13, which has always advised judges to obtain written waivers of counsel at the time of the plea and sentencing. Samples are contained in the Manual in both English and Spanish.*

MAGISTRATE JUDGES MAY CONDUCT FELONY ARRAIGNMENTS IF ASSIGNED TO DO SO BY THE CHIEF JUDGE

A district magistrate judge who has been assigned to conduct felony arraignments by the chief judge of the judicial district has jurisdiction to conduct a felony arraignment and to comply with the due process requirements inherent in accepting a guilty or no contest plea, including determining if there is a sufficient factual basis to support the plea. There must be some factual finding that such an assignment has been made.

In *State v. Valladarez*, ___Kan. ___ (May 8, 2009) the Supreme Court states that the best practice would be for the chief judge to adopt a local court rule providing such assignment to the magistrates in the district (either collectively or individually) or have a written order on file making such an assignment. In the absence of a written order or rule, the question of whether the magistrate has the proper authority is a question of fact.

Another issue in *Valladarez*, was whether the magistrate had allowed for a proper allocution.* K.S.A. §22-3422 requires that, when the defendant appears for judgment, the court must inform the defendant of the jury's verdict or the court's finding and also ask if the defendant "has any legal cause to show why judgment should not be rendered." If none is shown, the court shall pronounce judgment against the defendant. The magistrate did not ask the defendant if he had any legal cause to show why judgment should not be rendered. The Court found that allocution errors are subject to a harmless error analysis and Valladarez had not been able to establish any prejudice as a result of the failure to provide a proper allocution.

""*Historically, the term "allocution" has been applied also to the right to speak at sentencing. Kansas provides a defendant this right under K.S.A. 22-3424(4). The practice of allocution is so steeped in history its origin is unknown. ... It was well established in English common law. There, the accused was not permitted counsel or to be a witness in his own behalf. Allocution was thus the only time in the proceeding the defendant could present facts supporting his innocence as well as facts supporting mitigation of his sentence. Allocution was thus extremely important, and its omission justified reversal…"* [Citations omitted]

State v. Webb, 242 Kan. 519, 522-523 (1988)

ADOPTIVE ADMISSIONS

Kendrall Ransom was charged with two counts of murder. After leaving the scene and returning to the "Washington" house in the Gray Ford Contour they had driven during the murders, Ransom and his co-defendants watched the 10:00 news. The news station reported that officers were looking for a green Ford Taurus involved in two shootings that evening. Ransom and his co-defendants laughed and "high-fived" each other after the news report because they believed

(Continued on page 23)

Court Watch

(Continued from page 22)
the officers had an inaccurate lead about the car.

During the trial, Washington (whose house the defendants fled) testified about the reaction of Ransom and the co-defendants to the news report, including the statement by one of the co-defendants, "*They have the wrong lead."*

On appeal, Ransom argued that Washington's testimony violated his right to confront the witnesses against him. First he argued that since the statement was allegedly made by a co-defendant, he could not confront him at trial. However, this argument failed because Ransom was not tried with the co-defendants. The rule regarding statements made by co-defendants who cannot be compelled to testify only applies when joint trials are involved.

Next, Ransom argued that based on *Crawford v. Washington*, 541 U.S. 36 (2004), this was testimonial hearsay that could only be admitted if the declarant was unavailable and the defendant has had an earlier opportunity to cross-examine him. In *State v. Ransom*, ___Kan. ___ (May 15, 2009) the Kansas Supreme Court held that the statements and "high-fives" were not testimonial in nature. The person making the statement could not reasonably believe that the statement would be used in a prosecution for the crimes.

Finally, the Court analyzed the pure hearsay nature of Washington's testimony and whether or not any exceptions apply. K.S.A. §60-460(h)(2) provides that an authorized or adoptive admission is admissible despite the fact that it is hearsay if the party against whom it is sought to be admitted had knowledge of the content of the statement and has "by words or other conduct, manifested the party's adoption or belief in its truth." This is called an adoptive admission. In other words, prejudicial statements made in the defendant's presence and tolerated without resentment, explanation, or denial may be admitted as if it was the defendant's own admission against interest.

Ransom argued that the State proved only that he stood silent while other men reacted to the news broadcast. The caselaw establishes that in order for silence to meet the standard of an adoptive admission several factors must be present: (1) the statement must be extrajudicial; (2) it must have had an incriminatory or accusative import; (3) it must be one to which an innocent person would in the situation and surrounding circumstances naturally respond, (4) it must have been uttered in the presence and hearing of the accused, (5) the accused must have been capable of understanding the incriminatory meaning of the statements; (6) the accused must have had sufficient knowledge of the facts embraced in the statement to reply thereto, and (7) the accused must have been at liberty to deny it or to reply thereto.

The Supreme Court found all factors were met in this case. Even if he didn't speak, Ransom was not unresponsive. He admitted in his confession that he participated in the contemporaneous laughter and round of "high-fives." This participation constituted an unambiguous nonverbal expression of knowledge about the shootings, as well as an understanding of the significance of the news report and any accuracy or inaccuracy of police leads. The "they have the wrong lead" statement was properly admitted as an adoptive admission.

FOUNDATION FOR DUI BLOOD TEST

At a DUI trial, involving a blood test, the medical technologist who completed and signed the defendant's blood draw form testified that the form contained her handwriting, but she could not recall working on the date the blood was drawn and had no recollection of the defendant. The defendant objected to introduction of the result based on insufficient foundation. If she could not remember the draw, there was no evidence that it was performed in a medically reasonable manner, he argued. The State responded that it should not be required to show that the blood draw was done in a medically reasonable manner unless the defendant objects on those grounds at the time the bloods is drawn or through a subsequent motion, which was not done in this case. The prosecution argued that the defendant consented to the blood draw and there was no evidence in the record to suggest it was *not* completed in a medically reasonable manner.

In *State v. Davis*, __Kan.App.2d___(May 22, 2009), the Court pointed out that drawing of a blood sample implicates the Fourth Amendment. Any warrantless blood draw is considered unreasonable unless (1) there were exigent circumstances in which the delay necessary to obtain a warrant would threaten the destruction of evidence.; (2) the officer had probable cause to believe the suspect was DUI; **and** (3) reasonable procedures were used to extract the blood.

No one disputed exigent circumstances or probable cause in this case. No on disputed the medical technologist's qualifications. The issue came down to whether reasonable procedures were used to extract the blood. The Court set out the factors to consider in determining the reasonableness of the procedure to include the qualifications of the person drawing the blood, the environment in which the blood was drawn, and the manner in which the blood was drawn.

The Court found that the testimony supported the fact that this was a licensed and experienced medial technologist taking a routine blood draw. The trooper witnessed the blood draw and testified regarding the process and everything was proper. There was no evidence presented that it was conducted in anything other than a reasonable manner. The evidence was sufficient to permit an inference the blood draw was in a medically reasonable manner. The result was properly admitted at trial.

(Continued on page 24)

Court Watch

(Continued from page 23)

The Court did spend some time talking about the prosecution's argument that this was really a consent search, therefore the three factors to consider for a warrantless search/ blood draw were irrelevant. It found that the consent abrogated the need for exigent circumstances and probable cause, but did not abrogate the need to show the blood draw was conducted in a medically reasonable manner.

TWO STABS WITH A KNIFE ≠ TWO AGGRAVATED BATTERY CHARGES

Defendant cut the victim's penis after stabbing him in the right leg. The issue in *State v. Mendoza*, ___Kan.App.2d ___ (May 22, 2009) was whether the prosecution can charge two stabs of a knife attack as two distinct counts of aggravated battery.

The Court held that since the aggravated battery statute encompasses all physical harms, disfigurements and physical contacts on the person and not on separate body parts, the unit of prosecution is the person harmed. Therefore, stabbing two separate parts of the body as part of the same conduct, cannot result in two separate charges.

WEAPONS SEARCH OF CAR WHEN OCCUPANTS ARE NOT ARRESTED

State v. Preston, ___Kan.App.___(May 22, 2009), involved a case where the driver and his passenger were not arrested or handcuffed at the time their car was searched. Although they were away from the car, the Court of Appeals held that the search of the car for weapons was still reasonable. The recent case of *Arizona v. Gant*, ___U.S. ___, 129 S.Ct. 1710 (2009) did not affect the ruling, the Court opined, because *Gant* applied when the driver was handcuffed and placed in a police car. In this case, Preston and his passenger would have been free to return to the car if drugs had not been found, so officers needed to make sure that neither he nor his passenger would have access to weapons upon return to the car. In the case where an arrest has not been made, officers are particularly vulnerable. A suspect could more easily break away from officer control and gain access to weapons in the vehicle. Just as officers in this case were justified based on the circumstances of the stop and the driver's criminal history to conduct a pat-down search for officer safety prior to the search of the vehicle, they were equally justified in conducting a protective search of the vehicle for weapons.

DISCUSSIONS WITH POLICE AFTER ATTORNEY HAS BEEN APPOINTED

Under *Michigan v. Jackson*, 475 U.S. 625 (1986), police are forbidden to initiate interrogation of a criminal defendant once he has requested counsel at an arraignment or similar proceeding. Kansas courts have recognized this rule. See, *State v. Coleman*, 275 Kan. 796 (2003). *Jackson* therefore presumes that a subsequent waiver of counsel in such a situation is invalid.

Jesse Montejo was a suspect in the murder of Lewis Ferrari. He waived his right to counsel and was questioned by police for almost 24 hours (after waiving his rights per *Miranda*). He ultimately admitted killing Ferrari and indicated that he had thrown the murder weapon into a lake. He was charged with first degree murder and the court appointed an attorney for him.

Later that day, police again read him his *Miranda* rights and he again waived them and agreed to go on a trip to locate the murder weapon. During the excursion, he wrote an inculpatory letter of apology to the victim's widow. Upon returning, he finally met his court-appointed attorney. At trial, his letter was admitted over defense objection, and he was convicted and sentenced to death. He appealed to the Louisiana Supreme Court, which held that because Montejo did not request an attorney, but simply stood moot while one was appointed, the *Jackson* rule did not apply. The only question was whether he had knowingly, intelligently, and voluntarily waived his right to have counsel present during his interaction with the police. Since he had been read his *Miranda* rights and agreed to waive them, there was nothing wrong with the police questioning. Montejo appealed to the U.S. Supreme Court.

Justice Scalia, writing for the Court, first pointed to the untenability of the Louisana court's rationale. Defendants in States that automatically appoint counsel without a request being made from the defendant (like Louisiana) would never trigger *Jackson*, while those in States that appoint only upon a request from the defendant would be "lucky winners." *"That sort of hollow formalism is out of place in a doctrine that purports to serve as a practical safeguard for defendants' rights."*

However, the Court found Montejo's position equally untenable: that once a defendant is *represented* by counsel police cannot initiate further questioning.

In *Montejo v. Lousiana*, 556 U.S. ____(May 26, 2009), the U.S. Supreme Court overruled *Michigan v. Jackson*, *supra*. It found that under *Miranda v. Arizona*, 384 U.S. 436 (1966) any suspect subject to custodial interrogation has the right to have a lawyer present if he so requests and to be advised of that right; under *Edwards v. Arizona*, 451 U.S. 477 (1981) once such a defendant has invoked his right to have counsel present, interrogation must stop; and finally, under *Minnick v. Mississippi*, 498 U.S. 146 (1990), no subsequent interrogation may take place until counsel is present regardless of whether or not the accused has consulted with his attorney. *"These three layers of prophylaxis are sufficient."*

Scalia went on to conclude that in determining whether a Sixth Amendment waiver was knowing and voluntary, there

(Continued on page 25)

Court Watch

(Continued from page 24)

is no reason categorically to distinguish an unrepresented defendant from a represented one. It is equally true for each that the *Miranda* warnings adequately inform him of his right to have counsel present during questioning, and make him aware of the consequences of a decision by him to waive his Sixth Amendment rights. The Court also made clear that these rules apply only to custodial interrogations. Justice Scalia concluded by stating:

"This case is an exemplar of Justice Jackson's oft quoted warning that this Court "is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added,'...We today remove Michigan v. Jackson's forth story of prophylaxis."

Although Justices Alito and Kennedy concurred, they wrote a stinging rebuke of Justice Scalia's inconsistent views of *stare decisis* in this case as compared to the *Arizona v. Gant* case just one month earlier. Justices Stevens, Souter, Ginsburg and Breyer dissented. Justice Stevens chastised Justice Alito for not joining in the dissent based on his dissent in *Gant. (FN 5)*

TENTH CIRCUIT CONSIDERS DENVER PIT BULL BAN

Denver has an ordinance banning pit bulls. The ordinance has a somewhat lengthy history. When first adopted, it was challenged as being in violation of the constitution. The case went to the Colorado Supreme Court, which ruled it constitutional. *Colo. Dog Fanciers, Inc. v. City & County of Denver*, 820 P.2d 644 (Colo. 1991) (en banc). Then the Governor of Colorado signed a law prohibiting municipalities from adopting breed-specific legislation. The City of Denver challenged the law as a violation of its home rule powers, and won.

When they learned that Denver intended to resume enforcement of the pit bull ban, Sonya Dias, Hilary Engel, and Sheryl White moved out of the city to avoid the City impounding and destroying their pit bulls (at great expenses to them). They then filed a federal §1983 action on behalf of themselves and others similarly situated arguing that the ordinance was vague on its face and deprived them of procedural due process, substantive due process and equal protection of the laws. The district court, without a hearing, dismissed all claims. The case found its way to the Tenth Circuit Court of Appeals in *Dias et al. v. City & County of Denver*, ___F.3d ___(10th Cir. May 27, 2009)

The Tenth Circuit found that the plaintiff dog owners had no standing to seek prospective relief because there is no credible threat of future prosecution. They moved. It also determined that the ordinance was not vague on its face. However, it did send the case back to the district court on the issue of substantive due process.

It found that the plaintiffs were entitled to a hearing on whether or not the pit bull ban is rationally related to a substantive due process claim as far as retrospective relief. The plaintiffs argued that the ordinance is not rationally related to a legitimate government interest. Although Denver clearly has an interest in animal control, they contend that there is a lack of evidence that pit bulls as a breed pose a threat to public safety or constitute a public nuisance, and thus it is irrational for Denver to enact a breed-specific prohibition. The Tenth Circuit panel (which included Judge Tacha) found that the plaintiffs had presented enough evidence to withstand a motion to dismiss:

"Whether plaintiffs can marshal enough evidence to prevail on the merits of their claim that the Ordinance is irrational is a different matter entirely. But at [this] stage we must assume that they can, even if it strikes us 'that a recovery is very remote and unlikely.'….Crediting the allegations in the complaint, and drawing all inferences therefrom in the light most favorable to the plaintiffs, we conclude that they have stated a plausible substantive due process violation."

Doesn't sound to promising for pit bull owners, but stay tuned.

NOT REQUIRED TO REMAIN AT SCENE OF NON-INJURY SINGLE CAR COLLISION WHEN NO ONE THERE TO EXCHANGE INFORMATION WITH AND NOT REQUIRED TO REPORT IT TO POLICE UNLESS DAMAGE IS GREATER THAN $1,000

Tyler Holm was charged with leaving the scene of an accident (K.S.A. §8-1603, *see also*, STO §24) failure to report an accident (K.S.A. 2008 Supp. §8-1606, *see also* STO §27) and no liability insurance (K.S.A. §40-3104, *see also* STO §200) after his car rolled off the road into a ditch and he left the scene. He did not report the accident for 22 hours. He claimed he swerved to avoid a deer and he could not call because his phone was not working.

In *State v. Holm*, ___Kan.App.2d___(May 29, 2009), the Court of Appeals found that reading the statutes involving leaving the scene together, they only require that the driver remain at the scene of a non-injury accident if the property damaged by the damaging driving is attended to by another person. Therefore, a single car, non-injury accident does not require remaining at the scene unless the property of some other person is damaged. In addition, the failure to report statute only requires that non-injury property accidents be reported if the damage is at least $1,000. In Holm's case, the prosecution did not present any evidence regarding the amount of property damage to Holm's van or the ditch. Therefore there was insufficient evidence at trial to convict Holms of either leaving the scene or failure to report.

(Continued on page 27)

THREE WOMEN ACCUSED OF ALTERING WICHITA BOND RECORDS

By Becky Tanner
Reprinted from Wichita Eagle
May 15, 2009

Three Wichita women were indicted today on charges of computer fraud and altering Wichita Municipal Court bond records. The accusations came from an ongoing investigation by the U.S. Attorney's Office, the Federal Bureau of Investigation and the Wichita Police Department.

"It is our duty to assure that citizens receive the honest services of their public employees," U.S. Attorney Lanny Welch said.

The indictment alleges Municipal Court employee Kaylene J. Pottorff, 43, took bribes to change court records for the benefit of bonding agents Alicia Bell, 35, and Jessie Garland, 41, according to a news release from the U.S. Attorney's Office.

According to the release:

Pottorff worked as a collections officer for the court and is accused of changing court records between March 2004 and April 2008. She is accused of accepting bribes from Bell and Garland and of falsifying computerized court records. She is charged with two counts of conspiracy, two counts of impairing computer data and two counts of bribery.

Bell is accused of using fraudulently altered lists of active bonds from court records with fraudulent jail booking forms to defraud her mother, Pearl Neal, AAA Bonding Co. and others. She is charged with one count of conspiracy, one count of impairing computer data and one count of bribery.

Garland is accused of using the altered lists to defraud B&J Enterprises and Larry Hiebert, the bondsman and surety company on Garland's bonds. She is charged with one count of conspiracy, one count of impairing computer data and one count of bribery.

Upon conviction, the conspiracy crimes carry a maximum penalty of five years in federal prison and up to $250,000 in fines; impairing computer data carries a maximum penalty of 10 years in federal prison and a fine of up to $250,000; and bribery, a maximum of 10 years in federal prison and a fine of up to $250,000.

Assistant U.S. Attorney Brent Anderson and U.S. Attorney Lanny Welch are prosecuting the cases.

Examples of Judicial Conduct Found to Be Improper in 2008

♦ A judge was cautioned about *ex parte* communication resulting from e-mail correspondence

♦ A judge, who lost his/her temper and used profanity in the courtroom, was publicly ordered to control his/her temper and cease and desist from using inappropriate language in court.

♦ A judge was cautioned on the issue of delay regarding the determination of indigency for purposes of appeal.

♦ A judge who allowed too little time between scheduled events and failed to honor all commitments, was cautioned on the importance of scheduling adequate time between events.

♦ A judge, who took 14 months to file an order, was cautioned on the issue of delay.

♦ A formal proceeding was filed against a judge alleging violations arising out of a relationship with an administrative assistance. The judge retired from office while the matter was pending.

♦ A judge who lost his/her temper and engaged in emotional outbursts, was given a public censure.

♦ A judge who acknowledged delay of several months in ruling on a 60-1507 motion was informally advised regarding the issue of delay.

♦ A judge was publicly ordered to cease and desist from vountarily testifying as a character witness.

Help for domestic violence victims can be found at a new website:

www.womenslaw.org a

The website is dedicated to helping victims of domestic abuse. It has tips on how to safely leave an abuser, information on preparing for court, and advice on how to find a lawyer. It is funded by private donations and grants.

Court Watch

(Continued from page 25)

AN IMMIGRATION HOLD DOES NOT DEPRIVE DEFENDANT OF PROTECTIONS OF RECEIVING A TRIAL IN DISTRICT COURT WITHIN 90 DAYS IF IN CUSTODY

Carlos Montes-Mata was being held by Lyon on drug charges. He pled guilty and was awaiting sentencing. Immigration and Customs Enforcement (ICE) filed a I-247 Immigration Detainer Notice with Lyon County. Prior to trial, he filed a motion to dismiss for lack of a speedy trial. He had been in custody for 111 days without a trial.

K.S.A. 22-3402(1) states that any person charged with a crime and held in jail *solely by reason thereof* must be brought to trial within 90 days of arraignment on the charge or the charges must be dismissed. The State argued that the ICE hold vitiated the 90 day requirement because after the detainer was received, the defendant was no longer *"held in jail solely by reason"* of the drug charges.

In *State v. Montes-Mata*, ___Kan.App.2d___(May 29, 2009), the Court of Appeals found that the immigration detainer did not seek to hold Montes-Mata in concurrent custody, but simply served as notification to the State that ICE may seek custody of Montes-Mata in the future. The detainer only asked the Lyon County Sheriff to notify ICE within 48 hours of Montes-Mata's release so that it could assume custody if it determined it needed to.

The Court pointed out that the decision might be different if other "boxes" on the ICE form had been checked. For example, *"the form could serve to notify a sheriff's office of (1) a notice to appear or other charging document initiating removal proceedings; (2) an arrest warrant in removal proceedings; or (3) a deportation order or order of removal from the United States."* But these boxes were not checked in this case.

Therefore, the State was required to bring him to trial within 90 days under the statute and failure to do so requires that all charges be dismissed.

QUALIFICATIONS OF EXPERT WITNESS IN CHILD SEXUAL ABUSE CASE

Kelly Robbins testified in the child sexual abuse case of Rodolfo Gaona. She was not a psychiatrist, psychologist, social worker, mental health technician, or family therapist. She had a B.S. degree in the Administration of Justice with a major in investigation and had specific training in child interview techniques and extensive training and experience in investigation of child sexual abuse. The question in *State v. Gaona*, ___Kan.App.2d___(May 29, 2009), was whether the court acted properly in allowing her to testify as an expert witness.

The Court of Appeals found Robbins was properly allowed to testify as an expert. She was not giving a medical diagnosis, but was confined to a general discussion of common behavioral traits of sexually abused children. She did not provide diagnostic testimony beyond her credentials, she did not state or imply that the child had been sexually abused, she did not opine on whether or not the victim was credible and she did not suggest any involvement by the defendant. Since there is no bright-line prerequisite for the qualifications to give such testimony, the narrow scope of her testimony was within the scope of special knowledge, skill, experience or training that she possessed.

WHAT IS MEANT BY 'FACILITATING" A FELONY?

Federal law makes it a felony "to use any communication facility in committing or in causing or facilitating" certain felonies. (Note: Kansas law has a similar provision at K.S.A. §65-4141). Defendant agreed over the phone on several occasions to buy cocaine from Mohammed Said, one gram at a time. Purchase of a gram of cocaine is a misdemeanor in the federal system, but the sale of a gram of cocaine is a felony. The law mentioned above, makes it a felony to use a phone to facilitate a felony. Since the seller was committing a felony, the Government charged the defendant with six felonies on the theory that in each of his phone calls arranging to purchase cocaine, he was facilitating the felony of sale of cocaine. The case was eventually appealed to the U.S. Supreme Court. The defendant argued that his committing of a misdemeanor crime could not cause or facilitate a felony in violation of the statute. The Government argued that the defendant's purchase of cocaine certainly facilitated or made Said's sale of cocaine easier.

The U.S. Supreme Court, in an unanimous decision, held that *"where a transaction like a sale necessarily presupposes two parties with specific roles, it would be odd to speak of one party as facilitating the conduct of the other. A buyer does not just make a sale easier; he makes the sale possible. No buyer, no sale; the buyer's part is already implied by the term "sale," and the word 'facilitate' adds nothing. We would not say that the borrower facilitates the bank loan."* It pointed out that where a statute treats one side of a bilateral transaction more leniently, adding to the penalty of the party on that side for facilitating the action by the other would upend the calibration of punishment set by the legislature. Consistently the Court has refused to treat non-criminal liquor purchases as aiding or abetting the illegal sale of alcohol. Likewise, a woman who voluntarily crosses state lines to engage in prostitution, could not be charged with aiding or assisting in transporting a woman across state lines for an illegal purpose in violation of the Mann Act.

The Court found that there was no question that Congress intended to impede drug transactions by adopting the statute at issue. But it does not follow that it intended to penalize a first-time buyer of misdemeanor level of drugs for personal use 12 times more severe because he used a phone to make the buy. The defendant's convictions were reversed. *See, Abuelhawa v. U.S.*, ___U.S. ___ (May 26, 2009).

(Continued on page 28)

Court Watch

(Continued from page 27)

JUDGE MUST RECUSE SELF IN CASES INVOLVING LARGE CAMPAIGN DONORS

In a case that formed the basis for John Grisham's book, *The Appeal,* the U.S. Supreme Court has ruled that a West Virginia Supreme Court justice was required to recuse himself in a case involving the largest contributor in his election campaign.

Massey Energy was involved in a long running dispute with another coal company, Harmon Mining (and others). A West Virginia jury found Massey liable in a contract dispute and awarded $50 million in damages to Harman Mining. Knowing the state supreme court would consider the appeal, Don Blankenship, the chairman and CEO of Massey Energy donated $3 million to the judicial campaign of Brent Benjamin, who challenged the incumbent. He won by less than 50,000 votes. Blankenship gave more money than all other contributors to Benjamin's campaign combined and more than three times the amount spent by Benjamin's own election committee. In fact it was $1 million dollars more than was spent by all the other candidates combined. When the case reached the appellate court, Harman Mining asked that Benjamin recuse himself. He refused. The appellate court voted 3-2 to throw out the $50 million verdict. The case made it all the way to the U. S. Supreme Court.

In *Caperton v. A.T. Massey Coal*, ___U.S. ___ (June 8, 2009), the Court held in a 5-4 decision that Harmon Mining's due process rights had been violated by Judge Benjamin's refusal to recuse himself in the case.

The Court reasoned that a fair trial in a fair tribunal is a basic requirement of due process. Although a judge may do a lot of soul searching regarding whether or not he or she feels he or she would be biased in a case, the judge's own inquiry into bias is difficult to review unless actual bias is shown. The Due Process Clause requires a review of objective standards that do not require proof of actual bias. The issue may not be whether or not the judge was influenced, but whether there would have been a possible temptation to the average judge *"not to hold the balance nice, clear and true."*

Not every campaign contribution by a litigant or attorney creates a probability of bias requiring recusal. However, when a person with a personal stake in a particular pending case has a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign, due process is violated if the judge remains on the case. *"The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election."*

The majority concludes by pointing to state judicial ethics codes and opines that states may choose to adopt standards more rigorous than the Constitution requires. The West Virginia Supreme Court's decision setting aside the $50 million dollar verdict was reversed and was remanded for consideration *sans* Justice Benjamin.

The dissent, lead by Chief Justice Roberts, lists 40 questions it thinks the majority decision raises, including whether recusal is required when the party to the suit gave a large sum to the judge's opposition, what role do endorsements play in disqualification, and are the parties entitled to discovery on the issue of recusal. The dissent raises some very interesting questions and is very interesting reading for those interested.

WHETHER IMPROPER IMPLIED CONSENT ADVISORY TAINTS SUBSEQUENT RESPONSE TO A PROPER IMPLIED CONSENT ADVISORY

Chella Bradley was arrested for DUI. When the officer placed her in his patrol car he asked her if she would take a breath test. He gave her no implied consent warnings. She refused. Later at the station, he read her the implied consent warnings and again asked her to take the breath test. She again refused. Her attorney moved to suppress both "refusals" on the grounds that the first one was given without the statutorily required implied consent warnings, and the second one was tainted by the initial request and refusal and should also be suppressed.

In *State v. Bradley*, ___Kan.App.2d ___ (June 12, 2009), the Court of Appeals held that the first refusal must be suppressed for failure to comply with the implied consent warnings, but the second one should not be suppressed. K.S.A. §8-1001(f) requires implied consent advisories before a test is **administered.** Although sections of K.S.A. §8-1001 use language regarding what is necessary before a test is "requested," those sections are not applicable to this case. Here the proper advisories were given before a test was administered. The Court did say that the results of a second or subsequent test may be suppressible as fruit of the poisonous tree if it can be shown that the results were obtained 'as a result" of the first test or leads obtained from the first test. But that was not the case here.

IN DETERMINING WHETHER STATEMENTS ARE TESTIMONIAL OR NOT, THE AWARENESS OF A YOUNG WITNESS THAT HIS OR STATEMENTS MAY BE USED BY POLICE IN PROSECUTING THE OFFENDER, IS NOT DISPOSITIVE

Four year old advised her mother that family friend had "hurt her" and described sexual abuse. Mother took child to hospital emergency room. Nurse observed some evidence of sexual trauma. Child made statements to nurse about the sexual nature of the touching. Child was deemed unavailable for

(Continued on page 29)

Court Watch

(Continued from page 28)
trial. The prosecution wanted the nurse to testify about what the child said to her.

The issue in *State v. Miller*, ___Kan.App.2d ___ (June 5, 2009) was whether or not, based on *Crawford v. Washington*, the child's statements to the nurse were testimonial in nature. If they were, and the child was unavailable to testify, the statements could only be admitted if the defendant had a chance to cross-examine her on the statement at some point. If the statements were not testimonial, the Confrontation Clause does not come into play. One factor in determining whether a statement is testimonial is whether or not an objective witness would have reasonably believed the statement would later be available for use in the prosecution of a crime. This was a four year old child. She clearly had no concept of how her statements would be used. The Court found, basically, that the standard is that of a reasonable adult. The evidence collected by the nurse was for the purpose of preserving evidence for a later prosecution, not for medical diagnosis or treatment. A reasonable adult witness would have realized this. Therefore, the statements the child made to the nurse were testimonial and inadmissible because they had not been subject to cross-examination by the defense.

NO CONSTITUTIONAL RIGHT TO POST-CONVICTION DNA TESTING

In *District Attorney's Office for the Third Judicial District v. Osborne*, ___U.S. ___ (June 18, 2009), the U.S. Supreme Court held that there is no constitutional right to obtain post-conviction access to the State's evidence for DNA testing. The availability of DNA testing, the Court opined, does not suddenly put every conviction involving biological evidence in doubt. The power to adopt rules regarding obtaining DNA evidence, postconviction, rests with the state legislatures. Many states have done so and have put protections in place like a requirement that materiality be established, or that the defendant submit a sworn affidavit of innocence, or that testing was technologically impossible at trial, or that the defendant requested testing at trial. At trial, the defendant is presumed innocent. But once the defendant has been afforded a fair trial and convicted, the presumption of innocence disappears. Given a valid conviction the defendant has been constitutionally deprived of his liberty. Therefore, a defendant only has a limited interest in postconviction relief. *"To suddenly constitutionalize this area would short-circuit what looks to be a prompt and considered legislative process."*

FEES ARE NOT PART OF SENTENCE

K.S.A. 2008 Supp. 22-3424(a) requires that judgment and sentence be imposed in open court. The case law is clear that the journal entry is simply the record of the sentence imposed. The actual sentencing occurs when the defendant appears in open court and the judge orally states the terms of the sentence. The question in *State v. Phillips, et al*, ___Kan. ___ (June 19, 2009) was whether or not docket fees, booking fees, and BID (Board of Indigent Defense—court appointed attorney) fees are part of the sentence and, therefore, must be announced in open court in order to be valid. Conflicting opinions have been issued by varying panels of the Court of Appeals.

A sentence is *"the punishment imposed on a criminal wrongdoer."* The Kansas Supreme Court held that docket fees and booking fees are not punitive in nature and therefore are not part of a sentence. BID fees, likewise, are not punitive, but merely an effort to recoup costs and are therefore not part of a sentence. The Court also mentions court–appointed attorney application fees, juror fees, county attorney's fees, and fingerprint fees as similar types of cost recoupment fees. Due process of law is not infringed because a defendant is on notice that all applicable statutorily-mandated costs are imposed by virtue of the rendition of a judgment. A judge generally does not have discretion regarding the amount to impose because it is generally set by statute or local ordinance. Even if the court has some discretion in the amount imposed or whether or not some or part of it is waived (based on indigency, for example), these are still cost recoupment statutes, not punitive provisions. Some fees may actually be assessed in advance of judgment, like court-appointed attorney application fees. There is no requirement that those fees be announced again at sentencing. Although judges are encouraged to outline all fees at the time of sentencing, failure to do so does not void the order to pay said costs.

The Court also mentions that an order to pay these costs may be treated like a civil judgment. *"Consequently, a defendant who has the ability to pay costs but refuses to pay them as ordered may be required to spend time in jail similar to a civil litigant who fails to abide by a court order to pay a judgment"* However, before revoking probation or incarcerating a person for failure to pay costs, the Court must determine whether or not the probationer willfully refused to pay although he or she had the resources to do so or whether or not the probationer was making a bona fide effort to pay. If the Court finds that the probationer was making a bona fide effort to acquire the resources to pay, but was still financially unable to pay, the Court must consider alternatives to imprisonment as punishment, such as community service or extension of time. (*citing State v. White*, 41 Kan. App.2d ___ (2009)). *See, supra*, p. 19.

Editor's Note: Similar holdings have been entered around the country concerning the assessment of jail fees. *See*, *Sickles v. Campbell County, Kentucky*, 439 F. Supp.2d 751 (E.D. Ky 2006); *Brown v. Knox County*, 39 S.W.3d 585 (Tenn.Ct. App. 2000); *State v. Johnston*, 31 P.3d 1101 (Or. App. 2001); *See also*, Lind, H.C, *Items of Costs of Prosecution For Which Defendant May Be Held*, 65 A.L.R.2d 854 (includes continuance fees and costs of supervised release, as well as jail fees, preparation of probation office report, education and training programs, etc.); *Costs and Fees Which May Be Assessed*, 24 C.J.S. Criminal Law §2428 (2009) (cost of giving notice to victims, extradition fees, incarceration costs and criminal justice education fees).

(Continued on page 30)

Court Watch

(Continued from page 29)

REASONABLE SUSPICION FOR SEARCH OF PAROLEE'S HOME

Michael Haffner was on parole for possession and manufacture of methamphatamine. While on parole he agreed to refrain from possessing, using or trafficking in any controlled substance; and he agreed to submit to urine tests as directed by his parole officer. He submitted a urine sample which was positive for methamphetamine. (It is unknown whether or not this was a "random" UA or a suspicion-based UA). Two weeks later, an unidentified woman telephoned Haffner's parole officer and stated that she had seen Haffner cooking methamphetamine in his house. She stated she had already reported or planned to report the activity to the sheriff's department. A week after receiving the anonymous call, Haffner's parole officer contacted law enforcement and asked them to conduct and investigation and/or parolee search. The Sheriff's Department had simultaneously received a tip on its tip line that Haffner might be manufacturing methamphetamine in his home and abusing his wife. Law enforcement went to Haffner's house. While waiting for someone to answer the door, they detected a strong smell of ether coming from an outdoor trash bin. Haffner was not at home, but his wife answered the door. Officers told her they were there to conduct a search and they entered and searched the home. They found evidence of a meth lab, so they secured the house and obtained a search warrant. Haffner was charged with possession of meth, manufacture of meth and criminal possession of a firearm. He moved to suppress on the basis that the initial warrantless parole search of his home was not based on reasonable suspicion. He argued that reasonable suspicion could not be based on the positive UA which occurred over a month before the search and two unsubstantiated anonymous phone calls.

The Court of Appeals disagreed in *State v. Haffner*, ___Kan.App.2d ___(June 19, 2009) and reversed the district court. In order to establish reasonable suspicion for a parole search, a parole officer must merely be able to point to specific, articulable facts that would lead a reasonably objective parole officer to suspect that the parolee has violated a condition of his or her parole. The saliency of the positive UA was not significantly diminished by the passing of a month between the UA and the search. "*The positive UA clearly provided reasonable suspicion that Haffner had violated a condition of his parole, and that suspicion was all that was required to subject Haffner's person or property to a search.*" The two anonymous tips added credibility to the information the parole officer already had. Taken together, there was sufficient reasonable suspicion to search Haffner's house.

Editor's Note: *The Court does not disclose whether or not the initial urine test was a random test or one based on suspicion. As indicated in the Spring Verdict, State v. Bennett, 288 Kan. 86, 97-98 (2009) may cast doubt on the ability of parole officers to require random (thus, suspicionless) UA's. However, it did not seem to be an issue in this case.*

UNREASONABLE DELAY BETWEEN VIOLATION AND HEARING ON PROBATION REVOCATION MOTION RESULTS IN WAIVER OF THE VIOLATION BY THE PROSECUTION

In November 2005, Michael Curtis pled guilty to possession of cocaine. He received a 40-month prison term, but was granted probation. Two months later , January 2006, he possessed cocaine. The State filed a motion to revoke, but dismissed it a few weeks later. Curtis admitted to consuming alcohol. The State filed a motion to revoke based on the cocaine possession from Jaunary 5. Six months later the motion was dismissed on the State's motion. The State then filed a third motion, again on the basis of the January cocaine use. In November 2006, his probation expired. A pending motion to revoke was on file. After his probation ended, Curtis was arrested for DUI, DWS and eluding. The State filed another motion to revoke, again based on the January 2006. So now two motions were pending, both alleging only the January 2006 cocaine use. Before the motion could be heard, Curtis tested positive for alcohol consumption. The State amended the fourth revocation motion twice, each time adding a reference to the positive alcohol tests. The motion was finally heard in October 2007, almost a year after his probation expired. His probation was revoked for the January 2006 cocaine use as well as the alcohol consumption and driving offenses the occurred after his probation was over.

In *State v. Curtis*, ___Kan.App.2d ___ (June 19, 2009), the Court rejected Curtis's argument that the fourth motion, which was filed after his probation expired, served to replace the third motion which was filed before his probation had expired and was therefore out of time. The fourth motion, even though initially identical to the third motion, had no impact on the fact that a motion was pending before Curtis's probation ran out. However, the Court found, after a review of the facts and stated reasons for the delay, that a 21-month delay between the initial allegation of a violation of his probation and the actual revocation was unreasonable and constituted a waiver on the part of the State to pursue the violation, and therefore deprived the defendant of his due process rights. The Court did not need to address the fact that the State included post-probation violations in its motion, so it did not.

JUVENILE ADJUDICATIONS ARE NOT TO BE CONSIDERED IN DETERMINATION OF PERSISTENT SEX OFFENDER STATUS

James Boyer was convicted of a sexually violent crime. Pursuant to K.S.A. §21-4704(j) a person's prison sentence is doubled if he is a second or subsequent offender. The question in *State v. Boyer*, ___Kan.___ (June 19, 2009) was whether a juvenile adjudication is treated as a prior. The Court of Appeals had conflicting opinions on the topic. The Supreme Court found that based on a strict reading of the statute, juvenile adjudications do

(Continued on page 31)

Court Watch

(Continued from page 30)
not count as priors.

DISMISSAL V. ACQUITTAL FOR PURPOSES OF APPEAL BY THE PROSECUTION; TRESPASS INCLUDES REMAINING WITHOUT AUTHORIZATION IN A PORTION OF A BUILDING, EVEN THOUGH MAY HAVE ENTERED BUILDING WITH PERMISSION

Jeff Bannon entered the dealer's only section of an automobile auction facility after being repeatedly told not to do so. He was arrested and charged with criminal trespass. He was convicted in municipal court and appealed to district court. Prior to a jury being impaneled, the court was going over instructions with the parties. The City stipulated that Bannon was inside the structure lawfully, but entered into a segregated part of the facility without permission and after being told not to enter that section. Bannon's attorney moved for "judgment of acquittal" on the theory that based on *State v. Hall*, 270 Kan. 194 (2000) (a burglary charge) since Bannon was authorized to enter the structure, his subsequent entry into the "dealer's only" area was not a violation of the trespass law. The district judge agreed and granted the defendant's "judgment of acquittal."

Pursuant to K.S.A. §22-3602, the City prosecutor can appeal a dismissal, but it cannot appeal an acquittal. Therefore, the first question in *City of Wichita v. Bannon*, ___Kan.App.2d ___ (June 19, 2009) was whether the district court's action was an acquittal or a dismissal. Holding that whether a prosecution ends in a dismissal or an acquittal does not depend on the trial judge's characterization of the court's action, the Court of Appeals found it was a dismissal. A judgement of acquittal requires resolution of the factual elements of the offense charged and results in a prohibition against subsequent prosecutions for the same offense. Jeopardy does not attach until a jury is impaneled and sworn. The jury was not impaneled in this case and there were no factual findings because the parties stipulated to the relevant facts.

It then found that the district judge misapplied the *Hall* case to a trespass charge. Under the district judge's interpretation, *"if an absent-minded customer inadvertently wanders into a portion of a retail store where customers are not allowed, the proprietor could keep that customer out of the restricted area only be ejecting the customer from the store with instructions never to return. Such an all-or-nothing construction seems unreasonable to us. In our view, a business owner in Wichita has the right to distinguish public areas from private ones, and when a person knowingly and willfully disregards the distinction, recourse is proper"* under the municipal code. The case was remanded back to the district court for trial.

CRIME OF INFECTING SOMEONE WITH A DISEASE REQUIRES SPECIFIC INTENT

Robert Richardson was infected with HIV. He had sexual intercourse with two females. He was charged with a violation of K.S.A. 21-§3435 which states in relevant part:

> *(a) It is unlawful for an individual who knows oneself to be infected with a life threatening communicable disease knowingly:(1) to engage in sexual intercourse or sodomy with another individual with the intent to expose that individual to that life threatening communicable disease."*

In *State v. Richardson*, ___Kan. ___ (June 19, 2009) the Kansas Supreme Court held that the statute is constitutional, but requires proof that Richardson knew he was infected with HIV, and intentionally engaged in sexual intercourse with the two women **with the specific intent to expose them to HIV**. This intent cannot be inferred, as argued by the State, by the mere fact that Richardson had sex knowing himself to be infected and knowing he could infect them. *"Under the State's interpretation, a person infected with HIV must be totally abstinent or risk being prosecuted for a felony each time he or she engages in sexual intercourse or sodomy, regardless of whether the act is between two consenting (perhaps married) adults with full knowledge of the virus and utilizing prophylactic measures. We disagree."* The State must establish that he intended to expose them to the disease.

Although at the preliminary hearing the prosecution presented evidence that the two women did not know Richardson had HIV; he falsely represented to one of them that he had no sexually transmitted diseases; and he did not use a condom, this evidence was not presented at trial. Had it been, the State may have been able to establish the specific intent element through such circumstantial evidence. However, the State relied at trial solely on the fact that Richardson had sex with the women knowing he was infected. *"Such a presumption upon a presumption is insufficient to carry the State's burden."*

THE FACT THAT THE STATEMENT WAS MADE "OUTSIDE THE PRESENCE OF THE DEFENDANT" IS NOT A PREREQUISITE TO ADMITTING A CO-CONSPIRATOR STATEMENT UNDER THE VICARIOUS ADMISSION EXCEPTION TO THE HEARSAY RULE

Kimberly Sharp was convicted of felony murder. During the trial, one of the co-defendants, Cornell, testified regarding a conversation he heard between Sharp and two other co-defendants (Holllingsworth and Baker), where she inquired about the victim's condition and they responded that he was "probably dead by now." The testimony was clearly hearsay (out of court statements offered to prove the truth of the matter asserted). However, K.S.A. §60-460(i)(2) sets forth an exception for vicarious admissions. The statement must show that Sharp and the declarant (person who said the victim was "probably dead by now") were participating in a plan to commit a crime and the statement was relevant to the plan or its subject matter and was made while the plan was in existence and before

(Continued on page 32)

Court Watch

(Continued from page 31)

its termination. Several cases have also inserted a requirement that the statement of the co-conspirator must have been "made outside the presence of the accused." Sharp was present when the statement was made, so she argues this prerequisite cannot be met and the statement should have been excluded.

In *State v. Sharp*, ___Kan. ___ (June 19, 2009), the Kansas Supreme Court found that there is no requirement in the statute that the statement be made outside the presence of the accused and there is no such requirement. The opinion states that any cases that state such a requirement "are expressly disapproved."

STRIP SEARCH OF 13-YEAR OLD UNCONSTITUTIONAL, BUT SCHOOL OFFICIALS HAVE QUALIFIED IMMUNITY

In October 2003 a student, Jordan, told the Safford Middle School principal and his assistant that students were bringing drugs and weapons to school and he had gotten sick from some pills. A week later, Jordon gave the assistant principal a pill that he said he got from another student, Marissa. Learning the pill was prescription strength Ibuprofen, Marissa was called out of class. Next to Marissa in the classroom was a day planner that contained several knives, lighters, a permanent marker and cigarettes. Marrissa was searched and an over-the-counter naproxen pill and several ibuprofen were found on her. She told the assistant principal that the day planner and the pills belonged to Savana Redding, a 13-year old student at the school. Savana was called to the office. She admitted the day planner was hers but said she had lent it to Marissa days earlier and none of the items in it were hers. The pills were shown to Savana and she also denied any knowledge of the pills. She gave the assistant principal and an administrative assistant permission to search her backpack. They found nothing. (Savana and Marissa were known friends and troublemakers and had been associated with cigarettes and reports of alcohol use in the past.)

Savana was then escorted to the school nurse's office to "search her clothing for pills." The school nurse, a female, asked Savana to strip down to her bra and panties. She was told to pull her bra out and to the side and shake it, so as to dislodge anything that may be hiding in it. She was told to pull out the elastic on her underpants so as to dislodge any pills that may be hidden there. No pills were found.

Savana's mother sued the school for a violation of Savana's Fourth Amendment right to be free from unreasonable searches and seizures.

School searches need only be based on reasonable suspicion, not probable cause. Such a search is permissible when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

In *Safford Unified School District et al. v. April Redding*, ___U.S. ___ (June 25, 2009), the U.S. Supreme Court found that Savana's constitutional rights had been violated. It found that the search of Savana's backpack and outer clothing was reasonable. However, nondangerous school contraband does not conjure up the specter of stashes in intimate places and there was no evidence that such a hiding place was common at the school. The "prescription strength" ibuprofen was 400 mg., equivalent to taking two over the counter Advil. The naproxen was non-prescription strength, equivalent to one Aleve tablet. Savana had an expectation of privacy and even if the nurse didn't "see" anything, the mere fact that she had to stand in front of school officials in her bra and panties and partially expose her breasts and pelvic area was embarrassing, frightening, and humiliating. *"What was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear."* However, the justices went on to opine that the school officials had qualified immunity from suit.

Justice Thomas dissented and opined that after the decision students all over the country would start hiding contraband in their underwear. In addition, he objected to the Court requiring an analysis of how dangerous the drugs were. Drugs are prohibited, period. In fact, these drugs were illegal to posses without a prescription, so a crime was involved as well as a school policy violation, regardless of how subjectively dangerous the drugs were. Judges, he argued, are not qualified to second guess the best manner for maintaining quiet and order in a school environment.

COURT STRIKES DOWN K.S.A. §22-2501(C) IN LIGHT OF *GANT*: CANNOT SEARCH INCIDENT TO AN ARREST FOR EVIDENCE OF ANY CRIME

K.S.A. §22-2501(c) states that when police make a lawful arrest they *"may reasonably search the person arrested and the area within such person's immediate presence for the purpose of...discovering the fruits, instrumentalities, of evidence of* ***a*** *crime."* The Kansas Supreme Court has held that in light of the U.S. Supreme Court decision in *Arizona v. Gant,* 556 U.S. ___(2009) (*see*, page 13, *supra*) K.S.A. §22-2501(c) is unconstitutional. In *State v. Henning et al.*, ___Kan. ___ (June 26, 2009) the Court overruled the Court of Appeals pre-*Gant* decision upholding the statute's constitutionality. *See*, *The Verdict*, Winter 2008, p. 6.

Henning was arrested on an outstanding warrant. He and the driver of the car in which he was a passenger were asked to step from the car while the officer searched the car. Henning was handcuffed at the time, but the driver was not. The officer found drugs in the car. The driver was then arrested. Both were charged with drug possession. The officer testified that

(Continued on page 33)

Court Watch

(Continued from page 32)

the sole reason he searched the car was for evidence of a crime, (**any** crime) as allowed by K.S.A. §22-2501(c).

The Kansas Supreme Court pointed out that the *Gant* decision reinforced its decision in *State v. Anderson*, 281 Kan. 896 (2006), which was the impetus for the Kansas Legislature to change the language of K.S.A. §22-2501(c) to allow police to search for the evidence of "a" crime, instead of evidence of "the" crime, as the statute read at the time *Anderson* was decided. It pointed out legislative history associated with the change wherein Rep. David Haley warned that such a change would shred constitutional protections against unwarranted searches or seizures and erode the basis for probable cause. He predicted that the amended legislation "will be found unreasonable under state and/or federal constitutional mandates."

Therefore, the law in Kansas is now clear. To have a valid search incident to an arrest, when there is no purpose to protect law enforcement present, the search must seek evidence to support the crime of arrest, not some other crime, be it actual, suspected, or imagined. In the vehicle context, in most cases when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains evidence relevant to the crime of arrest.

SAFEGUARDS THAT MUST BE IN PLACE REGARDING REQUIREMENT THAT INDIGENT DEFENDANT'S REIMBURSE THE GOVERNMENT FOR THE COST OF REPRESENTATION

"The State [or City in our cases] *must provide the assistance of legal counsel to an indigent defendant. Defendants may be required to repay some or all of the costs associated with their legal defense, but the repayment may not obstruct the defendant's access to counsel at any stage of a criminal proceeding, and repayment may only be enforced if there is some likelihood that the defendant will be able to repay the costs. The courts must be able to review the defendant's financial circumstances to determine whether to reduce or waive repayment of these costs. If changed circumstances reduce the defendant's ability to repay defense costs, then the defendant must be able to petition for reduction or elimination of the assessed costs. If the defendant is acquitted or the charges are dismissed, the defendant must not be required to repay the costs of counsel. Finally, courts may reasonably construe reimbursement statutes in a manner consistent with constitutional mandates."*

Justice Rosen writing for the majority in *State v. Casady*, ___Kan.___ (June 26, 2009) which ultimately held that the state court-appointed attorney application fee (K.S.A. §22-4529) was constitutional as long as the above safeguards are in place.

Editor's Note: *K.S.A. §12-5409 (f) allows the municipal court judge to order a convicted defendant to "reimburse the city for all or part of the reasonable expenditures by the city to provide counsel and other defense services to the defendant." It goes on to require that the judge take into account the defendant's financial resources and the nature of the burden that payment will impose in determining the amount and method of payment. A defendant who is not in willful default is allowed to petition the court to waive payment in full or in part. In fact, if it appears that to the satisfaction of the court that the payment of the amount due will impose manifest hardship on the defendant or the defendant's immediate family, the court can waive all or part of the payment due or modify the method of payment.*

LAB REPORTS OF DRUG TEST RESULTS MUST BE INTRODUCED THROUGH A LIVE WITNESS TO COMPLY WITH CONFRONTATION CLAUSE

Luis Melendez-Diaz was arrested for possession of cocaine. At trial, the prosecution placed the bags of cocaine into evidence. It also submitted three "certificates of analysis" showing the results of the forensic analysis performed on the seized substances indicating that the substance "was found to be cocaine." The certificates were sworn to before a notary public by analysis at the state forensics lab, as required by state law. The issue in *Melendez-Diaz v. Massachusetts*, ___U.S. ___ (June 25, 2009), was whether or not the certificates were admitted in violation of the confrontation clause as set out in *Crawford v. Washington*, 541 U.S. 36 (2004). Justice Scalia, writing for the Court, found that the certificates were not properly admitted. The defendant had a constitutional right to confront the lab analysts who tested the evidence and prepared the reports. The "official record or business record" exceptions do not save the prosecution because, Scalia wrote, although they may have been records kept in the ordinary course of business, they were calculated for use in the court, not in the business. The Court points out that while a clerk may authenticate an official record for use in evidence, the clerk is simply certifying the correctness of a copy of record kept in the office, not certifying the substance or effect of the document, or interpreting its contents.

"Business and public records are generally admissible absent confrontation not because they qualify under an exception to the hearsay rules, but because—having been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trail—they are not testimonial."

The Court did, in response to arguments from the dissenters (Kennedy, Breyer, Roberts and Alito), make a few interesting footnotes and observations:

(1) *"We do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While the dissent is correct that "[i]t is the obligation of the prosecution to establish the chain of custody,,"...this does not mean that everyone who laid hands on the evidence must be called…'gaps in the chain [of custody] nor-*

(Continued on page 34)

Court Watch

(Continued from page 33)

mally go to the weight of the evidence rather than its admissibility.' It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony is introduced must (if the defendant objects) be introduced live. Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records."

(2) *"The analysts who swore the affidavits provided testimony against Menendez-Diaz, and they are therefore subject to confrontation; We would reach the same conclusion if all analysts possessed the scientific acumen of Mme. Curie and the veracity of Mother Theresa."*

(3) *"In their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial... As the dissent notes...some state statutes, 'requir[e] defense counsel to subpoena the analyst, to show good cause for demanding the analyst's presence, or even to affirm under oath an intent to cross-examine the analyst.' We have no occasion today to pass on the constitutionality of every variety of statute commonly given the notice-and-demand label. It suffices to say that what we have referred to as the 'simplest form [of] notice-and-demand statutes'...is constitutional"*

Editor's Note: *The Kansas Court of Appeals has already held, post-*Crawford, *that the Kansas proffer statute, K.S.A. §22-3437 (a form of notice-and-demand) is unconstitutional as it relates to criminal cases.* State v. Laturner, *38 Kan.App. 2d 193 (2007) (involved lab test for meth from KBI). The Kansas Supreme Court granted a petition for review of* Laturner *and heard oral arguments in March 2008. On January 29, 2009, the court issued an order to stay* Laturner *pending the decision in* Melendez-Diaz. *So a decision should be forthcoming. See also, State v. Dukes, 38 Kan.App. 958 (2008) (admission of calibration and certification records of breath test machine does not violate confrontation clause because those records exist regardless of the defendant's result, and a live witness is not necessary to present defendant's driving records).*

AGE OF DEFENDANT MUST BE PRESENTED TO JURY IN ORDER TO IMPOSE MAXIMUM ALLOWABLE SENTENCE FOR AGGRAVATED CRIMINAL SODOMY OR AGGRAVATED INDECENT LIBERTIES

K.S.A. §21-3506 (aggravated criminal sodomy) and K.S.A. §21-3504 (aggravated indecent liberties with a child) both involve sexual behavior with someone under the age of 14. When the perpetrator is 18 or over the penalties are significantly enhanced, to wit: they become off-grid person felonies subject to life in prison with a mandatory minimum of 25 years (a hard 25 life sentence, pursuant to Jessica's Law).

In *State v. Bello*, ___Kan.___(July 2, 2009) the State failed to present evidence regarding whether Bello was over or under the age of 18. However, since he was over 18 he was sentence to the more severe penalties. The Court found this to be error. Based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), without a finding by the jury that the defendant was 18 years of age or older, the maximum sentence that could be imposed was the lesser sentences of level 1 and level 3 felonies, respectively, as established by the sentencing guidelines. Bello's sentence was vacated and the case was remanded for re-sentencing.

AND THE GENERAL SAYS.....

What follows are opinions from the office of Kansas Attorney General Stephen Six that may be of interest to municipal judges. The full text of all AG opinions can be found at: ww.accesskansas.org.

Opinion Regarding Confidentiality Rules
May 13, 2009

The Kansas Governmental Ethics Commission has several statutes and rules that apply to it that state that when a complaint is filed the filing and the allegations are confidential and cannot be disclosed by anyone. The Commission has assessed fines against complainants who have disclosed to others and the press the fact that they have filed complaints and the contents thereof. The AG opined (through his Deputy and Chief Counsel) that these confidentiality provisions violate the First Amendment of the U. S. Constitution and cannot be enforced against those who file complaints. He states that similar statutes requiring confidentiality of complaints against judges, attorneys, and elected officials have been struck down as unconstitutional around the country. He uses the U.S. Supreme Court case of *Landmark Communications, Inc. v. Virginia*, 434 U.S. 829 (1978) involving a pending state judicial inquiry as the watermark case. The opinion quotes *Landmark*: *"Our prior cases have firmly established ...that injury to official reputation is an insufficient reason for repressing speech that would otherwise be free."*

Stating that the Commissions confidentiality rules are "out of step" with those of other state agencies, he notes that both the Supreme Court and the Disciplinary Administrator specifically exclude the complainant and the respondent from their confidentiality rules.

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 Annual Conference as well as a few from the Municipal Court Clerks Conference. Ms. Ralston indicated that the department's backlog is now caught up, although they are still down ten employees. She stated that it is their hope to have certified driving records available on line in the near future. Also, check out their new website designed specifically for courts for lots of useful information: http://www.ksrevenue.org

Question: We have been told in the past that since inattentive driving has no state law equivalent, we are not to report them to you. My clerk says this is no longer the case. What is the deal? We have been promising defendants that this won't show up on their driving records. Are there any ramifications if we don't' report them to you?

Answer:
In September 2008, we implemented seven new traffic codes to our driving record tables for compliance with accurately reporting CDL driving history. The violations are as follows: careless driving; inattentive driving, seat belt use, child restraint, and unsafe condition of vehicle; operating without equipment as required and improper use of equipment.

Our intention, and how the process worked internally, was for these types of violations to only show on a "full" driving record for CDL drivers or to those who were entitled to the full record; i.e....courts & law enforcement. The "limited" version of a driving record for a non-CDL driver did not show the violations. However, these violations showed on records purchased through the Information Network of Kansas (INK) by insurance companies and their agents because they were getting the "full" records. The result was mass confusion, extra work and explanation on everybody's part, most notably the courts/prosecutors who had informed drivers these violations would not show on the driving records.

This issue is resolved. Those seven violations, while still being submitted electronically to our office, are not entered on non-CDL driving records. But again, they are recorded on the CDL records for reporting purposes. You are correct though, since there is no state law for inattentive driving, there is not any ramification if a conviction of that type is not reported.

Question: In an MIP case, how long does it take from the time the court sends the DMV notice of conviction until the suspension takes effect?

Answer:

DMV workload is current. Convictions are usually processed within five business days of receipt.

Outline the procedures for DL suspension of MIP.

Based upon consultation with our Legal Services Bureau, MIP convictions will be processed by the DMV as follows:

- If the court does not order the suspension time as required by statute, the conviction will only be recorded on the driving record.
- If the court orders a suspension (regardless of length of time or what the record indicates regarding the number of occurrences) we will follow the court order and apply the time as ordered.

It is the judge's responsibility to follow the law. The DMV will no longer send notices when the judge has failed to suspend appropriately.

Question; When is the "Amended Description" used if someone pleads not guilty, and the defendant's attorney and the prosecutor agree to a lesser charge. Is that when it is used?

Answer: Only one court uses the "Amended Description." We just need the final disposition. You don't need to show the charge it was originally, just the final one.

Question: If a person shows up in 2009 and pays a ticket from 2004, do we collect the 2004 reinstatement fees or the 2009 fees?

Answer: Typically, we would collect the reinstatement fee indicated on the original suspension order, so 2004. However, based on recent statutory changes increasing the reinstatement fee to $69 and an accompanying order from Chief Justice Davis, all persons who pay their reinstatement fee after July 1, 2009 must pay the current fee, $69, regardless of when suspended.

Question: Describe what an SR-22 is and the circumstances in which it is necessary to be filed.

Answer: The SR22 filing is evidence of liability insurance filed by a person's insurance company with the DMV. When required to be filed, it must be maintained continuously for a one year period. Failure to maintain liability insurance on a vehicle at the time of an accident or traffic stop (K.S.A. 40-3104 and K.S.A. 40-3118) will require an SR22 filing. A conviction defined in K.S.A. 8-285 will also require a person to file an SR22 with the DMV.

The DMV will notify a driver/owner when an SR22 filing is required. The Court does not get involved in this process and does not submit it for the defendant. The driver must comply with the request from DMV regardless of whether or not the

(Continued on page 36)

Updates from the DMV

(Continued from page 35)

driver has submitted proof of insurance to the court as part of a "no proof of insurance" charge.

Question: Is there such a thing as a "hardship" license in Kansas? Can I give a driver the authority to drive after you have entered a suspension order?

Answer: No and No.

Question: What procedure should be followed when the defendant is suspended due to a returned DC-66, however the clerk made an error by filling in the wrong insurance company or policy number?

Answer: The Court takes no action. The driver must respond to the request for proof of insurance from the DMV. The driver can send in the correct information.

Question: What procedure do we follow if a ticket's charges are sent in as convictions in error by electronic abstract?

Answer: An amended abstract for a minor conviction (i.e., speeding) can be amended by submitting a paper abstract of conviction marked "AMENDED". An amended abstract for a major conviction (i.e, driving while suspended) can be submitted electronically with "YES" in the field "FOUND GUILTY, MENDED" and a description of the amended charge in the field "AMENDED". The "OTHER ORDERS" field may also be used to further describe the required amendment. If necessary, an amended abstract for a major conviction may be submitted by paper.

Question: What percentage of courts use private software and what percentage use the state program for electronic abstracts?

Answer: About 73% use a private vendor and its software.

SPECIAL REQUEST FROM DMV

Our department has been it hard by the economy. We lost 10 full-time positions and 5 part-time. Unfortunately, customer service has had to take a back seat. We do not answer the general phone line on Mondays and Fridays. Our phone message advises people that this is due to economic cuts. Please DO NOT use the private court line we have given you and your clerks to call for a defendant in your court who can't get through. Do not be a middle man for a driver. If it is not a question related to your court or court operations we will refer you or your staff to the main line.

Question: Can a driver's license be suspended for failure to appear on a non-traffic case, or does it have to be traffic related?

Answer: Yes. Please see K.S.A. §8-2118 for offenses that can result in a suspension for failure to comply. Bicycle and pedestrian violations are in the uniform traffic code, so would therefore subject the defendant to driver's license suspension for failure to comply.

Question: Does a speeding ticket still go on a driver's record at whatever speed when within a city limit even if they are under 10 mph?

Answer: The following are non-moving violations: 10 mph over or less in a 55-70 mph zone or 6 mph over or less in a 30-55 mph zone. It has no application in 25 mph zones or less.

In other words, speed limits of 30 mph to 54 mph have six mile "buffer" in which the conviction is not recorded on the driving record. Speed limits of 55 mph to 70 mph have a ten mile "buffer" in which the conviction is not recorded on the driving record.

Question: What traffic violations do you no longer suspend on?

Answer: Fail to comply on an MIP charge.

Question: Do you suspend for lack of payment on a no proof of insurance charge?

Answer: No, not if that is the only charge.

Question: Do you suspend on an open container charge if the Court does not issue restrictions?

Answer: No.

Question: Do we still send suspended driver's licenses to the DMV if they were taken by police?

Answer: Yes. We then destroy them. We do not return them.

Question: What convictions result in mandatory suspensions?

Answer: See the "Cheat Sheet" on our website:
http://www.ksrevenue.org/courts

Question: Update on new DL requirements for 16 and 17 year old drivers. What are the restrictions and when do they go into effect.

Answer: House Bill 2143 is effective January 1, 2010. You can go to the DMV website at www.ksrevenue.org and click on the "FAQS" button. Under the Motor Vehicle Section

(Continued on page 37)

Updates from the DMV

(Continued from page 36)

there is a link to "Teen Driving" which will take you to another link for graduated driver's license information; including a comparison chart of current restrictions versus the new restrictions.

Question: Do all suspensions come from Topeka?

Answer: No, suspensions can be imposed by the Court if allowed by statute.

Question: If an out-of-state violator wants the Notice of Reinstatement faxed to their state's DMV, do we send you anything?

Answer: Pursuant to the Non-Resident Violator's Compact (NRVC), the court is required to send the Withdrawal of the Suspension to their state's DMV (Kansas), who in turn, will forward the compliance notice to the driver's home state DMV. However, the court can fax a copy of the compliance notice to the home state DMV (in addition to notifying Kansas) if they choose to.

Question: When submitting electronic a 30 day suspension, does the DL reinstate from the day sent?

Answer: If the suspension is for Failure to Comply with a traffic citation, the reinstatement is effective the date the compliance is received in Driver Control. If the suspension is based upon a conviction, with the court ordering a 30 day suspension, the reinstatement date is 30 days from the date of conviction or whatever date the court orders the suspension effective from.

Question: When an error is made in a clerk's office and a defendant's DL is suspended in error, why can't the DMV help out and reinstate the DL while on the phone with the clerk, then the clerk follow up with the proper paperwork?

Answer: The DMV does assist the clerk/court in these situations on a daily basis.

Question: How do we handle electronic reporting of parking violations of unoccupied vehicles where we don't have driver information?

Answer: Parking violations are not reported to the DMV.

Question: When will we be able to get on-line to get our own driving records?

Answer: Sometime in the future, however, the DMV Modernization Project has taken precedence with our resources.

NEW INDIGENT TABLES ADOPTED

Effective July 1, 2009 the State Board of Indigent Defense Services adopted the 2009 Federal Poverty Guidelines. The new income guidelines for appointment of counsel are:

Size of Family Unit	Amount Allowed
1	$10,830
2	14,570
3	18,310
4	22,050
5	25,790

Add $3,740 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/09poverty.shtml

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.***

PROSECUTION NOT REQUIRED TO PRODUCE OFFICER'S WRITTEN CERTIFICATION TO OPERATE INTOXILYZER AS LONG AS COMPETENT EVIDENCE IS PRESENTED OF SAME

Unpublished Decision

During Tim Martens' DUI trial the officer testified that he was certified to operate the intoxilyzer, but the prosecution did not produce documentation of the certification.

In *State v. Martens*, Slip Copy, 2009 WL 1036120 (Kan. App. April 17, 2009), after a review of several of the cases dealing with the foundation necessary to introduce the breath test results, the Court of Appeals held that competent testimony (the officer's testimony that he was certified on the date of the test) alone can be sufficient even in the complete absence of the written document.

INTRODUCTION OF LAB REPORTS UNDER BUSINESS RECORDS EXCEPTION TO THE HEARSAY RULE

Unpublished Decision

K.S.A. §60-460(m) does not require that the custodian of business records lay the foundation facts for the admission of the records into evidence. The foundation facts may be proved by any relevant evidence, and the person making the entries in the records need not be called to authenticate them if the records can be identified by someone else who is qualified by knowledge of the facts. The only circumstances in which the custodian is required is if a party has requested the custodian's presence.

In *State v. Garza*, Slip Copy, 2009 WL 1036108 (Kan.App. April 17, 2009), Harold Riddle, a forensic scientist at the KBI lab, obtained drug evidence and tested it. He testified at trial to receiving it and returning it, but he was not the evidence technician, or the records custodian. However, he testified that the lab records are maintained in the laboratory and *"we all have access to them and help maintain them."* The Court found that was sufficient to have his lab report entered as a business record. The lab evidence technician had not been subpoenaed.

REVOCATION OF PROBATION FOR FAIL TO REPORT WHEN DEFENDANT HAS BEEN DEPORTED

Unpublished Decision

Allendy Garcia Tupas was sentenced in April 2004 to 32 months in prison for an aggravated battery charge. He was placed on probation for 36 months. A condition of his probation was that he report at such time and in the manner directed by his probation officer. At the time of his sentencing, Immigration had placed a hold on his release. When he was released on probation, he was turned over to Immigration. He was deported. Four years later, Tupas appeared for a hearing on the probation revocation motion. He did not testify. His probation officer testified he had never reported His probation was revoked and he was sent to jail.

Tupas argued that he was never advised how to report after his deportation. However, the Court dismissed this argument because he never presented any evidence on this issue at the hearing. He next argued that his probation violation was not "willful" because he was in the custody of federal immigration officials. However, the Court of Appeals found that there is no authority to support the argument that only willful violations will support a probation revocation. Although he was entitled to an opportunity to explain his justification for not reporting and to argue that revocation is not the appropriate disposition, on the record submitted to the appellate court, Tupas did not make any showing and the district court's decision was supported by substantial evidence. *See*, *State v. Tupas*, Slip Copy, 2009 WL 1140323 (Kan. App. April 24, 2009).

FOUNDATION NECESSARY FOR ADMISSION OF BLOOD TEST

Unpublished Decision

Steven Eberhart was arrested for DUI. His car had rolled down a ditch. He had to be cut out of the car. At the hospital, he consented to a blood test. A registered nurse obtained the sample, with a result of .15. On appeal, he challenges the denial of his motion to suppress based on inadequate foundation for admission of the blood test.

At the suppression hearing, the officer testified that in the emergency room he checked in with either the emergency room doctor or head nurse and they provided the medical personnel to do the blood draw. He said the person that drew the blood was in scrubs, she said she was a nurse, her name tag indicated she was a nurse and they were in a hospital. The defendant argued that this was insufficient evidence to show that the person that withdrew the blood was a registered nurse or a licensed practical nurse or other professional designated in K.S.A. 8-1001(c) to take blood. Next, he argued that there had not been sufficient proof submitted that the vial containing the blood had been in-

(Continued on page 39)

Unpublished Decisions

(Continued from page 38)

verted five times. The officer testified that following a blood draw, if the nurse does not invert the vial 5 times, the he does. He couldn't remember which one of them did it in this case, but it was done.

In *State v. Eberhart*, Slip Copy, 2009 WL 1140266 (Kan.App. April 24, 2009) the district court found that the blood sample was drawn in "reasonable compliance" with the statutory and constitutional requirements and denied the motion to suppress and the Court of Appeals agreed. The burden on the prosecution to prove admissibility of evidence is different than its burden to establish guilty beyond a reasonable doubt. The burden had not been shifted to Eberhart, as he argued, to establish the inadmissibility of the blood test. The Court of Appeals went on to say that any infirmities claimed by the defendant were cured at trial. The registered nurse that drew the blood testified at trial and testified to her qualifications. In addition, the toxicologist who tested the blood testified at trial. She said the purpose of inverting the vial is to make sure the blood is mixed with the anticoagulant and preservative to make sure it doesn't clot. It doesn't matter who mixes it as long as it is mixed. That was clearly done in the case because there was no clotting when she received the sample. The blood test was properly admitted.

APPLICATION OF "BILL OF RIGHTS FOR VICTIMS OF CRIME ACT"

Unpublished Decision

DeJuan Bell was being sentenced on a felony and applied for placement at Labette Camp. He was denied because he was on prescription medication for a broken jaw. Before he could stop taking the medicine and apply again for placement at LaBette, he was shot in the right foot. In *Bell v. State*, Slip Copy, 2009 WL 1140246 (Kan.App. April 24, 2009), Bell argued that because he was a victim of a crime, he had certain rights under the Bill of Rights for Victims of Crime Act and he should have been given an opportunity to heal from his gunshot wound and then gain admission to Labette. The Kansas Court of Appeals found that Bell's gunshot wound had nothing to do with his ineligibility for Labette. The decision to deny him admission was made well before he became the victim of a crime. However, even if he had been denied on the basis of the gunshot wound, the Act does not create any enforceable rights for crime victims. It is merely directive or permissive, nothing more than an "aspirational objective." No sanctions are imposed if the Act is not followed. In addition, even if the Act did create enforceable rights, the rights are solely related to the crime during which the victim was injured, not external matters. The Act does not seek to compensate victims for matters unrelated to the victim's injury. Therefore, it is inapplicable to Bell's situation.

COCAINE FOUND IN HOUSE AND ON PERSON MAY BE CHARGED AS TWO DIFFERENT COUNTS

Unpublished Decision

Police arrested Amy Betts at her residence on a felony warrant. After finding a plastic container of cocaine in her pocket when they frisked her, the police sought and obtained a search warrant for her residence. In the master bedroom, they found a metal container containing cocaine and found marijuana in the living room, the master bedroom, and the kitchen and they found numerous items of drug paraphernalia. She was charged with two counts of possession of cocaine, one count of possession of marijuana and one count of possession of drug paraphernalia.

The issue in *State v. Betts*, Slip Copy, 2009 WL 121673 (Kan. App. May 1, 2009) was whether Betts could be charged with two counts of possession of cocaine. She argued it was multiplicitous. The Court found that the counts were not multiplicitous because she did not have actual possession of the items at the same time, nor at the same location. Therefore, the possession did not arise from the same conduct.

COMPLAINT IS SUFFICIENT IF CHARGES "MINOR IN POSSESSION/CONSUMPTION," EVEN IF DOESN'T SPECIFY ALCOHOL

Unpublished Decision

Megan Devaney was charged with "Minor in Possession/ Consumption" in violation of Lenexa Municipal Code Sec. 39G3A. She challenged the sufficiency of the complaint since it failed to indicate the substance she possessed or consumed. In *City of Lenexa v. Devaney*, Slip Copy, 2009 WL 131575 (Kan. App. May 8, 2009), the Court of Appeals held that the complaint was sufficient. K.S.A. 2008 §8-2106 (a)(2) specifically permits a law enforcement officer to issue a written traffic citation for a violation of K.S.A. 2008 Supp. §41-427 (minor in possession /consumption of alcohol). The city ordinance mirrors the state statute. The citation must contain a notice to appear in court, the name and address of the person, the offense or offenses charged, the time and place the person shall appear in court, the signature of the law enforcement officer, and any other pertinent information. K.S.A. 2008 Supp. §8-2106(b). The ticket in this case contained all the required information. The traffic citation is not required to contain facts constituting the crime. Although it did not specify that Devaney was charged with possession or consumption of alcohol, it referred to the city code which clearly prohibits consumption or possession of alcoholic liquor or cereal malt beverage.

(Continued on page 40)

Unpublished Decisions

(Continued from page 39)

CONTINUANCE REQUEST BY DEFENDANT TO HIRE OWN ATTORNEY, WHEN DEFENDANT HAD COURT-APPOINTED COUNSEL

Unpublished Decision

Christopher Hernandez had a motion to revoke his probation pending for failure to complete treatment, violation of a protection from abuse order, alcohol consumption, and failure to make ordered payments. He had signed affidavits admitting his alcohol use. He absconded and a warrant was issued for his arrest. He was picked up in North Carolina and extradited back to Kansas. At his request, he was appointed an attorney to represent him. However, on the day of the revocation hearing, he made an oral motion for a continuance to hire his own attorney. He stated that he did not have money to hire a lawyer, but the he would like 30 days to see if his family could raise sufficient funds. His complaint about his court-appointed attorney was vague, simply stating that he felt the attorney was incapable of representing him and failed to bring certain unspecified things before the Court. The Court denied the request, investigated all his arguments regarding the revocation, and revoked his probation. He appealed arguing that his right to counsel of his own choosing had been denied.

In *State v. Hernandez*, Slip Copy, 2009 WL 1312565 (Kan. App. May 8, 2009), the Court of Appeals found the trial court did not abuse its discretion in denying Hernandez's request.

When an indigent defendant requests the appointment of different counsel the defendant must show "justifiable dissatisfaction" with his or her appointed attorney. "Justifiable dissatisfaction" may be demonstrated by showing a conflict of interest, an irreconcilable conflict, or a complete breakdown in communications between the defendant and his or her appointed attorney. Hernandez did not provide any substantive explanation concerning the supposed inadequacies of his appointed counsel or how he was not provided adequate representation. The probability that he could hire private counsel was slim at best. In addition, the court held that any violation was harmless because of the overwhelming evidence that he had violated his probation. The Court pointed out that these cases involve a weighing of all the factors. The trial court will need to consider things like the reason stated for wanting to change counsel, whether substitute counsel has already been hired, the amount of time the defendant has had to obtain counsel, whether the defendant had received similar continuances in the past, whether competent counsel has been appointed and spent time preparing the case and the timing of the request (to wit: is it on the day of trial or sufficiently in advance of trial).

PROBLEMS WITH VENUE WHEN CELL PHONE INVOLVED

Unpublished Decision

Melissa Fast was ordered as part of a stalking protective order to have no contact with minor A. Fast was ordered not to "follow, harass, telephone, contact or otherwise communicate with minor A by any means including text messaging and internet." Fast was charged with violating the protective order based on a particular incident on July 25 in Jefferson County. Fast allegedly called minor A while she was at a slumber party with several other minors. The prosecutor argued in opening statements that the slumber party had occurred in Jefferson County. However, as the testimony came out it became clear that the slumber party was in Douglas County. The prosecutor then tried to establish that the calls were made from Fast's cell phone in Jefferson County. Fast lived in Jefferson County. The prosecutor argued that there was no evidence to dispute the fact that Fast lived in Jefferson County. The defense presented evidence that the cell phone log for the phone upon which the calls were received showed towers hit in Lawrence, Leavenworth, Perry and Topeka. All the calls to Fast's phone went through the Lawrence tower. The jury convicted Fast.

Venue for a crime lies in the county where the crime was committed. Therefore, the prosecution was required to prove that the offense occurred in Jefferson County in order for the Jefferson County court to have jurisdiction. In *State v. Fast*, Slip Copy, 2009 WL 1393865 (Kan.App. May 15, 2009), the Court found that the State had failed to prove venue even by a preponderance of the evidence standard. "[C]ourts naturally recognize that a cellular telephone is not tied to one location. The log presented during trial regarding the cell tower hits, did not prove Fast was outside Jefferson County when the calls were made, but it didn't prove she was in Jefferson County either." The conviction was reversed and the sentence vacated.

POLICE INTERROGATION OF ACCIDENT VICTIM AT HOSPITAL IS TYPICALLY NOT CUSTODIAL INTERROGATION REQUIRING *MIRANDA* WARNINGS

Unpublished Decision

J.B.Miser was a commercial truck driver who ran into a car and killed the driver of and a passenger in the car. Miser was sent to the hospital for treatment. Officer Collins was sent to the hospital to obtain blood and urine samples and a statement from Miser. Miser was in a hospital bed, conscious, but lying down. Collins went over the implied advisory and Miser consented to tests of blood and urine. Officer Collins then asked Miser what happened. Miser said he was headed west when he looked up and saw the car. He did know if he had hit anything but the truck flipped over and caught on fire.

At that point, Officer Collins provided Miser with *Miranda* warnings and Miser made incriminating statements. He later moved to suppress the statements on the basis that Collins questioned him first without providing *Miranda* warnings and the taint infected his post-*Miranda* statements. In *State v. Miser*,

(Continued on page 41)

Unpublished Decisions

(Continued from page 40)

Slip Copy, 2009 WL 1691940 (Kan. App. June 12, 2009), the Court reiterated prior case law that a police interview of an accident victim at a hospital is not a custodial interrogation unless the victim's confinement is police instigated or controlled for custody purposes. In this case, Miser was admitted to the hospital, but he was not placed under arrest while in the hospital or when he left the hospital. His admission to the hospital was not the product of police action; it was not police instigated or police controlled. The officer's initial question was general and designed to gather basic information, not to elicit an incriminating response. In fact, Collins was probably not required to provide Miranda warnings at any time during the interview, the Court opined. Nevertheless, he did and Miser stated he understood he rights and wanted to talk to the officer. He was lucid and capable of consenting. Therefore, his statements to Officer Collins are admissible.

AMENDING RESTITUTION ORDER ENTERED FROM BENCH

Unpublished Decision

As part of a plea agreement, Heath Wagoner entered a plea of no contest to two counts of theft and agreed to pay *"full restitution on all counts…in an amount to be determined"* jointly and severally with his codefendant. In return, the prosecution agreed to dismiss two other counts and recommend that his sentences run concurrently. After the plea and sentence, the district court judge announced from the bench, "*Restitution is assessed in the amount of $3,900, joint and several."* The following month, the prosecutor filed a motion seeking more restitution because the victim had submitted additional documentation. The victim was requesting a total of over $10,000. A new restitution hearing was held three months later and the court imposed a new restitution amount of $6,247.

After judgment is announced from the bench, K.S.A. §21-4721(i) grants the district court judge 90 days to adjust the judgment or correct any arithmetic or clerical errors. In *State v. Wagoner*, Slip Copy, 2009 WL 1692248 (Kan. App. June 12, 2009), the Court of Appeals held that the district court had no jurisdiction to increase the restitution amount announced from the bench. First, the judge did not reserve the issue of restitution at sentencing to a later date. The Supreme Court has held that a judge may extend the time in which to set the restitution amount, but the judge in this case made no such order. Second, the prosecutor's motion for additional restitution was not premised on an arithmetic or clerical error, but on the fact that the victim did not provide proof of additional loss until after sentencing. Finally, the plea agreement did not save the prosecution. The "amount to be determined" language meant determined at sentencing. The amount, $3,900, was determined at sentencing. The Court had no jurisdiction to increase the amount later.

Editor's note: *K.S.A. §12-4513 states that in municipal courts "Clerical mistakes in judgments or orders may be corrected by the court at* ***any*** *time." Likewise, the municipal judge can set aside an illegal sentence at any time. K.S.A. §12-4512 requires a judge on his or her own motion or the motion of the defendant (not the prosecutor) to set aside a judgment if the complaint does not charge a violation of a city ordinance or if the court was without jurisdiction of the offense. Any such motion must be made with ten days of the finding of guilty or within such further time as the court may fix during the ten-day period.*

INTRODUCTION OF SLOW MOTION VIDEO

Unpublished Decision

Willie Dale was charged with attempted first degree murder. He robbed a flower shop with a gun and left the store. Two patrons from a neighboring store followed Dale down the alley yelling at him that the police were on their way and he was not going to escape capture. Dale fired shots at his pursuers. Police arrived on the scene. Seeing the police, Dale stumbled and fell in the middle of the street. The officer put his car in park and got out. Dale rose from the ground, pointed the gun at the officer and shot from a kneeling position. The officer returned fire and got back in his car. Dale, now on his feet but walking away, aimed and shot at the officer once more. The officer returned fire and shot Dale in the leg. The entire shooting exchange happened over the course of about 10 seconds. Dale argued at trial that he didn't remember shooting, but if he did he wasn't trying to kill the officer. The officer's dashboard camera was operating and captured the exchange on video tape. The State introduced two copies of the video, one in real time and one in slow motion. Dale objected to the introduction of the slow motion tape as cumulative and not the best evidence. The district judge found that although it was cumulative, it would help the jury, so he admitted it. Dale appealed his conviction on the basis of the introduction of the slow motion video over his objection.

In *State v. Dale*, Slip Copy, 2009 WL 1591400 (Kan.App. June 5, 2009), the Court of Appeals found that merely slowing the playback speed of a video depicting identical events and from the identical source as the full speed video does not make the slow motion video something less than the best evidence. As to his objection that the slow motion video was cumulative, the Court pointed out that cumulative evidence is evidence that is "unduly repetitious." The slow motion video was not unduly repetitious because it was offered to help and would have helped the jurors to determine the actual sequence of events as they occurred over a very short space of time.

Finally, Dale argued that the artificial stretch of time created by the slow motion video created the false impression that Dale had more time to form an intent to kill than he actually did. The Court rejected this argument on the basis that the jury was well aware that the video was in slow motion. In addition, Dale's attorney argued very effectively in his closing statement regard-

(Continued on page 42)

Unpublished Decisions

(Continued from page 41)

ing the danger in trying to Monday morning quarterback based on a slow motion playback, something which in real-time was over in a snap. He analogized it to watching the film of the Kennedy assassination over and over in slow motion. Admission of the slow motion video did not constitute error.

DESTRUCTION OF IN-CAR VIDEO
Unpublished Decision

Mark Watkins was stopped by Trooper Schimmel for DUI (his sixth). In preparation for trial, Watkins attempted to obtain the videotape from the mobile video recorder in Trooper Schimmel's car but was notified by the Kansas Highway Patrol that Schimmel was not longer employed by KHP and the tape had been destroyed. It seems that the KHP practice is that when a trooper retires, he or she turns in all his or her equipment and videos. After 120 days, if no one requests them, the tapes are destroyed. Watkins moved to dismiss on the basis that the trooper testified that the video tape could be exculpatory and the mere fact that it was destroyed is evidence of bad faith. The district judge denied the motion, Watkins was convicted and he appealed.

In *State v. Watkins*, Slip Copy, 2009 WL 1591402 (Kan.App. June 5, 2009), the Court of Appeals held, consistent with the wealth of authority on the topic (*See*, *The Verdict, Summer 2000, p. 7*) that the defendant must show the tape was exculpatory and it was destroyed in bad faith. The fact that it "might" be exculpatory is not sufficient to sustain the defendant's burden to show that the tape was exculpatory. In addition, compliance with departmental policy is evidence that the destruction was **not** in bad faith. Therefore, dismissal would not have been proper in this case. The Court does conclude with the following admonition:

"We would note that although there was no bad faith shown, it is not good policy to destroy possible useful evidence as quickly as was done here. However, Watkins has not shown that potentially exculpatory evidence was on the tape. There was no testimony to indicate that there was any."

CROSSING OVER THE LANE DIVIDER, WHEN THERE ARE NO OBSTRUCTIONS OR EMERGENCIES TO SUGGEST IT IS NECESSARY, CONSTITUTES A SUFFICIENT BASIS FOR POLICE TO STOP A VEHICLE
Unpublished Decision

Trooper stopped Albert Tinoco after he observed Tinoco swerve approximately two tire widths into the left lane (a little less than 2 feet) on one occasion. There were no external conditions that would have caused Tinoco to swerve. After stopping Tinoco, the trooper developed probable cause for a DUI arrest. Tinoco was subsequently convicted of DUI and appeals on the basis that the officer did not have reasonable suspicion to execute a traffic stop.

K.S.A. §8-1522(a) states that whenever a roadway is divided into two or more clearly marked lanes *"a vehicle must be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety."* Tinoco argued that based on *State v. Ross*, 37 Kan.App.2d 126, rev denied 284 Kan. 950 (2007), the wording *"as nearly as practicable"* requires something less than absolute restriction to a single lane.

After *Ross* was decided, the Tenth Circuit Court of Appeals decided *U.S. v. Jones*, 501 F.Supp.2d 1284 (D. Kan. 2007), in which the Court was critical of the Ross decision and found that Ross contradicted the plain terms of the statute, failed to promote the Kansas Legislature's goal of multi-state uniformity, and conflicted with Tenth Circuit precedent as well as precedent from other jurisdictions with similar statutes. Even the Court of Appeals has failed to follow *Ross*. *See*, *State v. Marx*, 38 Kan.App.2d 598 (2007).

Therefore, it should come as no surprise that in *State v. Tinoco*, Slip Copy, 2009 WL 1591644 (Kan. App. June 5, 2009) the Court of Appeals held that pursuant to recent precedent from it and the Tenth Circuit Court of Appeals, the trooper had reasonable suspicion to effectuate a traffic stop for violation of K.S.A. §8-1522(a) when he witnessed Tinoco's vehicle drift out of his lane in the absence of external or exigent circumstances.

WHEN DIVERSION IS VIOLATED, CASE IS TRIED ON STIPULATED FACTS
Unpublished Decision

Talita Bell was placed on diversion for three counts of forgery. She violated her diversion by failing to report her arrest possession of drugs. In *State v. Bell*, Slip Copy, 2009 WL 1766553 (Kan. App. June 19, 2009), the Court of Appeals found that the district court was correct to try her

(Continued on page 43)

"This case somewhat resembles a set of Matryoshka nesting dolls: a claim of ineffective assistance of 60-1507 counsel inside a claim of ineffective assistance of appellate counsel, inside an overall K.S.A. 60-1507 claim of ineffective assistance of trial and appellate counsel."

Pittman v. State, Slip Copy, 2009 WL 1766144, (Kan.App.,2009)

Unpublished Decisions

(Continued from page 42)

forgery cases on the stipulated facts after it terminated her diversion as unsuccessful.

COMPLAINT WAS NOT DEFECTIVE, MERELY HAD "TECHNICAL" ERROR
Unpublished Decision

Ernest Shaw was arrested for possession of cocaine. He was charged with possessing "a stimulant drug, to-wit: cocaine." Cocaine is a narcotic, not a stimulant. Following his conviction, he moved for arrest of judgment based on a defective complaint. The district court granted the motion and the prosecution appealed. The Court of Appeals held that although cocaine has been held to be a narcotic drug rather than a stimulant, both the reference to cocaine and the "possession of cocaine" next to the statutory citation clearly demonstrated that the State was charging Shaw with possession of cocaine despite using the word "stimulant." He was fully informed of the charge and elements of possession of cocaine. Therefore this "technical" error did not render the complaint defective. His conviction was ordered reinstated. *See*, *State v. Shaw*, Slip Copy, 2009 WL 1766517 (Kan. App. June 19, 2009).

OFFICER'S DEVIATION ON STANDARD FIELD SOBRIETY TESTS GOES TO WEIGHT, NOT THE ADMISSIBILITY, OF THE TEST RESULTS
Unpublished Decision

Officer Leeds deviated from the standard procedure in conducting field sobriety tests during a DUI stop. As a result, the district judge announced that because the deviation was so great, he was refusing to give any weight to the one-leg stand test. The judge did, however, consider the defendant's performance on the walk-and-turn test even though the officer told the defendant to take ten steps, instead of the standard nine steps. The defendant appealed his conviction arguing that the judge should have also disregarded the walk-and-turn test. In *State v. Collier*, Slip Copy, 2009 WL 1766236 (Kan. App. June 19, 2009), the Court stated:

"Collier essentially challenges the weight to be given by the district court to the walk-and-turn test. However, we do not reweigh the evidence...Further, Collier fails to cite authority for her suggestion that any deviation from standard procedure in conducting field sobriety testing, however slight, renders the evidence inadmissible, and we are aware of no such authority.…We conclude substantial competent evidence supports the district court's finding that [the officer] deviated only slightly from standard procedure in conducting the walk-and-turn test and that this deviation did not affect the outcome of the test. Thus, the district court appropriately considered the results of the walk-and-turn tests as one factor in determining whether Collier's arrest was supported by probable cause."

JURY FREE TO IGNORE EXPERT WITNESS
Unpublished Decision

Max Miller was charged with DUI. He blew .081 on the Intoxilyzer 5000. There was no dispute that the machine was operating properly on the night of his arrest and that he had been drinking. However, he presented an expert to testify that test results using the Intoxilyzer 5000 have a 12 to 13 percent margin of error, so a .08 test result could indicate a BAC as high as .089 or as low as .070. Miller was convicted of the per se violation (.08 or more within two hours of operating a vehicle). He was acquitted of the alternate charge of operating at a time when he was under the influence of alcohol to the extent that he could no longer safely operate the vehicle. On appeal, he argued that he could have only been convicted of the per se charge if the jury ignored the uncontradicted testimony of his expert.

In *State v. Miller*, Slip Copy, 2009 WL 1766150 (June 19, 2009), the Court found that a jury is free to give whatever weight it wants to an expert witness. Opinion testimony is to be weighed just like any other testimony. It is up to the factfinder to determine the weight and credibility to give such evidence.

MISSOURI BAC CONVICTION COUNTS AS A PRIOR FOR ENHANCEMENT PURPOSES
Unpublished Decision

In *State v. Attwood*, Slip Copy, 2009 WL 1766514 (Kan. App. June 19, 2009) the Court of Appeals found that even though a Missouri BAC conviction is a "lesser offense" than DUI in Missouri, it is a prior for purposes of sentence enhancement on a Kansas DUI conviction. The Missouri law (Mo.Rev.Stat. §577.012 (1))prohibits the same conduct as K.S.A. §8-1567(a)(1), therefore it counts as a prior conviction.

DEFENDANT NOT ENTITLED TO HAVE PRIVATE DNA TESTS AT STATE EXPENSE
Unpublished Decision

Dale Denney was convicted of several sexually violent offenses. Post-conviction DNA tests were ordered which were unfavorable to Denney. The Court required that the evidence be preserved and made available to Denney's family if they wanted to hire their own expert to test the material. Denney argued that this privately ordered testing should be at State expense. In *State v. Denney*, Slip Copy, 2009 WL 1766242 (Kan. App. June 19, 2009), the Court held Denney was responsible to pay for any additional testing he wanted.

PROBATION CONDITION PROHIBITING DEFENDANT FROM ENTERING ANY ESTABLISHMENT THAT SELLS ALCOHOL IS CONSTITUTIONAL
Unpublished Decision

Defendant was convicted of several traffic-related violations including eluding, reckless driving and driving on a suspended diver's license. As a condition of probation he was prohibited from entering any establishment where the primary source of

(Continued on page 44)

Unpublished Decisions

(Continued from page 43)

income was from the sale of alcohol. He challenged the condition as unconstitutional.

In *State v. Fleming*, Slip Copy, 2009 WL 1858267 (Kan.App. June 26, 2009), the Court of Appeals found that conditions of probation that restrict constitutional rights must bear a reasonable relationship to the rehabilitative goals of probation, the protection of the public, and the nature of the offense. Fleming was not able to cite any cases supporting his suggestion that his inability to frequent establishments where the primary source of income is the sale of alcohol somehow impinges on his right to assemble or associate, or his right to free speech. *"Nor are we aware of any such authority."* The condition imposed was within the discretion of the trial judge, and the judge did not abuse her discretion.

JUDGE CAN EXCLUDE A PERSON FROM THE TRIAL IF THERE IS A JUSTIFIABLE BASIS TO DO SO

Unpublished Decision

Samuel Dartez was convicted of aggravated battery. Prior to trial the prosecution sought to exclude Stephanie Holden from the trial and the courthouse. The Court granted the motion and excluded her from the court house. There was a no contact order in place between the two. Dartez had threatened to kill Holden in the past. However, Holden had also been convicted in aiding an escape when Dartez escaped from the Stockton prison and hid out in her apartment. Dartez claimed on appeal that his right to a public trial was violated.

The Court of Appeals disagreed in *State v. Dartez*, Slip Copy, 2009 WL 1858241 (Kan. App. June 26, 2009), holding that the right to an open trial may give way to other rights or interests on rare occasions. In this case, the general public was not excluded, just one person for a justifiable reason. Therefore, his right to a public trial was not violated.

IMPLIED CONSENT ADVISORY GIVEN PRIOR TO PBT INSTEAD OF PBT ADVISORY

Unpublished Decision

Jason Luea was stopped on a traffic offense that quickly developed into a DUI investigation. The officer asked Luea to take a preliminary breath test (PBT). The officer did not give the three warning required for a PBT test, but instead gave the more detailed implied consent warnings. Luea submitted to the PBT and was arrested for DUI. After being *Mirandized*, Luea admitted to drinking. At the station, the officer again gave Luea both the written and the oral implied consent advisory. He agreed to submit to a test and blew .195. Luea's driver's license was ultimately suspended for failing the breath test. He challenged the suspension on the basis that the officer improperly gave the implied consent advisories for the PBT and said action constituted *"a blatant misuse and violation of the Kansas Implied Consent Law."*

In *Luea v. Kansas Dept. of Revenue*, Slip Copy, 2009 WL 1858260 (Kan. App. June 26, 2009), the Court of Appeals upheld the suspension. It held that since the DC-70 advisories were far more detailed than the PBT advisories, Luea could not have been prejudiced. In addition, the Court found that giving the DC-70 advisories prior to the PBT constituted substantial compliance with the statutory requirements. Third, there was no evidence to suggest Luea was confused by being given the same warnings for two different tests. And finally, Luea's suspension was based on the results of the Intoxilyzer test and there was no challenge to the advisories given before that test.

MUNICIPAL APPEAL BOND WHEN ORIGINAL BOND COVERS APPEAL

Unpublished Decision

Tyler Kirby was arrested in Dodge City on a municipal offense and posted a $1,500 appearance bond which guaranteed his appearance on a particular date at a particular time in municipal court and the bond document also stated *"if any appeal is taken, shall appear in the District Court in the county in which the City is located."* Kirby was convicted in municipal court and appealed. Kirby was ordered to post a $1,000 appearance bond on appeal. The City filed a motion to dismiss the appeal in district court because Kirby never posted the $1,000 appearance bond on appeal. The district court dismissed the appeal and Kirby appealed to the Kansas Court of Appeals.

In *City of Dodge City v. Kirby*, Slip Copy, 2009 WL 1858238 (Kan. App. June 26, 1009), the Court held that Kirby had satisfied the requirements of K.S.A. §22-3901(2) by posting an appearance bond that covered any appearances on appeal. Apparently, once the city prosecutor realized the error on appeal, the prosecutor agreed that the appeal should

(Continued on page 45)

"Although the ADO is one organism, it has many internal systems and organs, many individual lawyers who do not inevitably move in lock step on their dozens of cases in myriad procedural postures. It was not preferable but it was probably inevitable that some of those clients were slower than others to get a ticket on the McAdam *gravy train. So too the courts. Our common law method is sometimes painfully narrow and incremental. Although it should ideally get all cases to which a new rule applies on the same page simultaneously, this cannot always happen, for a variety of ponderous and pedestrian reasons."*

State v. Layton Slip Copy, 2009 WL 1859918, (Kansas Supreme Court, June 26, 2009).

Unpublished Decisions

(Continued from page 44)

not have been dismissed.

MINOR MISTAKES IN READING IMPLIED CONSENT NOT FATAL

Unpublished Decision

Melissa Menke was arrested for DUI. Before requesting that she take the breath test, the officer provided her with the correct copies of the DC-70, implied consent advisory form. However, when he read it out loud he said that her driving privileges would be suspended if she blew over 08, instead of **.**08. She moved to suppress her breath test results, arguing that this was more than a technical irregularity.

The Court did not buy it. In *State v. Menke*, Slip Copy, 2009 WL 1911759 (Kan.App. July 2, 2009), the Court held that the district court was correct to deny the motion to suppress. The written form was correct. She admitted at the suppression hearing that she knew the legal limit was .08, and she never indicated she did not understand the advisory. This was a mere technical violation and pursuant to K.S.A. 2007 Supp. §8-1001(n), *"no test results shall be suppressed because of technical irregularities in the consent or notice required…"*

A PHLEBOTOMIST IS SIMPLY SOMEONE TRAINED AND SKILLED IN DRAWING BLOOD

Unpublished Decision

Although Jeremiah Stegman was successful in suppressing the blood test results in his DUI trial on the basis that the Court was bound by the parties' filed stipulations regarding the qualifications of the individual who drew the blood (*See*, *State v. Stegman*, 41 Kan.App.2d 568 (2009) and *The Verdict*, Spring 2009, p. 19), the stipulations were not as limiting in his driver's license administrative hearing. Therefore, in *Stegman v. Dept. of Revenue*, Slip Copy, 2009 WL 1911743 (Kan. App. July 2, 2009), the Court of Appeals held that even though the person who drew the blood did not have the job title of "phlebotomist," the Department did establish that she was trained and skilled in the drawing of blood. That was all that was necessary. Kansas has no certification process for "phlebotomists." The results are admissible in the administrative hearing and his driving privileges should have been suspended by the district court, the Court held.

" Unfortunately, the issue has now taken on the character of a kind of judicial "Whac-a-Mole" arcade game that insists on popping up from its settled fate."

Justice Rosen, joined by Judge Standridge in their dissent filed in *In Re: Miller*, ___Kan. ___ (July 10, 2009)

PLEA AGREEMENT ANALYZED USING CONTRACT PRINCIPLES

Unpublished Decision

Brent McDaniel agreed as part of a plea agreement to plead guilty to felony domestic battery and have it run consecutive to another charge he had for domestic battery. At sentencing, contrary to the plea agreement, his attorney recommended that the Court run the sentences concurrently. The prosecutor took the position that since the defendant had disregarded the plea agreement he would recommend a "guideline" sentence which would result in McDaniel serving 6 more months than had been contemplated in the plea agreement. The judge gave the longer sentence. On appeal, McDaniel argued his due process rights were violated.

No so, said the Court of Appeals. They held that the case turned on basic contract principles. When McDaniel repudiated the plea agreement (contract), the prosecution was no longer bound by it and was free to recommend a different sentence. *See*, *State v. McDaniel*, Slip Copy, 2009 WL 1911721 (Kan. App. July 2, 2009).

JUDGE PIERRON AND THE "COLUMBO PIVOT"

Unpublished Decision

State v. Cook, Slip Copy, 2009 WL 1911746 (Kan. App. July 2, 2009) is a simple criminal case involving whether or not the search police conducted after a traffic stop was consensual. However, it is mentioned here simply to point out Judge Pierron's concurring opinion in the case and his apparent call for a re-examination of the fact that police are currently not required to advise defendant's that they have a right to refuse the search.

"Most citizens in a situation where they have been stopped for a traffic infraction are nervous and do not believe they can or should leave when an officer asks additional questions not related to the stop. Specifically, we see many executions by officers in traffic stops of what I would call the "Columbo Pivot." This refers to the well-choreographed movement of the hero of the popular eponymous police television show "Columbo."

As superbly employed by Lieutenant Columbo, an apparently innocuous interview was concluded with a polite farewell and departure, only to be followed a few seconds later by a pivot and return to the suspect with the request, "Just one more thing." Then would follow the quick and deadly questions that would nail the nefarious murderer.

Truly voluntary police/public interactions are appropriate and a valuable part of normal law enforcement procedures. What I perceive as a difficulty is that we see many cases where the additional questioning takes place under circumstances which assume all drivers are aware that they may leave immediately after they receive a ticket and can ignore an officer's request to have additional conversation. I believe this is very unrealistic.

If the Fourth Amendment is to have real meaning after a traffic stop is completed, we should require a brief warning by the officer that the driver is not required to answer any more questions but his or her additional voluntary submission to questioning is requested…."

The Verdict

Summer 2009 Issue 48

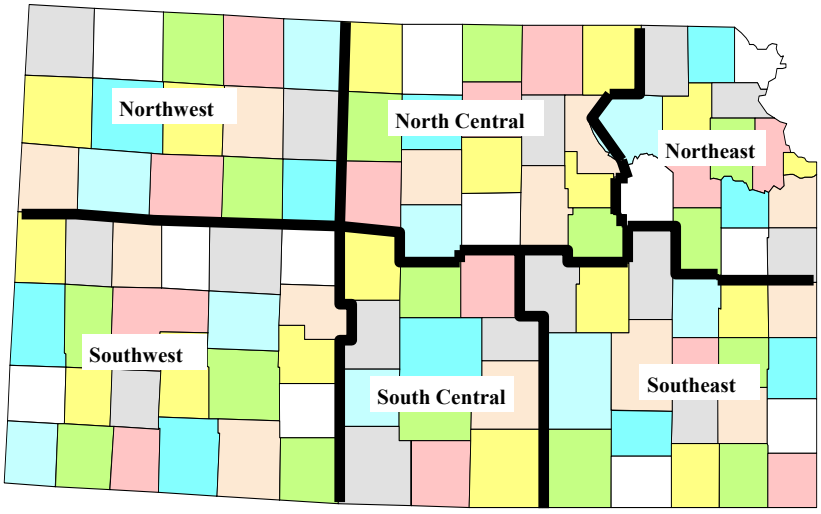
C/O Overland Park Municipal Court
12400 Foster
Overland Park, KS 66213
(913) 327-6852 ► Fax-(913) 327-5701
karen.arnold-burger@opkansas.org

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 2009 meeting the following positions will be up for election:

President-Elect
Secretary
Treasurer
Northeast Director
South Central Director

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

President
Brenda Stoss

BOARD OF EDITORS

THE VERDICT

Editor.....Karen Arnold-Burger (OP)
Correspondents...
.....Lloyd Swartz (Topeka)
.....Bryce Abbott (Wichita)
.....Pat Caffey (Manhattan)
.....Randy McGrath (Lawrence)
.....Cathy Lucas (Sublette)

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

KMJA BOARD OF DIRECTORS

President.....Brenda Stoss (Salina)
President-Elect.....Steve Ebberts (Topeka)
Secretary.....James Campbell (Ottawa)
Treasurer.....Kay Ross (Plainville)
Past-President.....John McLoughlin (Cimarron)

Directors:

Northwest District.....Dorothy Reinert(Atwood).....2012
Southeast District.....Fred W. Johnson (Oswego).....2012
North Central District.....Scott Condray (Concordia).....2011
Southwest District.....Charles Hull (Rolla).....2011
South Central District.....Greg Keith (Haysville).....2010
Northeast District.....Moe Ryan (KCK).....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