The Verdict

The Official Publication of the Kansas Municipal Judges Association

Issue 52 Summer 2010

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 that you may find interesting which have been signed by the Governor that were not reviewed in the Spring 2010 Verdict. This is not an exhaustive list, only those that may be of interest to municipal courts.*

STATE ASSESSMENT INCREASED FROM $19 TO $20

SB 434 increases the state assessment on all municipal court cases (except nonmoving traffic infractions) from $19 to $20 effective July 1, 2010. This new $1 in revenue will go to the department of corrections "forensic psychologist" fund for the purpose of contracting for the services of forensic psychologists.

MUNICIPAL COURT APPEALS INCREASED FROM 10 DAYS TO 14 DAYS EFFECTIVE JULY 1, 2010

HB 2656 increases the time to appeal a municipal court case to the district court from 10 days to 14 days. The day of the conviction is not counted, and all calendar days are counted after that. If the 14th day ends on a Saturday, Sunday, or a day the district court clerk's office is not legally accessible, then the time period extends until the close of business the next day that is not a Saturday, Sunday or legal holiday.

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A STEP BACK IN TIME

Before there was Ray Kroc and McDonalds, before there was Walt Disney and Disneyland, there was Fred Harvey and the Harvey Restaurants at train stops all through Kansas and points west.

Fred Harvey was a British-born 17 year-old boy who sailed to the United States in 1853 to make his fortune. He initially settled in the St. Louis area, working in a local restaurant that catered to steamboat travelers down the Mississippi. The advent of the Civil War forced him to move west, where he became a U.S. postal clerk and sold passenger tickets on the railroad on a commission basis in the St. Joseph area. He later transferred to Leavenworth, 50 miles down river, where he put down permanent roots. His dearest friends in Leavenworth were the mayor, Daniel Reed Anthony, brother of suffragette Susan B. Anthony who was a frequent visitor to Leavenworth and General George Custer. He also started

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SPOTLIGHT ON: FAITH MAUGHAN

At the 2010 Annual Meeting, Faith Maughan (Colwich) was elected as South Central Director.

Judge Maughan grew up in Peabody, Kansas an only child. She graduated from Peabody High School (where she was a drummer in the school band) and then received her degree in Psychology from Washburn University in 1993. She worked for two years at the Menninger Clinic in Topeka before attending Washburn Law School. Following law school, she worked as a prosecutor for the City of Wichita and then as an associate with Smith, Shay, Farmer and Wetta practicing in the areas of immigration, probate, trusts, criminal matters and civil litigation. She served for a time as an assistant district attorney in Reno county before starting her own firm with her husband, Maughan & Maughan in Wichita. The firm is a general practice firm with two partners and four associates. She also serves as city prosecutor for Park City and Maize.

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Spotlight On: Faith Maughan

Judge Maughan has also served for the last nine years in the U.S. Army Reserves, where she holds the rank of Captain in the Judge Advocate General Corps (JAG). She has two children, Avril, 6 and Liam 4. She loves to entertain in her home and cook.

She has served as judge in Colwich for approximately 5 years. Court is held the first Monday of each month. She believes she is better able to "reach" people as a judge than she has been as either a prosecutor or defense attorney. At least, it seems, the defendants are in a better position to the listen to the judge and therefore, she believes she can make a difference in their

Judge Steve Ebberts, Topeka, on the bench in his courtroom

Topeka City Hall, where the municipal court is located

Updates from O.J.A.

ANNOUNCING NEW JUDGES

Since our Spring 2010 issue, the following new municipal judges have been appointed or elected:

-Clinton DeMoss	Harper
-Katie McElhinney	Lenexa
-Gregory Keith	Garden Plain
-Larry Gray	Viola
-Mark Temaat	Oakley
-Leslie Beans	Kanorado
-Tiana McElroy	Cherryvale

2011 CONFERENCE

The Conference is April 18-19 at the Ramada Inn in Topeka. The programs on Monday afternoon will be held in the Supreme Court Courtroom in the Kansas Judicial Center.

2010 CONFERENCE EVALULATION

One hundred and sixty eight judges attended the Conference in Wichita. 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.

- The highest ranked programs were *You Be the Judge* (Arnold-Burger) and the *DMV Update* (Ralston) which received a 4.4.
- Two programs received ratings of 4.3: *Apprising the Defendant* (Ebberts) and *Wheel of Judicial Ethics* (Arnold-Burger).
- Two programs received a 4.2 ratings: *DUI Update* (Whitman and Jones) and the *Nuts and Bolts* panel.
- *Judicial Outreach* (Saloom) received a 4.0 rating.
- The *Bankruptcy* session (Somers) received a good rating of 3.

Scales admitted that he went to an acquaintance's house to have sex with her, but instead of engaging in intercourse, she asked him to process and package some of her cocaine. He complied. He left most of the drugs for the acquaintance, but he kept some baggies and put them in his pocket to take with him. As he was leaving, he was arrested by law enforcement officers who had set up the encounter as a sting. The court found that Scales had violated his probation by possessing cocaine with the intent to distribute it, and the court ordered Scales to serve his underlying 104-month prison sentence. Scales appeals….

Here, Scales admitted to violating his probation. He suggests in his petition for review that it was unfair for law enforcement to lure him to his acquaintance's home with the promise of sex. But the fact that he visited his acquaintance's home to obtain promised sex is irrelevant. As defense counsel correctly acknowledged below, there is no chance that Scales could present an entrapment defense here.

State v. Scales 2010 WL 1462714, 1 (Kan.App.) (Kan.App.,2010)

MAKE PLANS NOW TO ATTEND THE 2010 ABA TRAFFIC COURT PROGRAM IN LITTLE ROCK OCTOBER 13-15, 2010

Mark your calendar! The ABA Traffic Court Seminar is headed to Little Rock, Arkansas !

Confirmed programs to date include:

♦ Recaps of Recent Constitutional Cases, presented by a former Judge, Arkansas Court of Appeals, and a Professor of Law and Academic Dean at the University of Arkansas at Little Rock Bowen School of Law;

♦ Traffic Court Cases that Have Gone to Courts of Last Resort, presented by an Associate Justice, Arkansas Supreme Court;

♦ Constitutional Issues in Traffic Court, presented by a Past President of the National Association of Criminal Defense Lawyers and author of a well-known text on search and seizure, along with a senior assistant prosecuting attorney in Arkansas;

♦ The Effect of Alcohol on the Brain presented by experts from the University of Arkansas for Medical Sciences, followed by a panel discussion on Addiction Treatment and Sentencing Issues.

♦ Program segments on Judicial Outreach Best Practices, Ethics Opinions and Canons, and DUI and Paperless Courts will also be presented.

♦ An interesting program of social events is being planned including an Author's Hour with best-selling author and wordsmith, Richard Lederer. "Anguished English", "Get Thee a Punnery", etc.

The program will be held at the Capital Hotel, one of the finest boutique hotels in the South. It's an easy walk from there to the Clinton Presidential Library, the newest, most modern Presidential Library in the country.

Brochures will be mailed in the early spring.
To be added to the mailing list:
taylore@staff.abanet.org
312-988-6716

2010 Indigent Table
Same as 2009

For the first time since the Poverty Guidelines were issued, there will be no change in the Poverty Guidelines in 2010 from 2009. The income guidelines for appointment of counsel remain:

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/10poverty.shtml

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.

MULTIPLICITOUS TO CHARGE MULTIPLE COUNTS OF CRIMINAL THREAT BASED UPON NUMBER OF VICTIMS

Eric Whetstone made one threat that was communicated to two individuals; specifically, he communicated the threat to "burn down the house and kill [them] all." As a result he was charged and convicted of two counts of criminal threat for a threat to "[c]ommit violence communicated with intent to terrorize another," as proscribed in K.S.A. 21-3419(a)(1). The issue in *State v. Whetstone*, ___Kan.App.2d ___ (April 22, 2010) was whether these convictions were multiplicitous.

The Court of Appeals held hat they were and that the "unit of prosecution" for criminal threat allows only one conviction for the same underlying act regardless of the number of intended victims. The Court looked at (1) whether the convictions arise from the same conduct; and (2) whether by statutory definition there are two offenses or only one. Both parties agreed that the convictions arose from the same statement or conduct. The Court found that the statute provides "intent to terrorize another." The definition of "another" means "person or persons." Therefore, Whetstone could only be convicted of one count under the facts in this case.

FEDERAL LAW PROHIBITING DEPICTION OF ANIMAL FIGHTING AND CRUSHING SMALL ANIMALS IS UNCONSTITUTIONAL

Robert Stevens was a documentary film maker who sold videos of pitbull fights and pitbulls attacking other animals. He was arrested and charged with the federal offense of knowingly selling depictions of animal cruelty, with the intention of placing them in interstate commerce for financial gain. The statute under which he was charged, and eventually convicted, defined "animal cruelty" as a depiction *"in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed."* The law exempts any depiction "*that has serious religious, political, scientific, educational, journalistic, historical or artistic value."* The goal in enacting 18 U.S.C. §48 was to limit distribution of animal fighting and "crush" videos (videos of people crushing small animals to death, which allegedly appeal to a certain sexual fetish).

Stevens argued that the statute was unconstitutional, a violation of the first amendment protection of free speech. The United States Supreme Court agreed. In an 8-1 decision, with Justice Alito filing a dissent, the Court held that the statute was unconstitutionally overbroad. *See*, *U.S. v. Stevens*, ___U.S. ____(April 20, 2010).

"However 'growing' and 'lucrative' the market for crush videos and dog fighting depictions might be, they are dwarfed by the market for other depictions, such as hunting magazines and videos, that we have determined to be within the scope of §48. We therefore need not and do not decide whether a statute limited to crush videos or other depictions of extreme animal cruelty would be constitutional. We hold only that §48 is not so limited but is instead substantially overbroad, and therefore invalid under the First Amendment."

The Court did not preclude the government or the states from adopting statutes that would ban such activities, but simply stated the federal law as currently written was overbroad because it snared some clearly legal activity in its net.

WITHDRAWAL OF PLEA WHEN CONFLICT OF COUNSEL

Leona Ayalla was driving and her close friend Shannon Aguilar was a passenger. Their vehicle was stopped on a traffic offense. Both women had outstanding warrants. Police found 3 baggies of cocaine under Aguilar's seat and an additional two baggies of cocaine and two bags of crystal meth in Ayalla's bra. Aguillar was charged with possession of cocaine (apparently for the cocaine under her seat). Ayalla was charged with possession of cocaine and possession of meth (apparently for the items in her bra).

Both retained Jeff Carlin as an attorney. He agreed to handle both of their cases for $750 each if they both pled guilty to the same thing and $1,500 each if they chose to go to trial. Three days before they both pled guilty to possession of cocaine, Carlin filed a motion to withdraw as counsel stating that Aguilar has failed to pay the agreed attorney fees, which made it *"impossible for movant to zealously represent Defendant as is ethically required of an attorney licensed to practice law in the State of Kansas."*

No action was taken on the motion and no further comments were made about it three days later when Carlin represented both defendants in their guilty pleas to possession of cocaine.

After sentencing, Aguillar asked to withdraw her plea, stating she was coerced into entering the plea because of her relationship with the co-defendant, the additional financial burdens a trial would have placed on her and the conflict of interest of her defense attorney. The district judge denied the motion.

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Above: Sen. Jay Emler exhibits his best "Vana White" impression as he leads the group in Wheel of Judicial Ethics.

Center: Marcy Ralston accepts the Michael Barbara Award from KMJA President Brenda Stoss.

Below: Brenda Stoss introduces the Nuts and Bolts panel, Robin Lewis, Lee Parker and James Campbell.

Above: Wheel of Judicial Ethics instructors Cathy Lucas, Lee Parker and Brenda Stoss show off their bags of fabulous prizes.

Below: Lee Parker searches through his bag of goodies for the perfect prize for the next contestant.

2010 KMJA ANNUAL TRAINING

Court Watch

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In *State v. Aguillar*, ___Kan. ___ (May 21, 2010), the Court found that there was not only an actual conflict of interest in Mr. Carlin's representation of both defendants but an insurmountable one. This was a constructive possession case. Many cases around the country have found that representing multiple defendants in a "constructive possession" case creates an actual conflict of interest. The Court was astounded that the only comment the district judge had to the defendant's request was "*I've had Mr. Carlin in this courtroom a lot of times. I think he does a good job."*

K.S.A. §22-3210(d) allows a guilty plea to be withdrawn prior to sentencing upon good cause shown. If the motion is made after sentencing, the defendant must show "manifest injustice." Because the district judge gave no indication that he had applied the proper legal standard and because the case was so egregious, the Supreme Court ordered the district court to allow Aguillar to withdraw her plea without further hearing.

Justice Nuss filed a lengthy dissent. He argued that the Court had not given sufficient deference to *Mickens v. Taylor,* 535 U.S. 162 (2002) which requires that whenever a defendant argues ineffective assistance of counsel based upon a conflict of interest, the defendant must show that the conflict actually effected the representation. He dissents because the majority did not hold Aguillar to that standard.

ATTORNEY SLAMMED FOR CONTINUING TO RAISE THE SAME LOSING ARGUMENT

State v. Dawson, ___Kan.App.2d ___ (May 21, 2010) is less about the merits of Dawson's claim and more about her attorney. The basis of Dawson's appeal was denial of a motion to correct an illegal sentence, an argument that had been specifically rejected by the Kansas Supreme Court in 1997 in *State v. Duke*, 263 Kan. 193 (1997). However, the Court pointed directly at defense counsel:

"*Aside from the obvious problem that this court may not overturn our higher court, Dawson's appellate counsel has unsuccessfully asserted this same argument before our Supreme Court in at least 9 appeals in the past 5 years, and before panels of this court in approximately 30 appeals in that same period. Further, in this appeal, as in those many appeals, Dawson's appellate brief fails to recognize the numerous recent opinions from both courts rejecting his argument…*

"At this juncture, we think it necessary to note that Dawson has filed a 19-page appellate brief that fails to cite or acknowledge any of the many decisions filed after Duke rejecting the arguments he makes here. This failure is particularly significant since one of the attorneys representing Dawson in this appeal, Carl Maughan, was counsel of record in at least nine appeals before our Supreme Court in which this argument has been rejected. (Court cites all cases)*...Similarly, Maughan has been counsel of record in approximately 30 appeals before panels of this court in which he has unsuccessfully asserted nearly verbatim arguments regarding K.S.A. §22-3504. Further, as in this case, Maughan's briefs in those appeals failed to recognize the overwhelming precedent rejecting his argument.* (Court cites all cases)."

Ouch.

"Burnes' only reasoning for granting her work release request was that she has struggled with alcoholism. What could be more obvious after a tenth DUI? Alcoholism is not a reason to reverse a sentence mandated by the statute."

State v. Burnes, Slip Copy, 2010 WL 1462708 (Kan. App. April 8, 2010).

EVIDENCE NECESSARY FOR CRIME OF OBSTRUCTION OF OFFICIAL DUTY

William Sheldon was convicted of felony obstruction of official duty for the following actions:

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

A month later, Young again returned to Sheldon's pawn shop and with his wife's permission, pawned the gun in her name. However, this time he signed his name to the contract. A month later police noticed the discrepancy in the name on the contract and the name signed, as well as the incorrect race and date of birth. Sheldon was questioned about Young's unlawful possession of a firearm and gave some sketchy and perhaps even untruthful information about who signed the pawn sheets, whether Young was present when his wife picked up the gun, etc. It was later determined that Young could lawfully possess a firearm, so no charges were filed against Young.

Sheldon was charged with, among other things, felony obstruction of official duty in violation of K.S.A. §21-3808

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Court Watch

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which makes it a crime to knowingly and intentionally obstruct any person authorized by law in the discharge of any official duty. Obstructing in the case of a felony, is a felony.

In *State v. Sheldon*, ___Kan. ___ (May 21, 2010) the Kansas Supreme Court reversed the Court of Appeals unpublished decision (*See*, *Verdict*, Fall 2008, p. 29), and found that "*as a matter of logic as well as law*" the State could not meet its burden on the obstruction charge.

The uncontroverted testimony of the detective was that when he spoke with Sheldon he was only **investigating** a felony unlawful firearm possession charge against Young, one which was never charged because the facts did not support it. In order to sustain a conviction under the felony obstruction statute, obstructing an officer in his official duty, an underlying felony must have been committed or charged. Since a felony could not have been charged and was not charged, it did not matter whether Sheldon lied to detectives or not, he could not be charged with obstruction for doing so. There was no felony committed for him to obstruct.

DESTRUCTION OF FIELD NOTES

Defendant was stopped for DUI as part of a sobriety check point. The officers smelled the odor of alcohol, his speech was slurred, his eyes bloodshot. He had several clues on the field sobriety tests and he swayed from side to side when he walked. Open containers of beer were found in his car. He blew .084 on the intoxilyzer.

The defendant moved to dismiss on the basis that the officer had destroyed the field notes he took the night of the arrest. The officer testified that he transferred everything that was in his "shorthand" field notes into his police report prior to their destruction. There was no department policy requiring that he keep field notes.

In *State v. Johnson*, ___Kan.App.2d___(May 28, 2010), the Court of Appeals held that destruction of field notes did not require dismissal of the charges. Based upon a long line of U.S. Supreme Court and subsequent Kansas Supreme Court cases, the defense must establish, among other things, that the destruction of evidence was in bad faith. There was no indication that bad faith was involved, and in fact this didn't even involve the destruction of evidence, simply a transcription of notes. In addition, the defendant must establish that there was no ability to obtain comparable evidence by reasonably alternative means. The entire encounter was captured on video tape. The Court indicated that it would be hard pressed to find that the notes may have contained evidence that was not contained on the video. Therefore, there was no denial of the right to confront the witnesses against him.

FAILURE TO PRESERVE THE BREATH SAMPLE

Also in, *State v. Johnson*, ___Kan.App.2d___(May 28, 2010), the defendant argued that the DUI charges against the him should be dismissed because the police failed to preserve the breath sample for further testing. The Court of Appeals supported the district court's finding that it would be unduly burdensome for the State to maintain all breath samples. The Court reiterated its previous holdings that the results from a single breath test are scientifically reliable, and therefore, should be admitted into evidence. In addition, the statute allows the defendant to request additional testing on his own. He did not do so in this case. There was no evidence presented that the destroyed breath test sample was exculpatory outside of "wishful thinking" on Johnson's part.

SILENCE DOES NOT EQUAL INVOCATION OF *MIRANDA* RIGHTS PROHIBITING FURTHER QUESTIONING

Chester Thompkins was arrested in a drive-by shooting. He fled the area and was located about a year after the shooting. Officers had him at a desk in a small room and read him his *Miranda* rights. They asked him to read the fifth warning to make sure he could read and comprehend English. He did not specifically say he wanted to invoke his right to remain silent. It was also disputed whether he indicated affirmatively that he understood his rights. In any event, they asked him to sign a waiver and he refused.

For the next 3 hours, he sat almost completely silent and unresponsive with a few minimal exceptions (he declined a peppermint and said his chair was hard). The officers continued to question him. Finally, one of the officers asked him if he believed in God. Thompkins began crying and said that he did. The officer asked Thompkins whether he prayed and Thompkins responded that he did. The officer then asked whether Thompkins prayed for forgiveness for shooting the victim. Thompkins again responded that he did. When asked to write that down as a written confession, Thompkins refused. It is Thompkins admission to praying for forgiveness for the shooting that was the subject of *Berghuis v. Thompkins*, ___U.S. ___ (June 1, 2010).

In a 5-4 opinion, the U.S. Supreme Court held that you must speak to remain silent. It reached this conclusion by comparing this situation to that in *Davis v. U.S.* , 512 U.S. 452, wherein the Court held that a defendant must unambiguously invoke his or her right to counsel to stop an interrogation. Justice Kennedy, writing for the majority, wrote:

"*The Court has not yet stated whether an invocation of the right to remain silent can be ambiguous or equivocal, but there is no principled reason to adopt different standards for determining when an accused has invoked the* Miranda *right*

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to remain silent and the Miranda *right to counsel at issue in* Davis*."*

Thompkins was required to specifically state that he wanted to remain silent or that he did not want to talk to the police. Since he did neither, he did not invoke his right to remain silent.

It is clear then that he didn't invoke his right to remain silent, but did he knowingly and voluntarily waive his right to remain silent? Remember, the *Miranda* court stated that *"a valid waiver will not be presumed simply from the silence of the accused after the warnings are given."* Two typical final questions by police after reading the *Miranda* warnings are: *"Do you understand each these rights that I have read to you?"* followed by, *"Having these rights in mind do you wish to talk to me now?"* There is no indication that such questions were asked in this case although the lower court found that Thompkins had responded affirmatively to a question of whether he understood his rights.

The majority found, however, that Thompkins had waived his right to remain silent. There was no indication that he didn't understand the warnings, the Court opined. They were read aloud to him, he read the last one out loud to the officers and he was given time to look over the written warnings. Second, his response to the officers that he prayed to God for forgiveness constituted a *"course of conduct indicating waiver."* Finally, there was no evidence that the statement was coerced.

Thus, the Court summarized, *"after giving a* Miranda *warning, police may interrogate a suspect who has neither invoked nor waived his or her* Miranda *rights….[they] are not required to obtain a waiver...before commencing the interrogation."*

Justices Sotomayor who wrote the dissent (Stevens, Ginsburg and Breyer joined) wrote as follows:

*"The [majority] concludes that a suspect who wishes to guard his right to remain silent against...a finding of "wavier" must, counterintuitively speak—and must do so with sufficient precision to satisfy a clear-statement rule that construes ambiguity in favor of the police. ..Both propositions mark a substantial retreat from...*Miranda*."*

VOLUNTARY ENCOUNTER

In *State v. McGinnis*, ___Kan. ___ (June 4, 2010), the Kansas Supreme Court found the following facts indicated that the police had a voluntary encounter with the defendant and therefore the evidence obtained after the encounter was not subject to suppression.

Police were called regarding a possible stolen vehicle submerged in a creek. Officer drove to the creek access road in his marked police car and as he approached the location he noticed McGinnis driving in the same direction. McGinnis drove his car down the path to the edge of the creek bank and parked. The officer followed him down the path and parked two to three car lengths behind McGinnis. The officer saw McGinnis standing by the creek looking in the direction of the partially submerged car.

The officer walked down to McGinnis and asked him if he knew anything about the submerged vehicle. While walking by McGinnis's car he saw a twelve-pack of beer on the front passenger seat, although he could not tell if any of them were open. He did not suspect McGinnis of anything at this point.

McGinnis denied any knowledge of the submerged car and said he was just looking for a fishing spot (which was not unusual in this area). However, as he spoke, the officer noticed he had slurred speech, bloodshot eyes, and an odor of alcohol coming from him. The officer started a DUI investigation.

McGinnis admitted consuming two beer and failed the field sobriety tests. He took a blood test at the hospital which showed .12.

TO BE SUBJECT TO DEPORTATION DUE TO BEING A REPEAT DRUG OFFENDER, PROSECUTION MUST HAVE CHARGED DEFENDANT UNDER A RECIDIVIST STATUTE

Simply as a follow up to our discussion about "deportable" aggravated felonies from the 2009 Annual KMJA training, a review is provided of a recent Supreme Court case, *Carachuri-Rosendo v. Holder*, ___U.S. ___ (June 14, 2010), a rare unanimous opinion.

Carachuri-Rosendo (A lawful permanent resident who had lived in the U.S. since he was 5) had two misdemeanor drug convictions in Texas, the first for possessing a small amount of marijuana (he got 20 days in jail) and one for possessing one Xanex tablet for which he did not have a prescription (he got 10 days in jail). Texas had an enhancement statute, wherein they could have charged the second as a felony based on the sole fact that Carachuri-Rosendo had a prior, but the prosecutor chose not to do so.

However, because he **could have been charged** with a felony under federal law as a second time offender and subjected to up to 2 years in jail, immigration authorities started deportation proceedings against him. The law up to this point had been routinely interpreted to mean that a second time routine simple drug offense is always an aggravated felony, regardless of how it was treated by the State.

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(exception for cocaine and a few other harsher drugs, where first offense is aggravated felony) Carachuri-Rosendo was removed from the U.S. during the pendency of his appeals, because once they say your gone, your gone. The appeal has to be handled while you are in a foreign country.

The U.S. Supreme Court disagreed and found that if Carachuri-Rosendo had not been charged and convicted as a second time offender, he could not be deemed deportable as an aggravated felon. In part the Court relied on the fact that if one is charged under an enhancement provision, the person has the ability to challenge the priors and the State must prove up the prior as part of the new charge. In this case, the defendant was never given that opportunity because he was never charged as a recidivist. The Court specifically disapproved of the governments "hypothetical" approach to analyzing whether crimes were misdemeanors or felonies. (to wit: "could have been charged as…")

"We hold that when a defendant has been convicted of a simple possession offense that has not been enhanced based on the fact of a prior conviction, he has not been "convicted" [of a "felony"]. The prosecutor in Carchuri-Rosendo's case declined to charge him as a recidivist. He has, therefore, not been convicted of a felony…"

Editor's Note: The U.S. Supreme Court clearly recognized the fact that a prosecutor is not required to charge a defendant under a repeat-offender provision. The prosecutor can elect to charge as a first-time offender. There may be many reasons to do so. This U.S. Supreme Court case seems to recognize that it is a charging decision, not a jurisdictional decision. *See*, discussion of this issue as it relates to *State v. Elliott*, 281 Kan. 583 (2006), in the *Verdict*, Summer 2006, p. 1.

NO FOURTH AMENDMENT VIOLATION WHEN EMPLOYER READS YOUR TEXT MESSAGES RECEIVED ON COMPANY PAGER

Police officers with Ontario, California PD were given pagers. When officers kept exceeding their monthly text allotment, superiors decided to check the content of their texts to see if they were work-related. Officers filed action in federal court alleging that the department violated their Fourth Amendment rights and federal statute by reviewing transcripts of their pager messages.

In *City of Ontario v. Quon*, ___U.S. ___ (June 17, 2010), the U.S. Supreme Court held that this did not constitute a Fourth Amendment violation. It failed to examine whether this was a privacy violation, simply holding that the actions by the employer were reasonable, supported by a legitimate business reason and were not excessively intrusive.

FINDING OF CIVIL CONTEMPT AGAINST ATTORNEY OVERTURNED

Attorney was held in direct civil contempt and fined $1,000 per day until she revealed the name of her client who indicated he or she would commit perjury in an upcoming murder trial. The issue in *State v. Gonzalez and Sweet-McKinnon*, ___ Kan. ___ (June 18, 2010), was whether the attorney could be compelled to reveal this information and thus violate attorney-client privilege.

The Kansas Supreme Court held that if a prosecutor seeks to have criminal defense counsel testify regarding a current or former client's confidential information (which was the case here), the prosecutor must file a motion for issuance of a subpoena. The prosecutor must establish as a condition of issuance that (1) the information is not protected from disclosure by any applicable privilege; (2) the evidence sought is essential to the successful completion of an ongoing investigation or prosecution ; and (3) there is no other feasible alternative to obtain the information. If the attorney invokes the attorney-client privilege, the attorney has the burden to show it applies. If the prosecutor contends an exception to the privilege exists, the prosecutor has the burden of establishing the existence of the exception.

The Court found that the State simply failed to meet its burden. Although generally the name of a client is not privileged, in this case it was because the attorney had already improperly revealed the substance of the client's statement (just not the client's identity). So revealing the client's name would also reveal the confidential information. Therefore, a privilege did exist and the prosecutor didn't present any evidence on the other two factors.

APPARENT V. COMMON AUTHORITY TO CONSENT TO A SEARCH

Michelle Konen and Brian Kerestessy lived together in Little River, Kansas. Officers had reason to believe that Kerestessy may be involved in drug activity on his property. They went to the property. Konen was the only one there. They asked Konen for consent to search the outbuildings and vehicles on the property, particularly an old bus a distance away from the house, but still on the property. Although there was some dispute regarding the voluntariness of the consent, she eventually consented both orally and in writing to the search. However, she told the officers that the bus did not belong to her and she had never been in it. They did not check to see who the bus was registered to. It was guarded by a dog. They asked her to remove the dog so they could enter. She did. Inside they found a meth lab. Kerestessy was charged with manufacturing methamphetamine. He moved to suppress the items found in the bus on the grounds that Kenan did not have authority, either apparent or actual, to consent to the search.

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In *State v. Kerestessy*, ___Kan.App.2d ___ (June 25, 2010), the Kansas Court of Appeals agreed with Kerestessy. The Court stated that the first step in the analysis is to determine if Kenan had authority to consent to the search of common property. It found that she had common authority over the residence and the garage, because she shared them the defendant (even though she was not the actual owner). However, she did not have common authority over the bus because she did not own it; it was located away from the property; and it was guarded by a dog. (By the time of argument, the State had even given up the "common authority" argument).

The next step is to determine whether she had apparent authority over the bus. The State argued that she had apparent authority because the officers believed she had authority to consent. However, that is not the test, the Court pointed out. The test is whether a person of reasonable caution, having the same facts that the officer had, would believe Konen had mutual use of the bus or any legal interest in the bus, which would have given rise to apparent authority to consent to a search of the bus. In other words, would the officer have had a valid consent to search if the facts were as the officer reasonably believed them to be?

The Court found that there was no apparent authority. The officers made no attempts to ascertain whether Konen had "mutual use" of the bus or whether she had any legal interest in it. Again, the bus was a distance from the property, was guarded by a pit bull and she told them she didn't know anything about what was in the bus. They should have asked more questions and done more research to determine whether Konen had common authority over the bus.

Recently, United States Supreme Court Justice Stevens observed that *"imposing criminal sanctions for nonproscribed conduct has always been considered a hallmark of tyranny—no matter how morally reprehensible the prosecuted party"* [citation omitted]. I would submit that imposing an additional criminal sanction for an uncharged crime of which the defendant has not been convicted is no less tyrannical."

Justice Johnson's dissent in *State v. Reyna*, ___Kan. ___ (June 4, 2010). Reyna had been charged under Jessica's law and the complaint did not set out the victim's age as under 14 , nor his age as 18 or over, even though his sentence was enhanced as if it had been.

TWO OWNERS = TWO THEFTS

Defendant hid in the Yen Ching Restaurant in Wichita waiting for Cathy Chang to finish her closing duties. He had seen Chang take the money out of the cash register and place it in a bank bag. He decided to grab the bag when she wasn't looking. He then saw her place the bank bag and her purse on the top of the bar and walk toward the back of the restaurant. He grabbed the money bag and the purse and left. He was subsequently caught and convicted of burglary and two counts of theft , one for the purse and one for the bank bag. The issue in *State v. Hood*, ___Kan.App.2d ___(June 25, 2010) was whether he could be convicted of two counts of theft or just one.

The Court of Appeals found that based on the language of the theft statute, he could be charged for two counts of theft since the purse and the bank bag had different owners.

In determining whether multiplicity exists, the first prong is whether or not the convictions arise from the same conduct. In this case, they clearly did. This was one impulsive act, no fresh impulse was established between the taking of the bag and the taking of the purse. It was one act.

The second prong however is whether there are two offenses or only one under the statutory definition. The Court of Appeals found that since the theft statute requires an intent to deprive **the** owner of **the** owner's property, an unlawful taking occurs for each owner's property taken. The unit of prosecution is determined by the number of owners. Even if Hood had not known that the items he took had two different owners, the Court opined, the statute does not require that he know there were different owners. The question is whether the defendant was on reasonable notice that there were separate owners. Hood had such reasonable notice in this case. He watched her put the money in the bank bag from the restaurant's cash register and he watched her set her purse down. In addition, the character of the property, a bank bag and a purse, would lead anyone to the conclusion there were two owners.

The convictions stand and are not multiplicitous.

SECOND AMENDMENT TO U.S. CONSTITUTION APPLIES TO STATES

Two years ago, the U.S. Supreme Court held in *District of Columbia v. Heller*, ___ U.S. ___ (2008) that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense and struck down an D.C. law that banned the possession of handguns in the home. However, since D.C. is federal territory, the issue was left unresolved regarding whether the Court would rule the same way when a State or municipality was involved. In other words, does the Second Amendment analysis in *Heller*, also apply to the States?

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In *McDonald v. City of Chicago*, ___U.S. ___ (June 28, 2010), in a very lengthy and divided opinion, the Court held that the Second Amendment (as well as every other fundamental right in the Bill of Rights) does apply to the States and thus, in effect, struck down Chicago's handgun ban (although it technically sent it back to the appellate court to "reconsider" its ruling). The Court did point out however, as it did in *Heller*, that "*the right to bear arms is not a right to keep and carry any weapon whatsoever in any manner whatsoever for whatever purpose."* Regulatory measures regarding prohibitions on the possession of firearms by felons and the mentally ill, possession in sensitive places like schools and government buildings, and laws imposing qualifications on commercial sales are constitutional.

The opinion is a fascinating historical read of our Civil War and post-Civil War history. It is 210 pages, counting the concurring and dissenting opinions, and includes in the majority opinion a reference to "Bloody Kansas" and quotes Sen. Summer's proclamation that *"[n]ever was [the rifle] more needed in just self-defense than now in Kansas."*

RULE OF LENITY AND IDENTICAL OFFENSES

According to K.S.A. §21-3523 it is a level 1 person felony to electronically solicit a child to submit to an unlawful sex act if the offender believes the child is under the age of 14. It is a level 3 person felony if the offender believes the child is under the age of 16. Since the charges overlap, it is prosecutorial decision whether or not to charge a person who has solicited someone under the age of 14 with a level 1 or a level 3 person felony (because a child under the age of 14 is also under the age of 16).

Jason Sandberg was charged with the level 1 person felony, in that he believed the person he was soliciting for sex was 13 years old.

The "identical offense" doctrine is unique to Kansas and holds that if two criminal offenses have identical elements but different penalty classifications, a defendant convicted of either crime may be sentenced only under the lesser penalty provisions. Sandberg argued that since he could have been charged under either provision for the same act, the offenses are identical and he can only be sentenced for a level 3 person felony.

In *State v. Sandberg*, ___Kan. ___(July 23, 2010), the Kansas Supreme Court found that these were not two criminal offenses with identical elements. These are severity levels of the same offense, lesser included offenses. The identical offense doctrine does not apply to situations where the legislature has clearly established differing severity levels of the same crime. The fact that the decision may be subject to "prosecutorial whimsy" is irrelevant. It is a prosecutorial decision nonetheless to determine what "aggravating" factors he or she is going to allege.

Sandberg also argued that the "rule of lenity" requires he be sentenced under the lesser of the two severity levels. According to Am. Jur. Statutes §197, *"Under the "rule of lenity," a criminal statute is construed in favor of lenity toward an accused in situations in which a reasonable doubt persists about the statute's intended scope even after resort to the statute's language, structure, legislative history, and motivating policies. The touchstone of the rule being statutory ambiguity, …Furthermore, the view has been followed that the rule that ambiguous penal statutes are construed in favor of defendants is inapplicable unless two reasonable interpretations of the same provision stand in relative equipoise, that is, that resolution of the statute's ambiguities in a convincing manner is impracticable."*

The Kansas Supreme Court held that the rule of lenity was inapplicable because the statute is not ambiguous. It is clear as written. Regardless of whether or not the legislature intended it, it clearly created an overlap. The rule of lenity does not require a prosecutor to charge the least severe level in a hierarchy of included offenses, therefore it does not provide Sandberg any relief.

Justice Johnson dissented, arguing that the identical offense doctrine should apply. *"While the recognition that prosecutorial discretion permits whimsical decision-making in the real world might counsel against continuing the identical offense doctrine in this state, I do not view it as justifying the disparate treatment of overlapping provisions based upon where they are placed in the statute book."* He goes on to distinguish the situation in which a prosecutor ignores a fact in charging, such as use of a deadly weapon or the victim sustaining great bodily harm. In this case the prosecutor didn't have to ignore any fact because the greater degree of the crime (victim under 14) is a subset of the lesser included offense (victim under 16). He would require the legislature to be specific as it has been in other statutes and define the various severity levels based on the age range for the violation, i.e. K.S.A. §21-3504(a)(1) which makes it unlawful to have sexual intercourse with a child who is 14 or more years of age but less than 16 years of age. Absent that specificity, he would find that the identical offense doctrine applies and Sandberg should be resentenced for a severity level 3 person felony.

Editor's Note: The Court recognized that nothing forecloses a prosecutor from deciding in a particular case that, notwithstanding the presence of one of the aggravated factors, he or she will prosecute the defendant for only the lesser offense. *"In other words, in charging a robbery offense, a prosecutor could ignore the use of a weapon and decline to charge armed or aggravated robbery and instead prosecute*

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the lesser offense. Or in a battery case, the prosecutor could ignore a more serious degree of bodily injury and charge battery rather than aggravated battery." The Court is again recognizing that these are charging decisions not jurisdictional decisions. *See,* discussion of this issue as it relates to jurisdiction of municipal courts pursuant to *State v. Elliott*, 281 Kan. 583 (2006) in the *Verdict*, Summer 2006, p. 1 and *supra* in an Editor's Note, p. 9). Query how this is any different from a prosecutor charging a DUI offender as a second offender misdemeanant, rather than a third offender felon, when his or her prosecutorial discretion so dictates? Again, this seems to be a charging decision, not a jurisdictional one.

KANSAS SUPREME COURT AFFIRMS COURT OF APPEALS FINDING THAT OFFICER CANNOT EQUATE FIELD SOBRIETY TEST RESULTS TO A SPECIFIC BAC LEVEL, BUT THAT USE OF TERMS SUCH AS "PASS" OR "FAIL" ARE ALLOWED

In *State v. Shadden*, ___Kan. ___ (July 9, 2010), the Kansas Supreme Court affirmed the Court of Appeals ruling in *State v. Shadden*, 40 Kan.App.2d 1103 (2009) (Verdict, Winter 2009, p. 11) that although an officer can testify regarding his or her observations of the defendant's performance on the field sobriety tests, the officer cannot, absent a *Frye* hearing, equate the results of the defendant's performance with a specific BAC level. In addition, witnesses are allowed to use terms such as "points," "clues," "test," "pass," or "fail" when referring to the defendant's performance on the field sobriety tests. The Supreme Court reversed the Court of Appeals finding that the equating of the field sobriety test results to a certain level of intoxication was error requiring reversal of the conviction and instead found that the error was harmless given the other evidence presented of guilt.

PRE-*GANT* WARRANTLESS VEHICLE SEARCHES CAN BE SAVED BY THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE

In 2007, David Karson's pick up truck was searched incident to his arrest on a warrant. This practice was in accordance with Kansas statutory and case law at the time. In 2009, the U.S. Supreme Court concluded that a vehicle could not be searched merely because the occupant had been arrested when, as was true in Karson's case, the defendant was already handcuffed in the back of the patrol car. *See, Arizona v. Gant,* 556 U.S. ___ (2009).

In *State v. Karson*, ___ Kan.App.2d ___ (July 30, 2010), the Kansas Court of Appeals held that a police officer who conducts a search in reasonable reliance upon the settled caselaw of the Kansas Supreme Court and the United States Court of Appeals for the Tenth Circuit has not engaged in misconduct even if a later United States Supreme Court decision deems the search invalid. Accordingly, under the good-faith exception to the exclusionary rule, evidence found in such a search is not excluded based on the search's invalidity.

See also, p. 39, *supra.*

RECORDED STATEMENTS OF CHILD VICTIMS LESS THAN 13 YEARS OLD MUST BE TRANSCRIBED AS A CONDITION PRECEDENT TO ADMISSION

In order to admit the recorded statement of a child crime victim who is less than 13 years old several factors must be present under K.S.A. §22-3433. One of these requirements is that each party to the proceeding must receive a copy and a transcript of the video. There are no exceptions and "substantial compliance" by simply providing a copy of the video will not suffice. *State v. Martinez*, ___Kan. ___ (July 30, 2010).

FINDINGS REGARDING QUALIFICATIONS OF AN INTERPRETER

K.S.A. §75-4353 requires that when a person's primary language is other than English, the Court appoint an interpreter who meets the following criteria:

(1) A general understanding of cultural concepts, usage and expressions of the foreign language being interpreted, including the foreign language's varieties, dialects and accents;
(2) The ability to interpret and translate in a manner which reflects the educational level and understanding of the person whose primary language is other than English;
(3) Basic knowledge of legal rights of persons involved in law enforcement investigations, administrative matters

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"McCormick's argument regarding classic art and literature being subject to K.A.R. 44-12-313 is without merit. Possession of these items is not a significant part of the regulation's target. The regulation was promulgated to prevent inmates from possessing pornography and other sexually explicit materials detrimental to the prison's ability to function. The regulation is not aimed at Rodin's painting "The Kiss," the Bible, or any other works of art or literature referenced in McCormick's brief."

McCormick v. Werholtz Slip Copy, 2010 WL 2978148 (Kan.App.,July 23, 2010) (Inmate was challenging prison's denial of access to his "Stuff" magazine subscription).

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and court proceedings and procedures, as the case may be; and

(4) Sound skills in written and oral communication between English and the foreign language being translated, including the qualified interpreter's ability to translate complex questions, answers and concepts in a timely, coherent manner.

In *Shaha v. State*, ___Kan.App.2d ___ (August 6, 2010), the Court of Appeals found that while the statute does not specifically mandate that the district court make its findings regarding each of the above listed factors on the record, the better practice would be to do so. In *Shaha*, the defendant argued that the interpreter failed to provide a literal, word-for-word interpretation, but instead often summarized Shaha's responses and spoke in the third person.

There is a rebuttable presumption that an interpreter, exercising his or her official duties, has acted properly. A mere showing that an interpreter has had some difficulty translating a question or response is not sufficient to rebut the presumption because courts have recognized that languages may not translate directly. A literal translation is not essential so long as the answers of the interpreter conveyed the same meaning expressed by the witness.

The defendant was not able to present sufficient evidence to rebut the presumption that the interpreter was correctly and appropriately translating English into "Bala." and conversely, "Bala" into English. No misrepresentations were alleged and the defendant did not object to the translation at the time. The interpreter admitted he had no prior experience as an interpreter, but indicated he spoke the language well. It was his native language and he had mastered English. On two occasions he stopped the examining attorney and requested he rephrase the question, because the concepts did not translate easily into Bala.

RESCISSION OF REFUSAL TO TAKE BREATH TEST: NO BRIGHT-LINE RULE ON AMOUNT OF TIME ELAPSES AND OBSERVATION OF OTHERS CAN BE IMPUTED TO THE OFFICER

After an arrest for DUI, Charles McIntosh was read the implied consent advisories. When asked whether he would submit to a breath test, he said he would not. Jail staff then transported him to the booking area for processing. He remained in that area, out of the arresting officer's immediate view for 20-30 minutes, while the officer was completing paperwork associated with the arrest. The officer personally served McIntosh with the DC-27 form and his citation for DUI. McIntosh then advised the officer that he wanted to take the breath test. The officer refused on the basis that McIntosh had been given ample opportunity to take the test earlier. The DMV suspended McIntosh's driver's license for a test refusal. He appealed and the district court found that McIntosh had rescinded his refusal pursuant to Kansas law and should have been allowed to take the breath test, therefore his license should not be suspended.

In *McIntosh v. KS Dept. of Revenue*, ___Kan. ___ (August 20, 2010), the Kansas Supreme Court agreed that this was a valid rescission of the breath test refusal. According to *Standish v. Dept. of Revenue*, 235 Kan. 900 (1984), the Court set out several factors to consider in determining whether there has been a rescission of a breath test refusal that merits giving the driver the breath test. To cure a prior refusal, the subsequent consent must be:

(1) within a very short and reasonable time after the prior first refusal;
(2) when a test administered upon the subsequent consent would still be accurate;
(3) When testing equipment is still readily available;
(4) When honoring the request will result in no substantial inconvenience or expense to the police; and
(5) When the individual requesting the test has been in the custody of the arresting officer and under observation for the whole time since arrest.

Only (1) and (5) are at issue in *McIntosh*.

The Court found that there is no "bright line rule" for what is meant by a "very short and reasonable time" between refusal and rescission. Admittedly in *Standish*, the Court found that the 15-30 minutes between refusal and rescission was not reasonable. However, the Court in *McIntosh* distinguished *Standish* on the basis that the officer in *Standish* had already gone back out on duty. In this case, the officer had not even left the police station and was, in fact, still working on paperwork related to the case. Therefore, the elapsed time was totally within the officer's control and there is no indication that McIntosh was trying to manipulate said timeframe to his advantage. McIntosh's refusal was timely.

As to the fifth *Standish* standard, KDR argued that McIntosh was not in the immediate presence of the "arresting officer" during the entire time. The Court found that McIntosh was in the presence of jail personnel at all times and their knowledge and observations could be imputed to the arresting officer. Therefore, the fifth *Standish* standard was also met. McIntosh should have been allowed to take the test and the officer's refusal to allow such requires a reversal of McIntosh's driver's license suspension for test refusal.

RIGHT TO COUNSEL AT PROBATION REVOCATION HEARING

Defendant has a right to counsel at a probation revocation hearing. Any waiver of said right must be knowingly and intelligently made and must include an explanation of the right to court-appointed counsel as well as an explanation by the Court of the dangers of self-representation. *See, State v. Miller*, ___Kan.App.2d ___(August 20, 2010).

Legislative Updates

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This is effective July 1, 2010.

TEXTING WHILE DRIVING

H. Sub. For SB 300 creates a new law prohibiting the operation of a motor vehicle on a public road or highway while using a wireless communication device, to write, send or read a written communication. There are a few listed exceptions in the statute, such as law enforcement use, emergency use, GPS systems, etc. From its effective date of July 1, 2010 to January 1, 2011 law enforcement officers can only give warning tickets. After that, the state fine schedule has it listed as a $60 fine. However, since there are mandated fines in the statute, if your city adopted an ordinance it or you could set the fine as you deemed appropriate.

RELIEF FROM ONE YEAR DL SUSPENSION ON 2ND TIME BREATH TEST FAILURE

SB 368 allows drivers who have been suspended for one year for a 2nd-time breath test failure, **and** blew less than .15 on the intoxilyzer, to get a restricted driver's license after 45 days if they get interlock put on their car. The person can only driver to and from work, school or treatment, even with the interlock. Violation of the restriction will result in an **additional** one year suspension. The bill goes on to state that a person subject to interlock under this provision does **not** have the ability to operate a company car on business without an interlock as allowed for other interlock restrictions in the statute.

Effective July 1, 2011, the bill also allows a judge to revoke a third-time DUI offender's tags and registration. Prior law required it to be a fourth or subsequent conviction.

PRIMARY SEAT BELT LAW

HB 2130 amends current law to require that every occupant in a passenger car manufactured with a safety belt must wear a safety belt. The bill allows a law enforcement officer to stop a car for a violation of safety belt requirements by anyone in the front seat and by anyone under the age of 18. Current law would continue to require that a citation for failure to wear a safety belt in the back seat only be issued if another law has been violated.

The bill makes exception for mail carriers, newspaper delivery persons, and persons possessing a written statement from a licensed physician stating that the person is unable due to medical reasons. From June 30, 2010 until July 1, 2011 the fine for a violation is set at $5, and starting July 1, 2011 $10. (Will require amendment to STO §182.1).

See, Nuts and Bolts, p. 22, *supra*.

LICENSE PLATE COVERS

H. Sub. For SB 300 creates a new law prohibiting vehicle license plates from being covered with any clear or any other plastic-like material that affects the plate's visibility or reflectivity.

HELMETS AND EYE PROTECTION FOR MOTORCYCLE PASSENGERS

H. Sub. For SB 300 amends K.S.A. §8-1598 (STO §142) makes it clear that the driver of a motorcycle is responsible for making sure that both the driver (if under 18) and any passengers under the age of 18 have on helmets and eye protection and makes it a crime to allow or permit someone to operate or ride on a motorcycle in violation of the statute.

SUN SCREENING

H. Sub. for SB 300 makes some technical amendments to K.S.A. §8-1749a (STO §181) regarding screening devices on windshields, side wing, side windows and rear windows and provides an exception for law enforcement vehicles.

DRIVER'S LICENSE CHANGES

HB 2482 makes several changes to the law regarding driver's license renewal, graduated driver's license restrictions, and diversion agreements for commercial drivers. The highlights are as follows:

- Allows the spouse or dependant child living with a person on active military duty outside of Kansas to renew an expired driver's license without examination if done within 6 months of discharge or 90 days of re-establishing residence, which ever is sooner.
- Allows the spouse or dependant child living with a person on active military duty outside of Kansas who already has a digital photograph on file to renew by mail. However, mail renewal can only be done once.
- The DMV will no longer be sending a copy of the written test and manual prior to expiration of your license. It will only send a written explanation of substantial recent changes to traffic regulations adopted by the legislature.
- It won't send the examination, because you no longer have to take a written examination as part of a renewal, just the eye test.
- Allows age-restricted driver's licenses and farm permits to operate to and from any religious worship service held by a religious organization and those terms are defined in the statute. It does not appear to make similar provisions for DMV-restricted drivers (e.g., DUI, etc.)
- Allows an adult who has a motorcycle license for at least a year to ride as a passenger on a motorcycle oper-

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ated by a person who has a class M restricted or learner's permit. Prior law required that the licensed motorcycle driver be driving a motorcycle in the "general proximity" of the permit holder.

- Reiterates that driver or a holder of a commercial driver's license may not be allowed to enter into a diversion agreement that would prevent the person's conviction for any violation except parking, in any type of vehicle, from appearing on his or her driving records. It further defines *"holder of a commercial driver's license"* as: a person who, **at the time the person was arrested or issued a citation**, was the holder of a commercial driver's license, **even if the person surrenders** the commercial driver's license after the arrest or citation.
- Organ donation information will be available solely on the division's website.

LEGISLATURE RESPONDS TO KANSAS SUPREME COURT RULINGS REGARDING USE OF FORCE IN DEFENSE OF SELF OR OTHERS

House Sub. For SB 381 is a direct response to the Kansas Supreme Court ruling in *State v. Hendrix*, 289 Kan. 859 (2009). *See*, Verdict, Winter 2010, p. 7 and Spring 2010, p. 31.

In *Hendrix*, a defendant was not entitled to a self-defense instruction because no physical force was used, just the threat of physical force. It found that the statute requires that actual force be used against a person before she could claim self-defense. The justices suggested that legislative change would be needed to change the result, and the legislature responded.

The bill adds a definition to the criminal code of "use of force" which incorporates threats of use of force or the display of a means to use force, as well as actual force. The bill also creates a statutory presumption that a person has a reasonable belief that deadly force is necessary to protect self or others if the person is entering a dwelling or occupied vehicle or place of work by force or if a person is being forcibly removed from a dwelling, or occupied vehicle or place of work. There are a few listed exceptions to this.

It also amends K.S.A. §21-3213 (use of force to protect a dwelling) to allow a person to use force to prevent someone from interfering with their dwelling, place of work or occupied vehicle. Only such use of force as is reasonably necessary can be used.

JUVENILE MIP OFFENDERS CANNOT BE DETAINED OR PLACED IN JAIL

SB 452 amends K.S.A. 2009 Supp. §41-727 and prohibits the placement of any MIP offender **who is under the age of 18** in any jail, juvenile detention facility or sanctions house if that is the only charge.

RECODIFICATION OF KANSAS CRIMINAL CODE

HB 2668 recodifies the Kansas Criminal Code. The bill revises statutory language to add clarity and reorganizes statutes to be more user friendly. It also reorders statutes to reduce their number and repeals language no longer in use. It is the final product of the recommendations of the Kansas Criminal Code Recodification Commission created in 2007. the bill is 155 pages long, and judges are encouraged to review it.

SIGNIFICANT CHANGES MADE TO CODE OF CIVIL PROCEDURE

HB 2656 amends the Kansas Code of Civil Procedure to be more in compliance with the federal Rules of Civil Procedure. **This bill changes virtually every time limit in both the civil and criminal statutes.** As a general rule, every 10 day requirement was increased to 14 days; 20 day requirements were increased to 21; and the minimum time for anything seems to be seven days (anything less than 7, was increased to 7). Substantive changes include:

- Revises the law on computation and extension of time to exclude the day of the event that triggers the period and includes intermediate Saturday, Sundays, and legal holidays. So, no more "calendar days" v. "business days".
- Clarifies that when the clerk's office is inaccessible, time for filing would be extended to the first accessible day that is not a Saturday, Sunday or legal holiday.
- Amends the current 10-day period to file certain post-judgment motions to 28 days and prohibits any further extension of time.

More specific amendments of interest to municipal courts:

- Increases from 5 to 7 days the amount of time that law enforcement has to submit the officer's certification on a breath test refusal or failure to the DMV. (Amends K.S.A. §8-1002)
- Increases from 10 to 14 days the amount of time a person has to appeal the denial of a driver's license by the DMV (amends K.S.A. §8-235)
- Increases from 10 to 14 days the amount of time a person has to appeal the officer's certification notice of suspension under the DUI laws. (Amends K.S.A. §8-1020)
- Municipal appeals must be taken within 14 days (not 10 anymore) (Amends K.S.A. §22-3609). *See, p. 1, supra.*
- **No changes were made in the code of procedure for municipal courts (K.S.A. §12-4101 et seq.).** The 48 hour and 18 hour requirements of K.S.A. 2009 Supp. §12-4213 remains intact. In addition, the 5 day requirement between service of a notice to appear and court date of K.S.A. §12-4204 remains intact. The six hour hold of K.S.A. 2009 Supp. §12-4213 remains the same. Finally, the 10 day requirement for filing a motion to set aside judgment contained in K.S.A. §12-4512 was not changed.

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CONCERNING VEHICLE REGISTRATION

HB 2660 makes several changes to the law regarding vehicle registration. First, the bill authorizes three new licenses plates to be issued starting January 1, 2012, including a Boy Scouts of America license plate, a Vietnam War Veteran license plate, and an "I'm Pet Friendly" license plate.

The bill also defines a new type of vehicle, a "recreational off-highway vehicle," as a motor vehicle 64 inches or less in width, weighing no more than 2,000 pounds, having four non-highway tires, a non-straddle seat, and a steering wheel. An owner of a recreational off-highway vehicle would be required to obtain a non-highway title.

HUMAN TRAFFICKING

House Sub. for SB 353 renames the existing crimes of trafficking and aggravated trafficking to human trafficking and aggravated human trafficking. The bill also expands the definitions of crimes to include coercing unemployment and peonage (involuntary servitude) as ways to commit the crime. Finally, these crimes are added to the list of crimes subject to forfeiture.

FRAUDULENT LIENS

SB 537 creates a new law which allows any person aggrieved by the filing of a fraudulent lien to file a civil action against the person that filed the documents.

AMENDMENTS TO CONSUMER PROTECTION ACT

House Sub for SB 269 amends the Kansas Consumer Protection Act. The bill adds veteran, surviving spouse of a veteran and immediate family member of a member of the military to the definition of "protected consumer"—which currently includes elder and disabled persons.

The bill also creates the Musical Performance Advertising Act. This bill prohibits any person from advertising or conducting a live musical performance or production in the state through the use of false, deceptive, or misleading affiliation, connection, or association between a performing group and a recording group.

TB TESTS BEFORE COLLEGE AND HIV TESTS WHEN PREGNANT

SB 62 requires a physician or health care professional who provides care for pregnant women to test for HIV during the first trimester. The woman can decline such testing, but if she does her newborn must be screened after birth. In addition, under the bill, KDHE must develop a tuberculosis prevention plan and screening program in the colleges in the state.

CAUSE OF ACTION FOR VICTIMS OF CHILD PORNOGRAPHY

S. Sub. For HB 2509 establishes a cause of action for victims of child pornography against producers, promoters, or possessors of said pornography. The action can be pursued through private counsel or through the Attorney General. The action must be filed within three years of one of the following events (whichever is later): the conclusion of the criminal case, the notification of the victim by law enforcement of the child pornography, or if the victim is less than 18, three years after the child turns 18. The **minimum** recoverable is $150,000.

RELATING TO DISTRICT COURT APPEARANCE BONDS

S. Sub. for HB 2528 makes several amendments to current law regarding **district court** procedures for the forfeiture of an appearance bond. First, it states that if a defendant is arrested for a violation of a bond condition, the appearance bond is revoked (meaning the bonding company can no longer be held liable on the bond).

Second, it requires the **district court** to set aside a forfeiture if it can be proved by sworn affidavit that the defendant is unable to appear because he or she is incarcerated somewhere in the United States.

Next, it increases from 10 to 60 days the amount of time after notice to the bonding company, before judgment can be entered against it.

Finally, it prohibits a judgment being entered against the bonding company if more than two years have elapsed since the defendant's failure to appear.

Editor's Note: *This has no application to municipal court bonds.*

STATE FINES INCREASED BY $15 ACROSS THE BOARD

S. Sub for HB 2226 increases **state** fines assessed on traffic infractions that are on the uniform fine schedule by $15. Some of the increased revenue would be used to fund a new "criminal justice information system line" which would be used by the KBI to provide communication lines, outlets and terminals for KCJIS in each county.

Editor's Note: *This has no application to municipal court fines. K.S.A. 12-4305 requires the municipal judge to set the fines for ordinance traffic infractions, not the state legislature.*

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Legislative Updates

(Continued from page 16)

BROWN V. BOARD OF EDUCATION MURAL

SB 54 creates the Capitol Preservation Committee, which is required to develop plans for the placement of a mural in the State Capitol commemorating the U.S. Supreme Court decision in the case of Brown v. Board of Education.

TRANSIT BUSES IN JOHNSON COUNTY CAN OPERATE ON RIGHT SHOULDER

HB 2561 allows Johnson County transit buses to operate on the right shoulder, when the speed has been reduced to less than 35 miles per hour. However, the buses cannot be going over 10 miles faster than the other traffic and they have to yield to all other traffic on the shoulder or entering or exiting the highway. The bill also amends K.S.A. §8-1517 (STO §41) accordingly.

AMENDMENTS TO CONCEAL AND CARRY PROVISIONS

H. Sub. for SB 306 makes several amendments to the Personal and family Protection Act (conceal and carry law).

- Changes the term "weapon" to "handgun."
- Removes many of the current requirements to qualify to carry a concealed handgun.
- Allows a person to carry a concealed handgun while the application is pending if certain criteria are met.
- Eliminates certain requirements for license renewal.
- Reduces the current fees for licensure and renewal.
- Eliminates the requirement for fingerprinting of applicants for renewal and adds a requirement for a name-based national criminal records check for renewal.
- Extends the term of a license for 90 days after a person is no longer a resident of Kansas.
- Modifies the provision governing the public and private places a licensee may not carry a concealed handgun, including deleting the prohibition of carrying a concealed weapon on the state fair grounds.
- Excludes parking lots and garages from being included in any public or private facility where a concealed handgun is prohibited.
- Revises the sign prohibiting the concealed carry of handguns. Requires signs to comply with regulations to be adopted by the Attorney General.
- If a person carries a concealed handgun into a properly posted, prohibited location, it is an unclassified misdemeanor with a maximum $50 for a first offense and a maximum $100 for a second offense. A third or subsequent offense is classified as a class B misdemeanor (up to 6 months in jail and up to $1,000 in fines).
- Eliminates the language that extends "implied consent" to holders of concealed handgun permits. If a person refuses to consent to a test (when the officer believes the person is under the influence and in possession of a handgun) or consents and blows .08 or greater, the handgun permit will be revoked for 1 year on a first offense and three years on a second or subsequent offense. However, the legislation makes clear that the holder of the permit is not deemed to have given consent by the mere fact that he or she has a license to carry.
- K.S.A. 2009 Supp. §21-4201 (POC §10.1) places an exemption in the statute for *"any ordinary pocket knife which has a spring, detent or other device which creates a bias towards closure of the blade and which requires hand pressure applied to such spring, detent or device through the blade of the knife to overcome the bias towards closure to assist in opening the knife."*

UNLAWFUL SEXUAL RELATIONS WITH A PERSON IN CUSTODY

SB 434 amends the provisions in K.S.A. §21-3520 regarding sexual relations with a person on parole or conditional release to clarify that the offender must have knowledge that the person is on parole, conditional release, or postrelease supervision.

The bill also adds unlawful sexual relations with a person in custody and traffic in contraband in a correctional institution or care facility as crimes that require registration.

Finally, the bill requires the Kansas Parole Board to review all inmates sentenced for a class A or class B felony who have not had a hearing in five years to be granted a hearing sometime before July 1, 2012.

CONCERNING JUVENILE OFFENDERS

S Sub for HB 2506 amends the Juvenile Justice Code. First, the bill clarifies that the court has the discretion to revoke the jurisdiction of a juvenile offender and order the imposition of the adult sentence if the court finds that a juvenile committed a new offense or violated one or more conditions of the juvenile's sentence. The bill also specifies that the burden of proof is a preponderance of the evidence if the juvenile offender on extended jurisdiction challenges the reasons for revocation of extended jurisdiction.

The bill also requires the Commissioner of the Juvenile Justice Authority to notify the juvenile's attorney or the juvenile's parent, in writing, of the initial placement of the juvenile offender.

Step Back in Time

(Continued from page 1)

soliciting advertising for various publications in the area and became a real traveling salesman, traversing his area by the rapidly growing rail system.

Harvey House Museum, Florence, Kansas

As he traveled the rails, he was appalled at the grotesque eating establishments along the line. With only 30 minute stops, passengers barely got their food when the bell rang to get back on the train. As they left their plates ¾ full, employees would scrape them and reserve the same food to the next set of travelers to stop. Dining cars on the train had not yet been perfected because there was no way developed yet to walk from car to car. So, if you started in the dining car, you had to stay there until the next stop. Therefore, they were not popular with travelers.

So Fred got in the restaurant business again and, in 1875, agreed to take over three eating establishments along the Kansas Pacific railroad, Lawrence and Wallace in Kansas and Hugo, Colorado. The rest is history. He developed systems of bulk ordering that are still used by chain restaurants today. He developed a system of taking food orders on the train and then notifying the restaurant of the orders by telegraph and a system of train whistles and gongs. By the time the customers arrived, their food was hot and ready to eat. Good food, fast...an industry was born.

He expanded to Topeka and then to Florence, which he believed to be the most important restaurant and hotel on the line. It was the primary stop on the Atchison, Topeka and Santa Fe line and attracted lots of sportsman because of the spectacular hunting and fishing in the area. He decided to develop— in the sleepy town of 800—a boutique hotel and destination restaurant. He turned to one of the top chefs of the day, William Phillips of the Palmer House in Chicago, and convinced him to come to Florence and be the chef-in-residence. They upgraded the restaurants along the line to include the finest Irish linens, English china, and silver plates. Travelers were treated to an elegant dining experience, which became the signature of all Fred Harvey restaurants. He hired locals in Florence to take travelers on destination hunting and fishing trips. Thus, the tourism industry was born. Fred and his son Ford would later take this idea to the Grand Canyon and turn it into the top tourist destination in the United States, with the Fred Harvey El Tovar restaurant and hotel at the epicenter, where it remains today.

Fred Harvey home, Leavenworth

As his restaurant/hotel empire at train depots grew with the West, he found that the former slaves he had hired to serve as waiters were often taunted, beaten and robbed in some of the more remote western locations, particularly in New Mexico. He had the idea of sending young, single women to serve as waitresses. Patrons would not treat women badly, and certainly would not rob them. He put out the call to young Kansas girls and women who became the first Harvey girls. The women would agree to work for him for one year. They would live, chaperoned, in the hotels and boarding houses adjacent to the depots. Routinely after one year, the women would marry local men. And thus, many believe, Fred Harvey played a vital role in populating the West. It is also considered the first time women were employed in large numbers outside the home.

By 1890, Fred ran restaurants, lunchrooms and hotels in 24 towns across five states. He had 400 employees and an annual payroll in today's dollars of $6.1 million. He was serving 5,000 meals a day. A country that had not embraced a culture of "eating out" became enamored with Fred's superb breakfast, lunch and dinner fare. At their peak, there were 84 Harvey House establishments from Chicago to California, primarily along what became Route 66.

Eventually, Fred moved his headquarters to Kansas City where the recruitment of Harvey girls was in full swing. Over 100,000 Harvey girls were eventually employed and sent to remote points west.

He continued to maintain his home in Leavenworth and also bought property outside of Emporia, where he became fast friends with William Allen White. Fred's son Ford, who took over after Fred's death in 1901, was instrumental in building Kansas City's Union Station, as well as several others around the country. By the early 1900's the Fred Harvey enterprise not only owned hotels and restaurants all along the railroad from Chicago westbound, and dining cars on the major rail lines, it also owned all the newsstands, souvenir shops, drug stores, perfumeries, toy stores and some clothing stores. Kansas City's Union Station was the first "indoor mall," with every shop owned by Fred Harvey. In fact, it was Fred's idea that gave his good friend J.C. Nichols the idea to start a competing shopping area that became known as the Country Club Plaza. A young Walt Disney and his brother Roy worked for Fred Harvey at Kansas City's Union Station and Walt eventually adopted several of the Fred Harvey procedures in his

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Step Back in Time

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later business, including a replica of a Fred Harvey restaurant in Disneyland.

The impact Kansan Fred Harvey and his son, Ford, made on Americana is astounding. But what about Kansas jurisprudence? There are numerous cases in Kansas and throughout the country with the Fred Harvey business as a plaintiff or defendant, mainly as a result of its extensive real estate and trust holdings, as well as ownership in several electrical street car lines. As cars became more prevalent, Fred Harvey, through his surviving son Ford Harvey, started to diversify its holdings and ended up owning and operating the street cars in Kansas City. For example, in *Francis v. Harvey*, 92 Kan. 626 (1914) plaintiff sued for damages she received when a Harvey street car struck her at Kansas Avenue and St. Paul Street in Kansas City, Kansas. Francis was found to be contributorily negligent and judgment was rendered for the defendant.

"In the early days, the traveler fed on the buffalo. For doing so, the buffalo got his picture on the nickel. Well, Fred Harvey should have his picture on one side of the dime and one of his waitresses with her arms full of delicious ham and eggs on the other side, 'cause they have kept the West supplied with food and wives."

Will Rogers, a big fan of and frequent guest at Harvey Houses throughout the West.

In *Lewis v. Harvey*, 101 Kan. 673 (1917), after a heavy rain, Turkey Creek in Kansas City, Kansas flooded. (Some things never change). A Postal Telegraph wire broke and fell across the trolley wire. A boy accidentally came in contact with the broken telegraph wire, and received a shock of electricity which knocked him down. Bystanders immediately cried out. Frank Lewis, the plaintiff's husband, saw the struggling boy, and with a wooden handled umbrella tried to detach the wire from him. The wire then came in contact with Lewis, and he received an electric shock. The boy and Lewis were both killed. The plaintiff alleged that Ford Harvey, who owned the trolley car company, should have known that the telegraph wire was apt to break and fall across the trolley wires and it failed to properly insulate the trolley wires to prevent wire-on-wire contact.

In a case related to the Fred Harvey dining cars, *Mercer v. Fred Harvey*, 116 Kan. 365 (1924), Mercer, a Fred Harvey employee, was a waiter on the dining car of the Frisco railroad leading out of Kansas City, southbound to Fort Scott, then turning around and returning to Kansas City. On March 11, 1922 the cash box containing $33 ($400 in today's dollars) and two boxes of cigars were stolen from the dining car. The car foreman reported to the assistant purchasing agent that he had seen Mercer crossing the tracks in the rail yard with a cash box from one of the dining cars under his arm. The police were asked to investigate. On March 14, two Kansas City police officers arrived to investigate and talked to the assistant purchasing agent. He told the officers that a waiter, Mercer, had stolen the cash box and he wanted them to question Mercer. As Mercer entered the area where the purchasing agent and officers were, he heard the assistant purchasing agent say *"There is Mercer; that is the man, arrest him."* The officers jumped up, pulled Mercer down against a locker and asked him what he wanted there.

Mercer replied he was coming to get his clothes. The officers told him he did not need to worry about getting his clothes because he was under arrest. The officers demanded Mercer's keys. They asked him if he knew anything about money that was taken from the dining car. He said he did not. They searched Mercer to see if he had any cigars on him and he did. However, the assistant purchasing agent verified that the cigars found on Mercer were not the same as those that were stolen.

They proceeded to take him to his home and then search his home and the clothes in his trunks. They then took him to the police station and locked him up. He was subjected to questioning by the officers and the assistant purchasing agent and continued to profess his innocence. The case was presented to the prosecutor and the officers charged Mercer with theft. He was required to post a bond. *"The case was continued three or four times in the justice court and eventually dismissed for want of prosecution."* Mercer then filed a law suit against Fred Harvey company for false arrest.

The Court found that there was insufficient evidence of corporate responsibility for the purchasing agent's actions ordering Mercer's arrest. The assistant purchasing agent was not a general agent or manager of the corporation, simply a subordinate agent and there was no indication he was working under the authority or the direction of the corporation. Nor were his actions subsequently ratified by the corporation. The assistant purchasing agent was not in charge of tracking or handling cash received. A defendant's verdict was ordered.

Although not a Kansas case, *Fred Harvey v. Corporation Commission of Oklahoma*, 102 Okla. 266 (1924) involved a challenge by a group of Oklahoma cowboys over the Fred Harvey rule that all men must wear coats while eating in the dining room. If a gentleman wanted to eat in the restaurant he had to wear a coat. If he did not wear a coat, he had to sit at the lunch counter where only *ala carte* service was provided and at much higher prices. The men alleged discrimination against coatless men. The company was held by the Oklahoma Supreme Court to have the absolute right to enforce such a rule. *"The obstinate patron, who, by refusing to wear a coat, pays at the lunch counter a higher price for a meal than he would pay in the dining room, must charge his loss to his own stubbornness and bear his self-inflicted injury without complaint of discrimination…Fred Harvey equips these dining rooms with most luxurious furnishings, pleasing to the trained and appreciative eye, satisfying to the aesthetic*

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Step Back in Time

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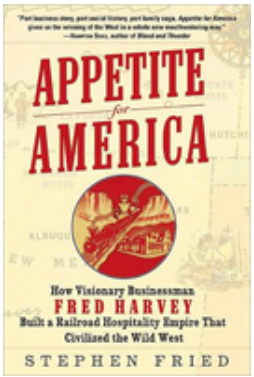
taste, and places the patrons amidst surroundings best calculated to stimulate the appetite. Food seldom elsewhere excelled is served by well-garbed and efficient attendants. Certainly it is not amiss to require the gentleman who there would dine to wear a coat for 20 minutes, as he sits in front of the cooling electric fans always there afforded."

Among the other cases involving Fred Harvey are *McIntyre v. Atchison, Topeka and Santa Fe Railway, Fred Harvey et al.*, 33 F.Supp. 461 (S.,D.N.Y. 1936) for a slip and fall at the El Tovar Hotel at the Grand Canyon, *Fred Harvey v. Mateas*, 170 F.2d 612 (C.A. 9 1948) for injuries when one of the Harvey mules used for expeditions into the Grand Canyon threw off a guest and injured him, *Nevill v. Gulf, C. and SF Ry. Co*., 187 S.W. 388 (Tex. Civ. App. 1916) involving a Harvey newspaper boy who was shot by a passenger, *Fred Harvey, Inc. v. Comegys*, 233 S,.W. 601 (Tex. Civ. App. 1921) involving a fight over a food bill between the restaurant manager and patron, and a copyright infringement case for stealing the idea for the 1946 Harvey Girls movie starring Judy Garland from a Kansas railroad worker's composition. *See, Funkhouser v. Lowe's, Inc.*, 108 F. Supp. 476 (W.D. Mo. 1952). Westlaw lists over a hundred cases involving the Harvey enterprises from the 1870's through the 1960's.



The Fred Harvey story is a fascinating one of early Kansas history. Those wanting to know more are encouraged to read, *Appetite for America: How Visionary Businessman Fred Harvey Built a Railroad Hospitality Empire That Civilized the Wild West* by Stephen Fried, published in March 2010.

Harvey House lunch counter, Emporia

Harvey House, Hutchinson

Harvey House, Syracuse, with Harvey Girls outside waiting the arrival of the train.

El Vaquero, Harvey House Hotel and Restaurant in Dodge City

Vintage Dining Car

NUTS AND BOLTS

Question: How do courts deal with unresolved cases? Do you dismiss the case after a certain time?

Answer: Many courts do have a process by which they dismiss or close old cases. Although there are no Kansas cases directly on point regarding how long a warrant can stay active on a municipal court case and still toll the statute of limitations, the Kansas courts have recently tended to look at what service attempts have been made. The fewer service attempts, the least likely it appears the appellate courts will tolerate warrants staying active forever. Since the statute of limitations on most city charges is five years, many courts have a five year purge date. Once a case is five years old without a disposition it is targeted for dismissal. The prosecution has the right to object to said dismissal, so most courts will send a list of cases pending dismissal and give the prosecutor a chance to object prior to dismissal.

Question: What actions can a municipal court judge in a rural setting take to ensure independence if the lines of responsibility get blurred?

Answer: A good resource to share with your city council and mayor regarding the independence of the court is the article written by Judge Arnold-Burger for the Kansas Government Journal, *The Third Branch,* which is available on the KMJA website.

However, if you believe that city employees are usurping your authority, such as dismissing or issuing warrants without your approval, amending tickets, etc. you do have the ability to issue a show cause order to the offending employee to show cause as to why they should not be held in indirect contempt of court for their actions interfering with the administration of justice. The show cause order must be personally served on the employee. If there is a possibility that you may jail them for their actions, remember they have the right to an attorney and to a court-appointed attorney if they can't afford one. You should also make sure and have a court-reporter or some sort of recording of the contempt proceedings, in case there is an appeal.

If you believe that officials are acting in an unlawful manner and you cannot trust local law enforcement to handle the matter, you can always contact the Attorney General's Office for assistance.

Question: How do Courts handle setting appeal bonds?

Answer: *See*, Municipal Judges Manual §11.02 and pp. 5-12 for the details of appearance bonds on appeal. The amount of the bond cannot be set at an amount to discourage appeals, but must be reasonable and related to guaranteeing the defendant's appearance to pursue the appeal in district court. Many courts set the bond at the total amount of the fines assessed plus the district court fee, which is currently set at $92. This insures that the appeal process is not simply used by the defendant as a method to delay payment.

Question: Are there any good ways to deal with individuals who refuse to provide their names or file a "Notice of Waiver of tort" pleading with the court?

Answer: This type of language is often used by persons who identify with the sovereign citizen movement. *See, Verdict*, Spring 2006, pp. 3 and 38; and *Verdict*, Summer 2008, p. 30 for a further discussion of these groups.

If a person does not enter a plea, the Court will enter a plea of not guilty and set the matter for trial. K.S.A. §12-4406(d). You can consider all pre-trial motions prior to the trial date or on the trial date, immediately prior to the trial setting. The judge must fully consider the defendant's arguments. It would be appropriate to inquire of the defendant if you do not understand his or her argument. The defendant can be required to be more specific and to help you understand his or her position. The prosecution has a right to respond to any motions filed by the defendant. You should ask that the prosecutor do so and fully consider the prosecutor's position as well.

Question: UPOC-10.1(5) (Transport Firearm Loaded). I have heard that case law may have changed that?

Answer: No, the panelists do not believe that the two recent U.S. Supreme Court cases of *District of Columbia v. Heller*, ___ U.S. ___ (2008) and *McDonald v. City of Chicago*, __ U.S. ___ (June 28, 2010) which dealt with the issue of the right to bear arms will impact UPOC §10.1(5). *See*, p. 10, *supra.* Both cases involved possession of a handgun in a home and the Court recognized that *"the right to bear arms is not a right to keep and carry any weapon whatsoever in any manner whatsoever for whatever purpose."* Therefore, it is yet to be determined whether laws prohibiting the carrying of a loaded weapon in an occupied vehicle, as is the case with UPOC §10.1(5), is an acceptable restriction.

Question: One of the clerks of municipal court is married to a high-ranking police officer. Is that a problem?

Answer: No.

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Nuts and Bolts

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Question: For the charge of no seat belt, the STO states that the fine is $30, including court costs. Are we able to charge court costs on seat belt violations? Our court costs are $40, so would the ticket be $70?

Answer: The former law and the new law regarding seat belts both state that the fine amount ($30 and $5 respectively) is inclusive of court costs. The clear legislative intent of the statute is that the fine shall not include any court costs and most cities are currently not charging court costs. In fact, the 2010 Standard Traffic Ordinance (STO), for those who adopt it, statutorily sets the fine at $5, with no court costs.

However, that said, cities do have home rule powers and the City can adopt an ordinance that sets a higher penalty for seat belts than the state law, just like cities do on many traffic infractions where the state fine is listed in the statute. In addition, the municipal judge has the statutory authority to set fine amounts that do not conflict with any mandatory fines set out in the ordinance, pursuant to a fine schedule (K.S.A. §12-4305), even though seat belt violations do not meet the definition of an ordinance traffic infraction. *See,* K.S.A. §8-2118 and K.S.A. §8-2501 et seq. Finally, the phrase "including court costs" in the statute only refers to district court costs and cannot infringe on the city's right to assess court costs by way of a charter ordinance. Some cities are taking that position and assessing their own court costs on seat belt violations.

Question: Do you handle juvenile DUIs in Municipal Court? If so, where do they serve their sentence and who pays for the lodging?

Answer: Yes. K.S.A §8-2117 provides that the municipal court has jurisdiction to hear DUIs for all persons 14 years of age and older. If the juvenile is under the age of 18 he or she can be sentenced to serve a maximum of 10 days in juvenile detention. The court may also place the juvenile on house arrest for as long as the court could sentence an adult. The Court may NOT order the defendant placed in a jail. *See also*, K.S.A. §38-2302(n).

Question: What do you do with parking tickets left on a windshield when no one comes to court?

Answer: You may issue a warrant for the registered owner if you follow the statutory procedure.

K.S.A. §8-2112 provides that whenever a motor vehicle without a driver is found parked , standing or parked in violation of any ordinance, the officer finding such vehicle shall take its registration number and may take other information displayed on the vehicle which may identify its user, and shall conspicuously affix to such vehicle a traffic citation. If the person charged does not appear within 5 days, the court clerk shall send a letter to the owner of the vehicle warning that if the letter is disregarded for a period of five days a warrant will be issued.. *See*, K.S.A. §8-2113. Finally, K.S.A. §8-2114 provides that proof of the violation and the registered owner constitutes prima facie presumption that the registered owner of the vehicle was the person who parked or placed the vehicle at the point where the violation occurred. See also, STO §§ 100-102.

Question: What about when the vehicle is owned by a corporation?

Answer: K.S.A. §21-3206 and §21-3207 and UPOC §1.3 state that a corporation is criminally responsible for acts committed by its agents when acting within the scope of their authority. In addition, cases around the country have held corporations such as Hertz and other rental car companies responsible for parking tickets received by their car renters. *See, City of Kansas City v. Hertz*, 499 S.W.2d 449 (Mo. 1973)

A corporation can be served with the notice to appear by delivering in person or by mail a copy of the notice to the resident agent who is authorized to accept service of lawsuits on behalf of the corporation, or to any officer, manager or partner. *See* K.S.A. §60-304 and K.S.A. §60-306. The registered office is a physical address in Kansas, generally on file with the Secretary of State, where the agent can be located for service of legal process.

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MORE FAMOUS KANSANS

Bill Farmer, Comedian and Voice Actor. The exclusive voice of Walt Disney's Goofy for the last 25 years. He has been named a "Disney Legend." He has also periodically voiced Bugs Bunny, Daffy Duck, Sylvester the Cat, and Foghorn Leghorn. He is also a comedian and comedy writer, working closely in a troup with Fred Willard. **Pratt, Kansas**

Lindsey Allen-Springer, Mgr. Development at Dream Works TV. She came up with the idea to have Overland Park, Kansas as the home of Tara in the *United States of Tara*, a Showtime series. If you watch the show you will see many props associated with Overland Park, which the city has sent at the request of the writers. Lindsey is from **Olathe**, **Kansas** and graduated in 2002 from K-State.

Ashley Irey, Sr. Designer, **Splendid,** Ashley's designs are sold at Anthropologie and are worn on the *United States of Tara* show and featured on *Oprah*. She is from **Overland Park, Kansas.**

Jerrod Nieman, Country singer/song writer. Current number one hit: *Lover, Lover*. He also wrote *Good Ride Cowboy* and *This Girl's a Cowboy*, both hits for Garth Brooks. He has written for numerous other artists. He is from **Liberal, Kansas.**

Nuts and Bolts

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Question: What if the car was stolen?

Answer: Unless the prosecutor or officer have specific information otherwise, the statute allows charging the registered owner. However, the presumption that the registered owner was responsible is rebuttable. The registered owner is free to bring in proof that the car was stolen (to wit: police report, insurance filing, etc.) and thereby avoid responsibility by rebutting the presumption.

Rain or Shine

Question: Under K.S.A. §8-1567 may a DUI be amended to Transporting an Open Container or Minor in Possession of Alcohol if there is insufficient evidence for a prima facie DUI?

Answer: Yes, as long as the amendment is not made to avoid the mandatory penalties.

After filing, a charge may be amended with permission of the Court to anything that is supported by the evidence. K.S.A. §12-4505.

The DUI law does have a "no plea bargaining" provision which provides that no plea bargaining agreement shall be entered into nor shall any judge approve a plea bargaining agreement entered into for the purpose of permitting a person charged with DUI to avoid the mandatory penalties established by law. If the amendment is not made to avoid the mandatory penalties and is supported by the evidence, there is no statutory prohibition to such an amendment. Any time a prosecutor seeks to amend a DUI, it would be wise for the judge to inquire as to the reasons for the amendment and document the reason in the court file as evidence that the amendment was not made for an unlawful purpose. See, K.S.A. §8-1567(s) and STO §30(o).

Question: May protective custody go past 6 hours? Example: According to a PBT, the defendant is still .163 twelve hours after the arrest. They aren't required to release a drunk person onto the street are they? May the court release defendant to a bondsman who offers to drive the defendant home?

Answer: There are several parts to this question that must be addressed separately.

First, we must look at the process, under the code of procedure for municipal courts, under which a person may be arrested and required to post bond on a city charge. Pursuant to K.S.A. §12-4211 and K.S.A. §12-4212, if an officer has probable cause to detain a person, the officer must release the person on a notice to appear in court unless: (1) the person refuses to sign the notice to appear; (2) the person is unable to identify himself by driver's license or other equivalent identification; (3) the person is not a resident of Kansas; or (4) the officer has probable cause to believe that the person may cause injury to self or others or damage property unless immediately arrested. If one of these conditions is met, the officer may arrest the person. Of course, he must be allowed to see a judge about bond within 48 hours of the arrest. *See*, K.S.A. 2009 Supp. §12-4213. Therefore, in the majority of cases, a DUI offender is going to be released to a responsible person after signing a notice to appear.

But what if the officer has public safety concerns about releasing the individual either on bond or on a notice to appear because he is still intoxicated and may be harmful to himself or others?

K.S.A. 2009 Supp. §12-4213(b) allows an officer to hold a defendant without allowing him or her to post bond for up to 6 hours if the officer has probable cause to believe that *"(1) such person may cause injury to oneself or others, or damage to property;* ***and*** *(2) there is no responsible person or institution to which such person might be released."* There is no statutory exception. Most officers are able to find a responsible person to release the defendant to within six hours of the DUI arrest, but if not, the person could be jailed without bond until the 6 hours ran out. The officer would have to then either release the defendant outright if it was a notice to appear case, or hold him until he posted bond, if it was a "bond-required" case.

In *State v. Cuchy*, 270 Kan. 763 (2001), the Kansas Supreme Court held that a sheriff department's policy of holding all DUI arrests for 12 hours without allowing them to post bond, violated defendants rights to post bond and to be taken before a magistrate without unreasonable delay. The Court took issue with this "blanket" policy without an individualized determination of whether a particular defendant was a danger to himself or others so as to warrant continued detention. Although clearly the case was interpreting a different statute than that governing municipal court arrests, it did seem to recognize a public safety need, based on an **individualized** review, to not release someone who is a danger to himself or

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Demeanor in Domestic Violence Cases

By Cynthia Gray

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The conflict and intense emotions inherent in court proceedings involving allegations of domestic violence can challenge a judge's ability to demonstrate judicial temperament and convey impartiality. Numerous judicial discipline cases illustrate judicial actions that create the appearance that a judge has prejudged the parties or does not take domestic violence seriously.

In a judicial discipline complaint, a woman explained, *"I understand now why women don't go to the courts for help/ protection because that judge treated me just like my husband does. I feel like the judge gave permission to my husband to abuse his wife and children."* Acting pro se, Eula Warren had filed a petition for protection from abuse against her husband, Charles Warren. Both were present at the hearing; neither were represented. When the judge asked if they wanted a divorce, the couple replied that they did. The judge then questioned why they had not filed for a divorce rather than "go through this c-r-a-p."

With the judge reading from the petition, the following exchange took place between the judge and Mr. Warren:

The Court: All right. It says: *"on Sunday, February 11th, we were in Subway eating."* Can't you find a better place to eat than that? *"before we went to the parade. My daughter, Sabrina, two, was acting up in the store and didn't want to sit down to eat. He told Sabrina if she didn't stop he was going to bring her to the bathroom and it was going to be a bloody mess."* True?

Mr. Warren: No, sir. I told her that I was going to take her in the bathroom and whip her booty and make her booty bleed.

The Court: That's good. Good for you. *"When we got to the parade route and parked, he started on me. He told me he wished that we would leave, and that he wanted a divorce. He was mad because my uncle and his brother asked him if he beat me. He told me that if I didn't look at him when he was talking he would punch me in the face. At one time he threatened to throw his coffee in my face. My girls were sitting in the back seat and they had started to fight over some toy. He told them they needed to stop. "*

The judge then summarily dismissed the complaint without explanation, stating, *"Heat, big smoke, but no fire. Dismissed. You want a divorce, get a divorce. You're not getting a TRO. See y'all later."*

The judge denied he was trying to belittle the Warrens with the comment about Subway, claiming it was "an inside joke" with his court staff. Regarding his apparent approval of Mr. Warren's threat to make his daughter's "booty bleed," the judge testified that he believed Mr. Warren was speaking colloquially and only meant that he was going to spank his daughter. The judge acknowledged he should have made it clear that he believed in correction, not abuse.

The Louisiana Supreme Court concluded that the judge's lack of patience *"prevented a full consideration of the legitimacy of the allegations in the pleading, especially considering some of the complaints in the pleading were not addressed before the matter was summarily dismissed." In re Ellender*, 16 So.3d 351 (Louisiana, 2009).

"There was a potential risk of serious harm stemming from this judicial misconduct in that the complainant was seeking protective relief from threatened violence in a domestic matter. Mrs. Warren appeared before Judge Ellender, unrepresented by counsel, asking the court for protection based on allegations of domestic abuse. The record is clear that Judge Ellender not only failed to treat this matter seriously, but he also acted in a condescending and demeaning manner toward Mrs. Warren and treated her with a lack of patience."

The Court explained *"why such behavior should not be tolerated with respect to any litigant, or attorney."*

"*Judges are called upon to render difficult decisions in sensitive and emotional matters. Being in court is a common occurrence for judges, but for litigants, especially pro se litigants, a courtroom experience can be an immensely difficult experience. Litigants appear before judges to have their disputes resolved. Judges serve the public, in part, by setting an example in how to resolve these disputes in a patient, dignified, and courteous manner. If a judge acts belligerently, those before the judge believe belligerence is acceptable. Judges have an opportunity to teach by example and demonstrate those attributes which all should strive to possess."*

The Court acknowledged that a judge's patience is often *"tested when simultaneously confronted with crowded dockets to be managed and countless difficult decisions to be made."* However, noting that it had listened to the recording of the hearing, the Court found that the litigants had not said *"anything that could be interpreted as grounds for provoking an inappropriate response on the part of the judge…"* The Court suspended the judge for 30 days without pay.

GROSSLY INSENSITIVE CONDUCT

The California Commission on Judicial Performance publicly admonished a judge for her remarks in numerous cases and for appearing to set distant trial dates to reflect her view that the cases should not be tried; several of the cases involved domestic violence. *Public Admonishment of Moruza* (California Commission on Judicial Performance December 16, 2008) (http://cjp.ca.gov/). The Commission found that the judge's statements were impatient, discourteous, inappropriately personal, undignified, and demeaning and suggested abandonment of the judicial role, embroilment, and a bias in domestic violence prosecutions.

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Demeanor in DV Cases

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For example, the judge commented that a domestic violence case was a *"crazy waste of time"* and that pursuing it amounted to *"stupidity,"* stating she had lived 30 years longer than the prosecutor and knew *"a lot more about relationships and life and the court system."* In another case, the judge asked, *"Is this another case where we're going to ruin the relationship between the victim—?"* In a third domestic violence case, the judge made a remark to counsel in chambers to the effect that she had tried to slap her husband once, that he had been quicker and slapped her back, and that she had never tried to slap him again. On another occasion, the judge told counsel that she had once called the police on her husband for domestic violence.

A domestic violence case that was approximately 10 months old and had been set for trial twice came before the judge for a pretrial conference in March. The public defender asked that the conference be continued for two weeks so that he could consult an immigration specialist. The judge noted her concern that the victim was using the criminal courts to gain an advantage in a family law case. The judge then set the trial for November, although the prosecutor had asked for a date no later than June. The Commission found that the judge gave the appearance that she set the distant trial date because she thought the case should not be tried.

"Judges serve the public, in part, by setting an example in how to resolve these disputes in a patient, dignified, and courteous manner. If a judge acts belligerently, those before the judge believe belligerence is acceptable"

The New York State Commission on Judicial Conduct removed a judge for, in addition to other misconduct, statements on and off the bench that indicated the judge *"does not take seriously domestic violence complaints and is reluctant—if not negligent—in properly applying the law in such matters."* *In re Romano*, Determination (New York State Commission on Judicial Conduct August 7, 1998) (www.scjc.state.ny.us).

In statements off-the-bench to his court clerk and the assistant district attorney, the judge indicated that he believed that many domestic assault charges were exaggerated by women and unfair to men, expressing skepticism about cases in which the victim was the primary witness and the complaint was signed by a police officer instead of the victim. He indicated that he did not favor issuing an order of protection or keeping an alleged abuser out of the home unless the victim came to court with a *"turban of bandages."* The judge expressed his belief that, *"if a female victim was truly frightened, [she could] leave the home and go to other family or friends or to the shelter."* The judge also told the assistant district attorney several times that he did not like most domestic violence cases because they involve *"he said, she said"* issues. The judge periodically told the court clerk that the police and prosecutors should be *"more discreet"* with domestic abuse cases because *"most likely, the defendant is the father; he's the husband; he's the one who makes the money, and it's not right that they're told that they can't go back into the house."*

As he was reading the charges from the bench for a defendant charged with hitting his wife with a telephone, the judge stated, "*What was wrong with this? You need to keep these women in line now and again."* Both the judge and the defense attorney laughed. The defense attorney the said, *"Do you know why 200,000 women get abused every year? Because they just don't listen."* The judge and the defense attorney laughed, and the judge did not rebuke the lawyer for the remark.

The Commission stated that the judge's statements and actions made it apparent that he is *"predisposed against victims of domestic violence."* The Commission emphasized that *"judicial indifference and gross insensitivity is inappropriate"* and discourages *"those who look to the judiciary for protection,"* noting that *"even isolated remarks cast doubt on a judge's ability to be impartial and fair-minded."*

See also, In the Matter of Roberts, 689 N.E.2d 911 (New York 1997) (judge stated *"Every woman needs a good pounding now and then"* and orders of protection "*were not worth anything because they are just a piece of paper,"* are *"foolish and unnecessary," "useless,"* and of "*no value*"); *In the Matter of Moore*, Determination (New York State Commission on Judicial Conduct November 19, 2001) (www.scjc.state.ny.us) (judge stated that he knew the victim (the defendant's daughter) and he would have *"slapped her around"* himself, before deciding not to issue an order of protection); *In the Matter of Bender*, Determination (New York State Commission on Judicial Conduct February 7, 1992) (www.scjc.state.ny.us) (during arraignment, judge asked police officer whether an alleged assault was *"just a Saturday night brawl where he smacks her around and she wants him back in the morning"* and advised the defendant to *"watch your back"* because *"women can set you up*"); *In re Greene*, 403 S.E.2d 257 (North Carolina 1991) (in open court, judge told victim in an assault on female case she would ruin her children's lives if she did not reconcile with her husband, referred to a support group as a one-sided, man-hunting bunch of females and pack of she-dogs, and polled spectators as to how many had little spats during their marriages); *In re Turco*, Stipulation and Admonishment (Washington State Commission on Judicial Conduct December 1, 1995) (www.cjc.state.wa.us) (judge stated to one defendant *"you didn't need to bite her. Maybe*

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Demeanor in DV Cases

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you needed to boot her in the rear end, but you didn't need to bite her;" in second case, he stated, *"my opinion is that the police do 95% of the work when they separate the parties...You know all we're doing is slapping someone after police have remedied the situation. But, so be it. So I mean there's nothing to get excited about in missing these cases;"* in the third case, after finding defendant guilty of assaulting his wife while forcibly removing her from an apartment where controlled substances were being used, stated *"fifty years ago I suppose they would have given you an award rather than what we're doing now").*

TREATMENT OF VICTIM

In several cases, a judge's treatment of a domestic violence victim went beyond discourtesy to detention or the threat of incarceration. The Florida Supreme Court publicly reprimanded a judge for improperly and *sua sponte* ordering that the victim in a domestic battery case also be taken into custody. *Inquiry Concerning Bell*, 23 So.3d 81 (Florida 2009). The judge had met the former husband who was the subject of a probable cause affidavit when they both were sole practitioners. During the marriage, the couple had attended the same church as the judge where he interacted with them. The judge's children provided babysitting for the couple. After the couple was divorced, the former husband came before the judge in a professional setting. The judge had also spoken to the former wife at a social event.

After reading the sheriff deputy's affidavit, the judge found that probable cause existed for a domestic battery charge against the former husband. Based on interviews, the former wife's injuries, and the location of the incident, the deputy had concluded that the former husband was the primary aggressor.

After five minutes of computer research, however, the judge found that there were sufficient facts in the affidavit to establish probable cause that the former wife had committed domestic battery when she attempted to force her former husband from her home. Therefore, the judge ordered that the former wife, who was present in court as the victim of domestic violence, be taken into custody—despite the absence of a complaint from the former husband, the sheriff's office, or the state attorney's office. The former wife was incarcerated overnight.

The judge explained that he had the former wife arrested because she had pushed her former husband first, transforming the argument from a verbal to a physical argument. He had concluded that the wife was the primary aggressor but that the deputy had arrested the former husband because he was a male, exhibiting leniency toward the woman. Although he believed he acted lawfully, the judge admitted that he would not have had the former wife arrested if she had not been in the courtroom that day. The judge acknowledged that his actions had the potential to create an appearance of impropriety.

See also, In the Matter of Ward, Findings, Conclusions, and Discipline (Nevada Commission on Judicial Discipline February 3, 2006) (www.judicial.state.nv.us/decision%20index.htm) (judge issued a protective order against an applicant who had sought a protective order even though the adverse party had not requested such an order; judge made comments to effect that he did not hear domestic violence cases); *In the Matter of Bender*, Determination (New York State Commission on Judicial Conduct December 21, 1999) (www.scjc.state.ny.us) (during an arraignment for a man charged with assaulting his girlfriend, the judge stated that the woman could be charged with trespass, advised the defendant that he could bring an eviction proceeding against the woman, agreed with the defendant's statement that he should *"dump the woman,"* and, when the defendant stated that the woman had caused him problems, replied, *"They can do that,"* and *"Women can be problems."*).

SUMMARY PUNISHMENT

In *In the Matter of Singer*, Determination (New York State Commission on Judicial Conduct July 1, 2009) (www.scjc.state.ny.us), the New York State Commission on Judicial Conduct admonished a judge who threatened to hold a litigant in contempt for not disclosing the address of the shelter where she was residing and did hold her attorney in contempt, in addition to other misconduct.

While presiding over a custody matter that involved allegations of domestic violence, the judge ordered the victim to disclose the address of the shelter where she was living. Counsel for the victim indicated that her client could not disclose the address. The judge replied that if the victim failed to provide her address to the court, he would hold her in contempt. When the case was recalled later that morning, the judge again threatened to hold the attorney in contempt if she persisted in refusing to disclose the location of the shelter. The attorney's supervisor was present and similarly declined to reveal the address, noting that state and federal statutes prohibited them from revealing the address of the shelter. The judge persisted in demanding disclosure of the address and grew increasingly impatient, discourteous, and intemperate toward the victim and her attorney. The judge held the attorney in contempt and fine her without giving her a reasonable opportunity to make a statement or issuing a written order.

The Commission stated:

"Having been placed on notice as to the issue, the judge should have determined whether the law provide such protection for a victim of domestic violence, as the attorney had suggested, before summarily punishing the attorney for her principled refusal to pro-

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Demeanor in DV Cases

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vide the information. Clearly there were no 'necessitous' or urgent circumstances justifying the judge's peremptory imposition of contempt against an attorney who was simply attempting to protect her client's interests and who had a sound legal basis for her position."

See also, Disciplinary Counsel v. Parker, 876 N.E.2d 556 (Ohio 2007) (judge insisted on having victim's facial injuries photographed); *In the Matter of Lamb*, 665 S.e.2d 169 (South Carolina 2008) (during hearing in a domestic violence case, judge directed the defendant to look at the victim, contrary to instructions by the transportation officer from the detention center); *Judicial Inquiry and Review Commission v. Shull*, 651 S.E.2d 648 (Virginia 2007) (in custody hearing, judge twice directed the mother to lower her pants in the courtroom, after she claimed the children's father had injured her thigh); *In the Matter of Browning*, 452 S.E.2d 34 (West Virginia 1994) (judge refused to assist woman seeking protective order, returned to her office to do paperwork, and later agreed to assist another litigant).

PENALIZING *PRO SE* LITIGANTS

Finally, a judge has a duty to avoid unduly rigid or overly technical conduct that would impede petitioners who are not represented by counsel from obtaining relief in domestic violence proceedings. *Inquiry Concerning Eriksson* (Florida Supreme Court February 11, 2010). Judge Eriksson openly disagreed with the circuit's policy that required him and other county judges to hear petitions for injunctions against domestic violence, writing letters to the Court and the Office of the State Courts Administrator.

One day in 2007, the judge presided over a series of domestic violence injunction hearings in which the pro se petitioners appeared to have little, if any, experience with the legal system. Instead of asking the petitioners whether they wanted to testify, the judge asked, *"Who is your first witness?"* and dismissed petitions if the petitioners did not know they were allowed to testify in their own cases and failed to produce independent witnesses. The judge refused to admit police reports and the petitioner's own sworn statements because he considered them hearsay. The judge also questioned petitioners about who instructed them to come to court, asking questions such as, *"Who sent you here?"* and *"Who told you to file this?"*

As the calendar proceeded, the judge became less rigid and formalistic, attempting to address the substance of the petitions. In some cases, he asked the petitioners to *"look in the mirror"* to identify their first witness.

The judge argued that no statute or prior case required him to instruct petitioners how to proceed. The Court noted that other judges had testified at the hearing that they routinely *"explain the rights of both the petitioners and respondents prior to the commencement of these injunction proceedings."* The judge also argued that, if he informed petitioners of their rights, he would be assuming an adversarial role. The Court stated that assertion was inconsistent with his refusal to allow petitioners to use police reports as evidence without any objection raised by the opposing party, noting he *"refused to insert himself into the controversy when petitioners did not know they had a right to testify on their behalf, but had no problem when rejecting potential hearsay evidence sua sponte."*

The Court stated that it has *"recognized the importance of the constitutional guarantee of citizen access to the courts, with our without an attorney."* It also noted that the legislature has provided that a cause of action for an injunction against domestic violence "*shall not require that either party be represented by an attorney"* and has waived the filing fee for domestic violence petitions to ensure that victims have access to the courts.

The Court concluded that the judge's conduct was particularly disturbing in light of his disagreement with the manner in which domestic violence injunctions were processed in his circuit.

"By asking extrajudicial questions such as, 'Who sent you here?' and 'Who told you to file this?' Judge Eriksson made his displeasure with being required to adjudicate domestic violence petitions abundantly clear. Even if this Court were to accept Judge Eriksson's contention that his questions to petitioners regarding how they learned about the injunctions process were performed in an academic and curious manner, the questions were not relevant to the cases at hand and reflected his intolerant attitude. The courtroom is not the proper venue for Judge Eriksson to express his disagreement with what he perceived to be a serious flaw with the system."

Finding that *"instead of promoting the accessibility of the judicial system, [the judge] discouraged vulnerable individuals from exercising their access to justice,"* the Court held that the judge's *"unduly rigid and formulaic process"* and his *"overly technical" approach "penalized pro se petitioners for being unfamiliar with the judicial system."* The Court publicly reprimanded the judge for this and other misconduct.

Position of Judge Against Whom a Docketed Complaint Was Filed in 2009*

Chief Judge	2
District Judge	13
District Magistrate Judge	5 (2 law trained)
Municipal Judge	4 (2 law trained)
Retired District Judge	1

In some instances, more than one complaint was filed against the same judge.* ***Source:* *2009 Annual Report, Kansas Commission on Judicial Qualifications*

Beware the Uninsured Driver

About one in ten drivers in Kansas may be without auto insurance, according to a new study from the Insurance Research Council.

The Uninsured Motorists, 2008 Edition, tracked data state-by-state from the period 2005 to 2007. The research council estimates the uninsured population using a ratio of insurance claims made by individuals who were injured by uninsured drivers to claims made by individuals who were injured by insured drivers.

Across the country, about one in seven drivers were without auto insurance, the study said.

The study found that the five states with the highest uninsured driver estimates in 2007 were New Mexico (29 percent); Mississippi (28 percent); Alabama (26 percent); Oklahoma (24 percent); and Florida (23 percent). Again, by contrast, Missouri's rate was 14 percent; Kansas was 10 percent. Massachusetts, at 1 percent, had the lowest estimate of uninsured drivers.

The report also hinted that the problem could get worse in 2010 because of lingering financial upheavals that put auto insurance out of the reach for many drivers.

"An increase in the unemployment rate of one percentage point is associated with an increase in the uninsured motorist rate of more than three-quarters of a percentage point," the study said.

Based on current unemployment rate projections, the percentage of uninsured motorists is expected to rise from 13.8 percent in 2007 to 16.1 percent this year, the council said.

Brenda Stoss introduces members of the DUI Commission, KMJA members Karen Wittman and Jennifer Jones at the Annual Conference in Wichita.

Nuts and Bolts

others (to wit: intoxicated).

As to the release of the defendant to a bondsman, the statute only allows the defendant to be held in protective custody **if** there is no responsible person to release the defendant to. Therefore, if the bondsman is offering to take the defendant home, the need for protective custody would no longer exist. In addition, as a judge, you can certainly order the defendant released to the bondsman, if the both the defendant and the bondsman are agreeable to said arrangement.

Question: What is the maximum time municipal court can hold someone on probation? What recourse does the city have if time is up an probationer still owes fines/fees?

Answer: K.S.A. 2009 Supp. §12-4511 states that a judge may place a defendant on parole for up to two years and may, during the term of the parole, extend it another two years upon a finding that the defendant has not yet successfully completed the conditions. Parole is similar to probation, except it constitutes a release from jail after serving some time, while probation is usually granted before any time is served.

The drafters of the Municipal Court Manual have opined that the court can place a defendant on probation for the same length of time it could if it placed the defendant on parole, so two years, with a two year extension. *See,* Kansas Municipal Judges Manual p. 10-7. However, if you are uncertain, your city could always charter out of K.S.A. 2009 Supp. §12-4511 and adopt substitute provisions that establish similar limits for probation and parole.

Remember, any motion to revoke probation or parole or any extension of probation or parole must be filed or occur before the term has expired. After the term has expired, the Court looses jurisdiction and, as to fines owing, the Court would be forced to either forgive them or turn them over for civil collection. *See*, Verdict, Winter 2008, p. 5.

The rest of the Nuts and Bolts questions from the 2010 Annual Conference will be addressed in the Fall issue of The Verdict.

MUNICIPAL JUDGE STATUS REPORT

Lawyer judges	***156***
Non-Lawyer Judges	***59***
Also serves as DMJ	***44***
Total Number of Judges	***259***
Total Number of Courts	***385***

UPDATES FROM THE DMV

Updates from the DMV,as relayed by Marcy Ralston:

Question: We are having more and more cases where prior DUIs or suspended license convictions are not found in certified driving records but defendants tell us about them. Is the department doing anything to improve reporting compliance?

Answer: We record what we receive. Hit and run and no proof of insurance come off after 5 years, so you will not see anything older than that on the driving records. No DUI convictions or diversions are recorded prior to 1996.

Question: How long does a DUI stay on your record if the defendant successfully completes the diversion agreement?

Answer: Lifetime

Question: Please review underage restrictions.

Answer: Graduated DL is handled by the DL examiners. Website has good information. Go to www.ksrevenue.org; "Your vehicle" then under "Driver's License" click on "Graduated driver's license"

Question: Please clarify whether we should send the actual driver's license or hold, until it is cleared, if it has been taken for driving on a restricted, DUI, etc.

Answer: Some statutes require that you send it in. If you send it in, we will destroy it pursuant to K.S.A. §8-257(b). When the driver ready to get the driver's license back, he or she can go apply for new/duplicate.

Question: Can you suspend DL on any violation set out in K.S.A. §8-2118?

Answer: Yes. *See*, K.S.A. §8-2110(a). However, we will suspend for "fail to comply" on a "no proof of insurance" charge for Kansas drivers only per the Nonresident Violator's Compact.

Question: What is the status and success of restricted DL initiative passed by the legislature in 2009?

Answer provided by DL Examiner, Terry Mitchell: It is too early to tell. There does seem to be a huge lack of understanding.

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Treasurer's Report

KMJA Treasurer's Report
Prepared by Kay Ross, KMJA State Treasurer

INCOME:

BALANCE AS OF 4/22/10……..……$11,898.45
Income from dues……$ 375.00
Bank Interest……$ 7.18
Total Income from
4/21/10 to 8/08/10……$ 382.18
TOTAL INCOME TO DATE……..…..$12,280.63

EXPENSES:

2010 Conference Expenses
Trivia prizes……$ 175.00
Candy gavels……$ 194.51
Treasurer's report fees…….$ 20.00
Hospitality room……..…..$ 1,260.81
Karen Arnold-Burger……$ 90.08

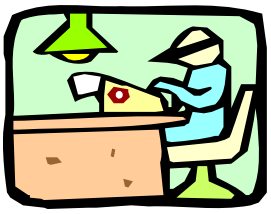
Other Expenses:

Verdict Printing…….$ 796.50
Surety bond……...$ 100.00

TOTAL EXPENSES TO DATE……..…$2,636.90

BALANCE ON HAND 08/09/10……..….$ 9,643.73

Projected 2010 August Board Expense: $1,800.00



We digress for a moment to note that appellate counsel in his brief mentions a video appearing on the YouTube website that is not part of the record. We are at a loss as to why counsel has mentioned it since it has no relevance whatsoever to the issues on appeal and it portrays Gaines in an extremely negative light, swearing and cussing at a judge in court.

State v. Gaines, Slip Copy, 2010 WL 3211672, 2 (Kan.App., August 6, 2010)

Updates from the DMV

(Continued from page 29)

Question: Please use screen and show how to read a copy of the driving record.

Answer: Step-by-step instructions and information on how to read a driver's record can be found at : http://www.ksrevenue.org/courts/index.html It is going to change soon though, to a much more user friendly format. Stay tuned.

Question: When will the delay in receiving certified drivers license records be handled?

Answer: I don't know. We have a 3-4 week turnaround right now. We handled 61,000 requests last year.

Question: If the Department of Motor Vehicles goes paperless as planned (renewals on line) what accommodations will be made for the many people who will be forced to find computer Internet service wherever they can?

Answer: There are no plans for DL renewals to be done on-line.

Question: When you suspend a license why don't you give notice to the driver a few days before the effective date of the suspension?

Answer: We never have. "Upon suspension, will notify" is the language in statute. Most get a 30 day notice in the mail anyway either from us or court except DWS suspensions and CDLs, so they know its coming.

Question: When an out-of-state defendant is suspended for minor in possession of alcohol, what is the process for suspension? Who suspends, Kansas or their home state?

Answer: We do not take any action on Kansas driving privileges for a MIP committed by an out-of-state driver.

Question: Where can I find a current list of interstate compact states for traffic violations?

Answer: Michigan and Wisconsin are not part of the compact. Everyone else is. We will put on the website.

Question: How do you find what violations are moving violations?

Answer: Kansas Administrative Regulations (KAR) §92-52-9 and §92-52-9a

Action taken by Division based on number of moving violations in a 12 month period (rolling 12 months, not calendar year):

3- warning; 4-restricted 30 days; 5-suspend for 90 days; 6 or more-suspend for one year

Question: Is there any kind of chart showing standard periods of suspension/restriction for various offenses/ convictions?

Answer: Cheat Sheets are on-line at: http://www.ksrevenue.org/courts/index.html under "Education" section.

Question: There is a lot of confusion about the legal necessity for licensure/registration/insurance for mopeds and mini-bikes. Can you clear it up?

Mini-bikes, also known as "pocket bikes" fit the definition of motorcycle and motor vehicle, therefore they must be registered and tagged with the state. You must have a Class M license to operate them; and if you are under 18 you must be helmeted, and wear eye protection. They cannot be driven on sidewalks or bicycle trails. You must carry insurance and have the necessary equipment of all motorcycles. This is usually their downfall. They generally lack appropriate turn signals, mufflers, headlights at a certain height, and other items necessary to operate on public streets.

As to mopeds, the driver must have either a regular driver's license or be at least 15 and have a class C license which is limited to the operation of motorized bicycles. Insurance is not required because they are not classified as motor vehicles, but they do need to be registered.

Question: What happens if case is in "fail to comply" status, and we dismiss the case as part of a purge?

Answer: Court must notify DMV when person can reinstate and collect the fee.

Question: I sent in a fail to comply on a driver and was told that since it was over 6 months old, no action would be taken. I thought there was no time limit on fail to comply suspensions.

Answer: For a Kansas driver there is no time limit on "fail to comply" suspension. But for a non-resident driver the "fail to comply" suspension must be sent in within 6 month of the violation, anything older than that will not be honored.

Question: How can a person who is suspended in Missouri, get a valid Kansas driver's license?

Answer: If the driver had a valid KS driver's license, went to Missouri, got a Missouri driver's license, it got suspended, and then returned to Kansas. If Kansas license was valid when person left, can get a valid KS driver's license.

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Updates from the DMV

(Continued from page 30)

Question: If an out-of-state driver has an interlock restriction on their out-of-state license and comes to Kansas to get a license, will the restriction follow them?

Answer: When a person has a restriction on their driver's license they are "ineligible" to get a license from Kansas because they don't have full privileges.

Additional Information/Updates:
K.S.A. §8-1602 (STO §23), K.S.A. §8-1603 (STO §24), and K.S.A. §8-1604 (STO §25) should all be entered as HR2.
K.S.A. §8-1605 (STO §26) and K.S.A. 8-1606 (STO §27) are not recorded.

Soon all conviction information will have to be submitted by ADC code. *See,* http://www.doj.mt.gov/driving/forms/acd.pdf. More information will be forthcoming.

AND THE GENERAL SAYS.....

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

AG OPINION 2010-11
May 12, 2010

An applicant for admission to a law enforcement training course is not disqualified from admission because the applicant was placed on diversion, as a juvenile, for a felony crime. To the extent that the conclusion in Attorney General Opinion No. 99-34 differs, it is withdrawn.

AG OPINION 2010-15
June 25, 2010

The federal Driver's Privacy Protection Act of 1994 (DPPA) is considered "other law" for purposes of state law authorizing disclosure of motor vehicle records. The DPPA permits, but does not require, disclosure of a person's photograph or digital image for use by an insurer, an insurance support organization, a self-insured entity, or its agents, employees or contractors in connection with claims investigation activities, antifraud activities, rating or underwriting. Such disclosure is discretionary with the Division of Motor Vehicles based on the Division's judgment that the requestor is in fact an authorized entity and that a photograph or digital image will be used for an authorized purpose.

IMPROPER CONDUCT 2009

The following examples are provided in the 2009 Annual Report of the Kansas Commission on Judicial Qualifications of conduct of judges that was found to be improper by the Commission.

- A judge was privately ordered to cease and desist from making inappropriate comments which resulted in rude and discourteous treatment of a female attorney and her client.
- A judge was cautioned regarding inappropriate *ex parte* communication resulting from a telephone communication regarding sale of a residence in a domestic action.
- A judge was found to have violated the Code of Judicial Conduct by refusing and/or failing to perform judicial duties assigned by the chief judge. The judge was also cautioned regarding such conduct in the future.
- A judge, who was alleged to be biased, frequently late to court, and engaged in an inappropriate close personal relationship with a court employee, was cautioned to avoid conduct which reinforces these perceptions. It is not only impropriety, but the appearance of impropriety, by which public perceptions are formed.
- A judge was cautioned regarding *ex parte* approval of an order without notice or a hearing. It was recommended that appropriate office procedures be implemented to avoid future occurrences.
- A judge was privately ordered to cease and desist from violating the law by participating or being present when bets were placed on sporting events or strategies discussed.
- A judge was informally advised regarding judicial temperament and emphasizing the importance of being patient, dignified, and courteous, as set forth in Canon 3B (4). [New Rule 2.8(B)].
- A judge was cautioned on the use of county courthouse attorney mailboxes for political purposes and reminded it is important to consider the public's perception of the use of what appears to be county property for political purposes.

Inflatable Seatbelts

By Sharon Silke Carty, USA TODAY

DETROIT — After about a decade of engineering, Ford is ready to roll out a technology that will improve safety for rear-seat passengers: inflatable seat belts.

The belts expand like an air bag in the event of a crash and distribute the force of the impact across a wider area of the passenger's chest. The belts, covered in a softer webbing than regular seat-belt material, may also make back-seat passengers more willing to buckle up.

"It feels a lot different; it's softer and more lightly woven," says Sue Cischke, group vice president of sustainability, environmental and safety engineering. *"When we asked people to sample them, they said it feels less rigid and more comfortable."*

Consistent seat-belt use is lower for rear-seat than front-seat passengers. The National Highway Traffic Safety Administration says 83% of front-seat passengers buckled up consistently in 2008, vs. 74% of rear-seat passengers.

The belts first will be an option on the next-generation Ford Explorer in the U.S., then rolled out in Europe and other markets, Cischke says.

They were first shown as a concept at the 2001 North American International Auto Show in Detroit, and Ford has been plugging away at them since. The project even survived the financial distress in 2005, when Ford shed thousands of employees in an attempt to stem losses.

Then-CEO Bill Ford emphasized, however, that work on innovative technology should continue. At that point, the inflatable seat belt was five years into development, and it made the cut. Still, says Srini Sundararajan, technical leader for Ford's research and advanced engineering division, there was a lot of doubt about the project. *"People kept saying, 'It cannot be done, inflatable belts cannot be done,' while all the tests we kept doing kept saying, 'It can be done, it can be done.' "*

Among the technical hurdles: the rear belts' air bags had to be much gentler than front air bags, which inflate with enough force to break out through the instrument panel, then release hot gas as they deflate. The belts will inflate with less force and use cool gas, Sundararajan says, making them safer for passengers of all sizes.

"We ensured that it was harmless," he says. *"One of the extreme conditions we tested was a sleeping child situation, where the child puts his head on the seat belt and sleeps. We tested that, and it works great. We didn't see any cause for concern."*

The team tested the belts when used with car seats, booster seats with high backs and booster seats with low backs. If the seat belt is not buckled, the system won't go off.

Sundararajan says he's pleased the technology is finally making its way into cars, and hopes it will become a widespread safety feature.

"We've developed so much technology for the front-seat occupants, we want to bring some of these advanced technologies from the front seat to the rear seat," he says. *"It's a vulnerable population, like elderly and children, who sit back there. And we believe this is the best way to enhance safety for the rear-seat occupants."*

Most Common Complaints Filed with the Kansas Commission on Judicial Qualifications in 2009

1. Prejudice/Bias (26)
2. Denied Hearing/Fair Hearing (23)
3. Delay in Making Decision (21)
4. Inappropriate Personal Comment (17)
5. Conduct Inappropriate to Judicial Office (14)
6. Injudicious Temperament (13)
7. Conflict of Interest (12)
8. Ex parte Communication (11)

Source: 2009 Annual Report, Kansas Commission on Judicial Qualifications

Unpublished Opinions

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

FAILURE TO MAKE OR PRESERVE VIDEO TAPE OF TRAFFIC STOP

Unpublished Decision

Kurtis Wall argues that the evidence of drugs and guns in his car which were discovered following a traffic stop should be suppressed because the officer either did not video tape the stop with his in-car camera, or if he did it wasn't preserved . In *State v. Wall*, Slip Copy, 2010 WL 1462710 (Kan. App. April 8, 2010), the Court of Appeals found that "there is currently no legal requirement that officers record all traffic stops. Wall's argument that there should be a policy to the contrary is better addressed to the legislature or our Supreme Court."

It went on to say:

"...the Due Process Clause does not impose an absolute duty on police to retain and to preserve all material that might be of conceivable evidentiary significance. ..if the State fails to preserve potentially useful evidence, there is no due process violation unless the defendant shows the State acted in bad faith...the State can only be said to act in bad faith under the Due Process Clause if it knew about the exculpatory value of the evidence at the time it was lost or destroyed. ..Wall does not identify any exculpatory evidence a videotape of the stop would disclose if produced. . ." (Citations omitted)

WARRANT CHECKS OF PASSENGERS IN LAWFULLY STOPPED VEHICLES OK AS LONG AS IT DOES NOT MEASURABLE EXTEND THE DURATION OF THE STOP

Unpublished Decision

Car is lawfully stopped for turn signal violation. Officer asks the driver and all passengers for identification to check for outstanding arrest warrants. Officer testified that had any of the passengers declined, he would have "done nothing further." Sandy Currie was one of the passengers. He told the officer his name and date of birth without protest. When the officer did the records check he found an outstanding arrest warrant for Currie. After placing Currie under arrest, he found cocaine on his person. Currie moved to suppress the evidence on the basis that the officer lacked any probable cause to ask the passengers for identification.

In *State v. Currie*, Slip Copy, 2010 WL 1379696 (Kan. App. April 2, 2010), the Kansas Court of Appeals held that based upon *Arizona v. Johnson*, 555 U.S. ___ (2009) and *State v. Morlock*, 289 Kan. 980 (2009), without a measurable extension of the duration of a lawful traffic stop, reasonable suspicion is irrelevant as it relates to passengers. Asking Currie for his identification and using it to check for warrants was constitutional. Curry did not argue that the stop was measurably extended by the officer's actions and there was no evidence presented that it was. Therefore, the request, the discovery of the warrant, the search and the seizure of cocaine was all permissible.

WHEN AGE OF VICTIM IS ESSENTIAL ELEMENT OF OFFENSE, FACT-FINDER CAN INFER AGE FROM CIRCUMSTANTIAL EVIDENCE PRESENTED

Unpublished Decision

Curtis Sanders was convicted of attempted rape and sexual battery. A statutory element of sexual battery is that the victim was 16 years of age or older at the time of the crime. In Sanders' trial, the prosecution did not put on any direct evidence of the victim's age. Because of this, Sanders argued in *State. Sanders*, Slip Copy, 2010 WL 1379407 (Kan. App. April 2, 2010) that the evidence was insufficient to convict him of the sexual battery charge. The prosecution conceded that in order to find the defendant guilty, the jury must be able to find, beyond a reasonable doubt, that the victim was at least 16 years old.

The prosecutor argued that based on the evidence that was presented, the jury could make such a finding. The jury could take into account the victim's appearance at trial, as well as other circumstantial evidence of her age, to wit: the victim was at a bar and did not return until 2:00 a.m.; she consumed alcohol at the bar as well as at a friend's house; she drove herself home from the bar; she maintained her own residence; she worked at a restaurant; and she had a child who was old enough to have her own room.

The Court of Appeals agreed and found that the circumstantial evidence presented supported a reasonable inference that the victim was 16 years-of-age or older. The Court distinguished the case from *State v. Perez-Reivera*, 41 Kan.App.2d 579 (2009), where a different panel reached a different result.

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Unpublished Opinions

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EXCEEDING THE SCOPE OF A PUBLIC SAFETY STOP

Unpublished Decision

David Brodin was asleep in his car in the public parking lot of a park. An officer approached him and asked him why he was sleeping in his car. He said he had a fight with his mother and she had kicked him out of the house. The officer asked to see his identification and Brodin provided his driver's license. A warrants check came back clean. After returning Brodin's license the officer did the "Columbo" move, taking a few steps away from the car and then returning and asking for consent to search. Brodin consented. The search uncovered drug paraphernalia. After arresting and *Mirandizing* Brodin, he admitted the residue in the paraphernalia contained methamphetamine. Brodin moved to suppress all evidence on the basis of an illegal search.

In *State v. Brodin*, Slip Copy, 2010 WL 1462709 (Kan.App. April 8, 2010) the Court of Appeals agreed with Brodin and suppressed the evidence. Although the encountered started as voluntary ("Why are you sleeping in your car?"), after establishing that he was merely sleeping and in no danger, the scope of that encounter was finished. By asking for Brodin's driver's license, the voluntary encounter became a detention. This detention was void of any probable cause or even reasonable suspicion that a crime had been or was being committed. Its sole stated purpose was to check for warrants. Therefore, the detention was unlawful.

However, even if a detention is unlawful, valid consent may purge the taint if the discovery of the challenged evidence has been sufficiently attenuated. The Court embarks upon a description of the Columbo pivot and its common usage in criminal cases. If finds that under these facts, the detention, the charade of the Columbo pivot, and the failure to advise Brodin that he was free to go, led the Court to the conclusion that Bradin did not know he was free to go or go back to sleep. *"The events were so quick after the supposed release that there was no chance for attenuation. Just because Brodin thought it was easier to comply than to insist on his rights does not mean the consent was voluntary."* The Court found the consent was not voluntarily given, therefore all evidence obtained should have been suppressed.

SEARCH INCIDENT TO ARREST MUST BE FOR EVIDENCE OF THE CRIME OF ARREST OR TO PREVENT ESCAPE OR PROTECT OFFICER SAFETY

Unpublished Decision

David Richardson was properly stopped by Salina police for suspicion of driving on a suspended license. The computer check following the stop verified Richardson was suspended. The officer searched Richardson's person, handcuffed him, and placed him in the patrol car of his backup officer, who took Richardson to the police station for booking. The arresting officer then searched Richardson's car and found contraband. Richardson was returned to the scene, given *Miranda* warnings, and made incriminating statements regarding the contraband.

In *State v. Richardson*, Slip Copy, 2010 WL 1610407 (Kan. App. April 15, 2010) the issue was whether the search of Richardson's car was allowed. The Court of Appeals found the search was illegal based on K.S.A. §22-2501 and *Arizona v. Gant*, 556 U.S. ___ (2009). The search could not be incident to an arrest, as argued by the prosecution, because it was made after the defendant was arrested, handcuffed, and on his way to jail. Therefore, the search was not to protect the officer from attack, prevent the defendant from escaping, or to discover the fruits, instrumentalities or evidence of the crime for which Richardson was arrested, driving on a suspended license.

FACTORS TO CONSIDER WHEN DETERMINING THE ADMISSIBILITY OF EVIDENCE FOLLOWING AN ILLEGAL ARREST

Unpublished Decision

Officer Swisher noticed a car driven by Crystal Thompson due to its loud exhaust. A computer check showed the tag on the car was registered to a different car. Officer Swisher walked toward the car to check the VIN number. He discovered a man, David, crouching in the back seat. Swisher asked him to exit the car. He did. By this time the VIN check had returned and the information was that the VIN was not registered to anyone. David indicated that the car was recently purchased. Swisher began to believe that David was under the influence of drugs and therefore there might be drugs or drug paraphernalia in the car. David told him there were no drugs in the car. While another officer went to find David's wife, who he indicated had driven the car to its present location, a Sergeant arrived and searched David's car, finding methamphetamine and a pipe. Crystal, David's wife arrived at the scene and told a conflicting story about the ownership of the car. Swisher then advised her of her *Miranda* rights and she agreed to speak with him. She admitted the pipe was hers, revealed she also had some marijuana in per possession and later at the jail, staff also found methamphetamine on her person.

In *State v. Thompson*, Slip Copy, 2010 WL 1687851 (Kan.App. April 22, 2010), everyone seemed to be in agreement that the search of the car prior to Crystal's arrival was illegal. Swisher had no legal basis to search the car at that time, based only upon his hunch. The question became whether there had been sufficient "attenuation" or remoteness between the search and the evidence received from Crystal to diminish the taint of the illegal search.

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The Court listed four factors, based upon *State v. Hodges*, 252 Kan. 989 (1993) to be used in determining whether evidence acquired following an illegal search will be admissible:

(1) whether *Miranda* warnings were given;
(2) the temporal proximity of the illegal arrest and the statement, confession, or consent to search;
(3) the purpose and flagrancy of the officer's misconduct; and
(4) other intervening circumstances.

In this case, although "temporal proximity" and "flagrancy of the misconduct" weighed against admissibility, Crystal was given her *Miranda* warnings and there were sufficient "other intervening circumstances" to wit: original purpose of the investigation regarding the tags was legitimate and Swisher did have some legitimate suspicions regarding drug use and the strange situation of David crouching in the car. Weighing these factors, the Court of Appeals found that there was sufficient attenuation and the evidence against Crystal was admissible.

REMOVAL FROM JURY BY PEREMPTORY CHALLENGE OF PERSONS WITH DISABILITIES DOES NOT REQUIRE A *BATSON* ANALYSIS

Unpublished Decision

In *Falk v. American Legion*, Slip Copy, 2010 WL 1687859 (Kan. App. April 22, 2010), Falk was suing for injuries (paraplegia) received following a motor vehicle collision in which an employee of the American Legion was allegedly at fault. During jury selection, the defendant used a peremptory strike to remove a disabled person from the jury. Falk challenges such action under *Batson v. Kentucky*, 476 U.S. 79 (1986). Under *Batson*, if a potential juror is a member of a protected class, and the strike is challenged by the other side, the person striking said juror must present a facially neutral reason for the strike, otherwise the court will presume it was improperly motivated and discriminatory and not allowed.

In *Falk*, the Court of Appeals found that for purposes of *Batson* challenges, disability is not a protected class. Therefore, the heightened scrutiny required by *Batson* is not required when a peremptory challenge is used to strike a disabled potential juror (this would include physical or mental disabilities).

ANOTHER JURY TRIAL WAIVER CASE: 12 V. 11 JURORS

Unpublished Decision

Steven Raiburn was charged with felony possession of marijuana. During jury selection the court and parties discussed whether to select an alternate juror. The Court asked if both parties would agree to proceed with 11 jurors if one juror was lost during the course of the trial. The prosecution agreed. The defense attorney stated that he and his client had discussed it briefly and were agreeable to proceed with 11 if necessary. The defense attorney turned to his client and said, "Isn't that right, Steve?" Raiburn replied, "Yeah." The district court then stated "Let the record reflect the defendant himself has indicated that he will proceed with 11 jurors if we lose a juror."

As luck would have it, one juror had to be removed during the course of the trial. Raiburn was convicted by 11 jurors and appealed his conviction to the Kansas Court of Appeals arguing that the court had never told him that he had a right to a 12-person jury before asking him if he wanted to proceed with an 11-person jury.

The Court of Appeals agreed with Raiburn and reversed his conviction in *State v. Raiburn*, Slip Copy, 2010 WL 1687846 (Kan.App. April 22, 2010). In order to effectively waive a 12-person jury, the defendant **must** (1) be advised **by the court** of the right to a 12-person jury, and (2) **personally** waive that right in writing or in open court (not by counsel). Since the Court did not advise the defendant of his right to a 12-person jury, his waiver was not valid. Asking him if he objected to an 11-member jury is very different than advising him he has the right to a 12-person jury. In addition, the Court cannot shift its responsibility to defense counsel.

FAILURE TO UNDERSTAND THE PBT WARNINGS IS NOT A BASIS TO SUPPRESS THE RESULTS

Unpublished Decision

Benjamin Rodriguez Arias was stopped for crossing the center line of the highway, barely avoiding a collision with oncoming traffic. Arias spoke limited English. The officer who stopped him noticed blood shot eyes and a strong odor of alcohol about him. The officer began his DUI investigation. There was some dispute as to whether Arias failed the field sobriety tests, or simply didn't understand the instructions. The officer then asked him to submit to a preliminary breath test (PBT). He read the statutory warnings to him in English. Arias took the test. The district judge refused to consider the results of the test due to the fact that Arias could not understand the warnings, since they were solely given in English.

In *City of Salina v. Arias*, Slip Copy, 2010 WL 1874096 (Kan.App. April 30, 2010), the Kansas Court of Appeals held that since K.S.A. 2009 Supp. §8-2012 was changed in 2006 to include PBT's in the implied consent law, it is not a defense that the defendant did not understand the written or oral notice. The Court cited cases involving Korean and deaf defendants, who likewise were not allowed to fall back on a lack of understanding to prevent admission of the evidentiary breath test. The statute requires that notice be given, but does

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not require that it be understood. The case was remanded for the district court to consider the PBT results.

CHILD ENDANGERMENT
Unpublished Decision

Kevin Siebold was charged with child endangerment. The evidence to support the charge was as follows:

Deputy Darrel Jones stopped Siebold on a routine traffic offense. Siebold's 8 year-old daughter, Amber, was sitting in the front passenger seat, on her mother's lap. The back of the car was filled almost to the top with various items and junk. Amber was not wearing a seatbelt. Under the floorboard of the front passenger seat officers found a plastic bag containing a prescription pill bottle with a childproof cap inside of which was methamphetamine and drug paraphernalia. A roach clip was found underneath the driver's seat. Rolling papers were on the dash board and next to the ashtray in the front seat. A glass pipe with methamphetamine residue was found in a brown bag in the back seat, and a spoon covered with white residue was found underneath several items in the back seat.

In *State v. Siebold*, Slip Copy, 2010 WL 1882148 (Kan. App., May 6, 2010), the Court of Appeals found that this evidence was insufficient as a matter of law to support a child endangerment charge. The drugs found were not accessible or even visible to Amber. The car was not be operated in a reckless manner, nor at an excessive speed. The prosecution could not establish, as required by K.S.A. §21-3608, that there was a reasonable probability that Amber's life, body or health would be injured or endangered. The conviction was vacated.

NO HOUSE ARREST FOR 4TH TIME DUI OFFENDER
Unpublished Decision

Under K.S.A. 2006 Supp. 8-1567(g) the district court does not have authority to place a fourth-time DUI offender on house arrest. *State v. Harrison*, Slip Copy, 2010 WL 2217564 (Kan. App. May 21, 2010).

INSUFFICIENT BASIS FOR TRAFFIC STOP
Unpublished Decision

Officer was patrolling when he came upon defendant stopped about 20 feet back from a stop sign in a residential area. The driver was seated with both hands on the wheel, staring straight ahead. As he passed by and proceeded a few blocks, he noticed the car had still not moved, although it was 2 a.m. and no other cars were in the area. He decided to make a u-turn and check on the driver. The officer pulled behind the car. He did not activate his lights. As he started to call in a car stop, the vehicle signaled and turned. The officer followed the vehicle. It committed no other traffic violations. However, the officer activated his emergency lights and stopped the vehicle to "check the welfare" of the driver. Turns out, he was DUI. However, the issue in *State v. Nichols,* Slip Copy, 2010 WL 2216778 (Kan. App. May 21, 2010) was whether or not the stop was lawful.

The Kansas Court of Appeals found that it was not. Any concerns the officer had about the defendant were dispelled when he began driving in a lawful manner. *"The officer's uncertainty was not, in itself, an objective, specific and articulable fact engaging a State interest sufficient to outweigh the intrusion on individual rights occasioned by the vehicle seizure."*

ERRATIC DRIVING IN A *PER SE* CASE
Unpublished Decision

Roy Hinton left his house after an argument with his wife to go to the liquor store to get more booze. He was drunk. His wife called her friend who called the police to report the behavior. The wife also called the police to report her husband's intoxication. Police located Hinton driving and although they observed no traffic violations, they stopped the car. He ended up being charged with DUI and blowing . 094.

There were several issues addressed in *State v. Hinton*, Slip Copy, 2010 WL 2545644 (Kan. App., June 11, 2010), including a discussion of whether the officer had probable cause to stop Hinton based on the tip. The Court found he did.

However, a more interesting issue revolves around closing statements in the case. Hinton was charged with a *per se* violation only. The officer testified he did not observe any erratic driving. Prior to closing, the prosecutor moved *in limine* to prevent defense counsel from mentioning the fact that there was no erratic driving, because lack of erratic driving is not a defense to a *per se* violation. The Court granted the motion and prohibited defense counsel from mentioning the lack of any erratic driving as an element necessary for a conviction.

Although the ruling seemed to simply limit defense counsel from linking erratic driving as a requirement for conviction, the ruling was understood as much broader than that.

The Court found that the Court's prohibition was error, although harmless error given the overwhelming evidence of guilt in the case. It was the prosecution that introduced the officer's testimony that there was no erratic driving. Defense counsel was entitled to point to the lack of erratic driving to support his theory that the intoxilyzer result was faulty. In other words, he could use the lack of erratic

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driving to impeach the breath test result, even if he could not imply that erratic driving was a necessary element for a conviction.

BITE-MARK EVIDENCE
Unpublished Decision

Lopez-Martinez was accused of rape. His victim told police that she bit her attacker on the right arm or shoulder in order to leave a mark. Lopez-Martinez (who was known by the victim) claimed his sexual encounter with the victim was consensual and he had received the bite-mark while wrestling with a young relative.

A forensic dentist testified for the prosecution who examined the bite patterns of both the victim and the relative and concluded that the bite-mark on Lopez-Martinez was not from the relative. He testified it could have come from the victim or from others, but it definitely was not put there by the designated relative.

In *State v. Lopez-Martinez*, Slip Copy, 2010 WL 2545626 (Kan. App. June 11, 2010), the defense argued that bite-mark evidence fails the *Frye* test *(See, Frye v. U.S.* , 293 F. 1013 (1923)) which is required for the admission of scientific evidence in Kansas. The Court of Appeals relied on *State v. Peoples*, 227 Kan. 127 (1980) in recognizing the reliability of bite-mark evidence.

However, in his concurring opinion Judge Leben states that he agrees that bite-mark evidence was properly used to exclude the relative as the perpetrator of the bite in this case, but he questioned whether future cases may properly challenge *Peoples* as good law. He calls for reconsideration of the admissibility of bite-mark testimony.

"The Peoples *decision was issued more than 30 years ago, which is a long time when considering the lifespan of a modern scientific method's validity. Like most other courts, our Supreme Court held that bite-mark evidence was sufficiently reliable to be admitted as expert testimony because courts elsewhere had so held...But reliance solely on past cases can be a problematic method for continued acceptance of scientific tests…(..an early opinion approving fingerprint-identification testimony cited Mark Twain's fictional short story* Puddin'head Wilson *as part of the basis for accepting the testimony)…*

Reconsideration of the admissibility of bite-mark testimony seems appropriate: a 2001 study concluded that the scientific basis for bite-mark analysis had never been established, and no recent research that establishes its scientific rigor can be found...Moreover, a recent study by the National Research council of the National Academy of Sciences found that the uniqueness of human teeth had not been scientifically established…" [All citations omitted]

UNREASONABLE SEARCH OF DEFENDANT'S PERSON
Unpublished Decision

Christy Shaffer walked out into traffic while crossing the street, outside of the crosswalk, causing a vehicle to slam on its brakes to avoid hitting her. This was observed by two police officers who were patrolling in the area.

The officers testified that they believed Shaffer's behavior was odd and that her gait seemed a little off. They stopped her for violating the pedestrian statute (K.S.A. §8-1533(b); STO §64(b)) and to check her welfare. When officers approached Shaffer she became somewhat hysterical, throwing her hands up in the air and throwing her sunglasses and an apple onto the ground The officers handcuffed her in an attempt to calm her down and have a conversation with her. Once she was handcuffed, the officers testified that they no longer feared for their safety from her. The officers then conducted a pat down search and found a crack pipe.

In *State v. Shaffer*, Slip Copy, 2010 WL 2545657 (Kan. App. June 11, 2010), the Court of Appeals found that the officers had a basis to stop Shaffer (violation of a statute and public safety stop) and a basis to handcuff her (officer safety), but they did not have a basis to search her person once the officers no longer felt their safety to be threatened. At most she was suspected of illegally walking into traffic. Although she behaved somewhat erratically, *"such behavior does not equate to being armed and dangerous."* The officer had no information about a prior violent criminal past, nor did they observe anything that would lead them to believe Shaffer was armed and dangerous. The pipe should have been suppressed.

IF SHE HAD ONLY LEFT THE PURSE IN THE CAR...
Unpublished Decision

Officer comes upon two people dumpster diving. The two individuals had just returned to their car when approached by police. It turns out the passenger had an outstanding warrant. While arresting the passenger on the warrant, one of the officers asked the driver if there was anything illegal in the car. She responded there was not and gave consent for the officers to search her car.

As they began to search, the driver asked if she could get her purse out from inside the car so she could put her driver's license up. The officer allowed her to do so but noticed that once she got the purse, she put her driver's license in her pocket and carried her purse to the front of the car, away from them. This seemed odd, so the officer asked the driver if there was anything in her purse that she could harm the officers with, like a gun. She said there was not. When the officer asked if he could look inside the purse, she turned away from him and began to grab something inside the purse. Thinking she might be reach-

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ing for a weapon, the officer told her to remove her hands from the purse. She also removed a small brown coin purse from inside the bigger purse. She opened it and the officer observed a little clear tube inside that he recognized to be drug paraphernalia. He asked to see it and the driver and denied that it belonged to her. He asked to see the brown purse. She handed it to him and it contained methamphetamine as well.

The issue in *State v. Colvard*, Slip Copy, 2010 WL 2502889 (Kan. App. June 18, 2010), was whether the search of the car and purse were proper.

The Kansas Court of Appeals held that the upon seeing the clear tube (drug paraphernalia), the officer saw contraband in plain view and had probable cause to search the purse. In addition, the search of the purse was justified for officer safety based on her odd behavior surrounding the purse.

Although the police had no independent basis to search the car incident to the warrant arrest of the passenger, the drugs were not in the car. Had the drugs been found in the purse in the car, then the Court would have had to analyze whether the driver had given a valid consent to search the car, because that is the only basis upon which the officers would have been able to search the car in this case. However, the driver got the purse out of the car, opened it herself, made the officers question their safety by her actions and put the contraband in plain view for the officers to see.

REASONABLE BASIS TO REQUEST A BLOOD TEST

Unpublished Decision

Officer is dispatched to the scene of an accident. A car has slid into the ditch after attempting to avoid a fallen tree obstructing the road. By the time the officer arrived, the paramedics had already loaded the driver into an ambulance. The officer talked to the passenger in the car who told him that both he and the driver had consumed a couple beers but he did not believe the driver was intoxicated. The sergeant on scene instructed the officer to go to the hospital and get a blood-alcohol test from the driver.

The officer went to the hospital and met the driver. He introduced himself, gave him a copy of the DC-70 implied consent advisory and read it aloud to the driver. He asked the driver if he would consent to a blood-alcohol test and he said he would. The results indicated a BAC of .13. The driver was charged with DUI.

The issue in *State v. Dillon*, Slip Copy, 2010 WL 25030000 (Kan. App. June 18, 2010), was whether the officer had a sufficient reasonable basis to request the blood test. The Court of Appeals found that he did.

K.S.A. 2006 Supp. 8-1001(b) (as it relates to this case) requires an officer to request a BAC test if the officer has *reasonable grounds* to believe the person was operating a vehicle while under the influence of alcohol and the person has been involved in a vehicle accident or collision resulting in property damage, personal injury or death. The Court found that the fact the passenger told the officer that the driver had a "couple of beers" would lead any reasonably prudent law enforcement officer to believe that drinking may have contributed to the accident.

PROBABLY NOT A GOOD IDEA TO HAVE "INEFFECTIVE ATTORNEY" REPRESENT DEFENDANT ON HEARING AS TO WHETHER OR NOT HE WAS "INEFFECTIVE"

Unpublished Decision

Prior to sentencing, Crystal Burns asked to withdraw her plea of guilty to attempted kidnapping on the basis that her court-appointed attorney, Josh Allen, was ineffective. Against her wishes, at the hearing on the motion, she was represented by Josh Allen, even though she advised the Court she was seeking to hire her own attorney with the help of her boyfriend.

In *State v. Burns*, Slip Copy, 2010 WL 2670810 (Kan. App. June 25, 2010) Burns argued that the district court should have appointed conflict-free counsel. She argued that Allen had a conflict because he had divided loyalties. On the one hand, he was obligated to faithfully and effectively argue that there was good cause to set aside the pleas because he was ineffective as defense counsel. On the other hand, in order to defend himself against the allegations of ineffectiveness, Allen would be required to advocate against Burns motion. At the hearing, Allen did not argue his own ineffectiveness nor did he seek to withdraw. No evidence was presented in support of her motion. In fact, Allen said nothing at the hearing except to respond to questions from the judge and confirm that Burns had indicated her desire to go to trial.

The Court of Appeals found that the district judge was required to appoint conflict-free counsel to represent Burns and remanded the case to the district court to do so and conduct a new hearing on her motion to withdraw her plea.

A CALIFORNIA "WOBBLER"

Unpublished Decision

In California, certain offenses which provide a range of punishments resulting in either a felony or misdemeanor classification are called "wobblers." A "wobbler" is deemed a felony unless charged as a misdemeanor by the State or reduced to a misdemeanor by the sentencing court, as allowed by statute. If a charge can be punished by im-

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prisonment in prison or imprisonment in the county jail, and the judge elects the county jail option, the felony wobbles into and becomes a misdemeanor. Or, if the defendant is sentenced to prison and then placed on probation without serving any time, the Court can declare the offense to be a misdemeanor.

Marcus Sanchez was charged in California with two "wobbler" offenses. He pled guilty to them as felonies, but after completing 4.5 years of probation, the Court declared them to be misdemeanors under the "wobbler" provisions of the statute. He pled not guilty to the amended misdemeanor offenses, and then the Court dismissed them (which was allowed under the California statutes). The statute required, similar to a DUI diversion, that in any subsequent prosecution the conviction would be resurrected for sentencing purposes "*and the conviction shall have the same effect as if probation had never been granted.*"

Jump ahead a few years and now Sanchez is in Kansas, being sentenced for a similar charge and the issue is whether the two convictions in California should be treated as felonies or misdemeanors. He pled to them initially as felonies, so if the conviction is restored as if probation had never been granted, the State argued that it was restored to the felony to which he pled. But they were later changed to misdemeanors and Sanchez argued that that is how they were finally recorded in California and dismissed.

In *State v. Sanchez*, Slip Copy, 2010 WL 2670784 (Kan. App. June 25, 2010), the Court of Appeals found that they should be counted as misdemeanors. It cited a California case that found that once a court has reduced a wobbler to a misdemeanor the crime is thereafter regarded as a misdemeanor "for all purposes." Recognizing that these two California provisions were inconsistent, the Kansas Court of Appeals reconciled them by finding that it reverts to what it was at the time of dismissal.

EVIDENCE OF PRIOR CONVICTIONS CAN BE ESTABLISHED BY EVIDENCE OF AN EARLIER PLEA WHICH INCLUDED LISTED PRIORS

Unpublished Decision

Chad Haug was charged with DUI, 4th offense. The State presented certified copies of one Missouri DUI conviction and one Iowa DUI conviction. However it did not have documentation of the second Iowa conviction it was alleging made him a 4th offender. Haug argued this second Iowa conviction wasn't him. However, the Missouri conviction listed both prior Iowa convictions and Haug pled guilty to the DUI in Missouri with the two prior Iowa convictions listed on the charging document. Therefore, the State argued, the other Iowa conviction was proven by the Missouri documents. Haug's plea included an admission to the factual basis for the plea, which included the two prior Iowa convictions. Haug argued that the Missouri charging document referencing two prior Iowa convictions was not substantial evidence of a conviction.

In *State v. Haug*, Slip Copy, 2010 WL 267086 (Kan.App. June 25, 2010), the Kansas Court of Appeals sided with the State and found that the evidence of the Missouri charging document and plea was substantial competent evidence of three prior convictions (Missouri, and two Iowa priors).

GUILTY PLEA CONSTITUTES WAIVER OF DEFECTS IN COMPLAINT OTHER THAN LACK OF JURISDICTION

Unpublished Decision

As part of a plea agreement, Joey Cross agreed to plead to a second offense possession of meth, possession of meth with intent to sell, possess of drug paraphernalia with the intent to manufacture meth and fleeing and eluding. There was an agreed sentence, including an agreement that the sentences run consecutively and all went according to plan. After his probation was revoked for various violations, he asked the district judge to run his sentences concurrently instead of consecutively. When that was denied, he asked that the court correct an illegal sentence, in that possession of meth and possession of meth with intent to sell were multiplicitous. As such, the court had no jurisdiction to convict him of both charges and therefore his sentence was illegal. This motion too was summarily denied.

In *State v. Cross*, Slip Copy, 2010 WL 2816804 (Kan. App., July 9 2010), the Court of Appeals held that multiplicity is a nonjurisdictional defect that is waived when the defendant enters guilty pleas to the charges. A plea of guilty constitutes a waiver of defenses and objections based upon the institution of the prosecution or defects in the complaint, information and indictment other than it fails to show jurisdiction in the court or to charge a crime.

PRE-*GANT* WARRANTLESS VEHICLE SEARCHES CAN BE SAVED BY THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE

Unpublished Decision

Fred Carlton was stopped for expired tags. Officers discovered his driver's license was revoked and arrested Carlton for said offense. They cuffed him and placed him in the patrol car and then searched his truck incident to the arrest, a practice that was considered proper prior to the U.S. Supreme Court decision in *Arizona v. Gant*, 556 U.S. --- (2009). The officers found meth, marijuana, and paraphernalia. Carlton moved to suppress the evidence seized as in violation of *Gant*, which prohibits the police from conducting a warrantless search of a vehicle incident to the occupant's arrest unless the arrestee is within reaching distance of the passenger compartment at the time of the

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search or it is reasonable to believe that the vehicle contains evidence of the offense of the arrest. Carlton was already in the police car when the search took place, and there would be no reason to look in the car for evidence of the crime of arrest, to wit: driving on a revoked license. The search took place prior to the *Gant* decision, but the motion to suppress filed by Carlton was heard after *Gant*.

The issue in *State v. Carlton*, Slip Copy, 2010 WL 2817048 (Kan. App. July 9, 2010) was whether the good-faith exception to the exclusionary rule should be extended as a matter of law to cases where, at the time a search is executed, an officer reasonably relied on settled case law to conduct the search. The Court noted that this was a matter of first impression in Kansas and, among those jurisdictions addressing it, there is a split of authority. However, the issue became clearer because not only did case law at the time authorize the officers' actions, but state statute also specifically allowed it. *See*, K.S.A. §22-2501(c). *Illinois v. Krull*, 480 U.S. 340 (1987) specifically held that the good faith exception applies when the officer reasonably relies on a statute that is later declared to be unconstitutional, which was the case here. Subsequent to *Gant*, the Kansas Supreme Court held K.S.A §22-2501(c) unconstitutional in *State v. Henning*, 289 Kan. 136 (2009). Therefore, the Court ruled that the motion to suppress should have been denied.

Judge Green filed a dissent arguing that the search wasn't proper under K.S.A. 22-2501(c) either, because all evidence of the crime had already been gathered, there was nothing else to gain from searching the car. He cites *State v. Anderson*, 259 Kan. 16 (1996) in support of his position that neither the existing Kansas case law, nor the statute would have allowed the search of Carlton's car.

See also, p. 12, *supra*.

IF LAW ENFORCEMENT OFFICER IS VICTIM, SIMPLE BATTERY IS NOT A LESSER INCLUDED OFFENSE OF BATTERY ON AN LEO

Unpublished Decision

Michael Gaines was convicted of battery against a law enforcement officer. He argued that the jury should have been instructed on the lesser included offense of battery because, he argued, the correctional officer was not engaged in the performance of his duties when he used excessive force against Gaines. He argued that an officer using excessive force against an inmate in violation of law is not engaged in his official duty and the jury could have so found.

In *State v. Gaines*, *Slip Copy*, 2010 WL 3211672 (Kan. App. August 6, 2010), the Court held that since the only victim of the battery was a law enforcement officer, and since the prevailing case law concludes that even when conducting an illegal arrest or using excessive force, officers are still acting within the scope of their duties as officers, a simple battery instruction was not warranted. If the jury concluded the battery took place, they had to conclude it was against a law enforcement officer.

CONTROLLED BUY OF ALCOHOL ON PROPERTY POSTED "*NO ONE UNDER 21 PERMITTED ON THE PREMISES*" DOES NOT CONSTITUTE CRIMINAL TRESPASS OR A FOURTH AMENDMENT SEIZURE

Unpublished Decision

Cliff Cormier, owner of Cormier Liquor Store, was assessed an administrative fine by the Alcoholic Beverage Control Board (ABC) for selling intoxicating liquor to a minor. ABC had conducted a controlled buy at his store, wherein, pursuant to the authority given it in K.S.A. §41-272a, it sent a 19 year-old into the store to purchase beer. The 19 year-old presented his true ID to Cormier, who sold him the beer.

At his hearing before ABC, Cormier admitted selling beer to someone who was underage. However, Cormier had posted his premises with a sign on the front door prohibiting anyone under the age of 21 from lawfully entering his store. He argued that the controlled buy constituted criminal trespass.

In *Cormier v. KS Dept. of Revenue*, Slip Copy, 2010 WL 3211945 (Kan. App. August 6, 2010), the Court of Appeals held that the criminal trespass statute makes it a crime to enter into or remain upon land by a person who knows he *"is not authorized or privileged to do so"* where the premises are posted in in a manner reasonably likely to come to the attention of intruders. *See,* K.S.A. 21-2721(a)(1)(B) and UPOC 6.7(a)(1)(B). In this case, the 19 year-old was statutorily authorized to enter the property. The legislature specifically empowered the Director of the ABC to inspect premises where alcohol was sold. See, K.S.A. 41-209. It further authorized the particular method of inspection, that being controlled buys. *See,* K.S.A. 41-272a. Therefore, the 19 year-old was authorized to lawfully enter the liquor store, even though there was a sign prohibiting minors.

Cormier also argued that this was a seizure in violation of his Fourth Amendment rights. This argument also failed. The Court held that Cormier is engaged in a highly regulated industry that is routinely subject to compliance reviews. There is no expectation of privacy in such a closely regulated commercial business.

Finally, Cormier argued that since the State also charged him criminally for furnishing alcohol to a minor, the parallel administrative and criminal actions stemming from the same act violated his constitutional protection against dou-

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ble jeopardy. He also argued res judicata and collateral estoppel, necessitating dismissal of his criminal case.

The Court rejected these arguments on the long-held principal that a criminal sanction and a civil sanction may be imposed for the same act without violating double jeopardy. Res judicata and collateral estoppel do not apply because they both require a prior final judgment on the merits. In this case, the State had dismissed the criminal charges, so there was no final judgment on the merits to even implicate res judicata or collateral estoppel.

"FRUSTRATION OF PURPOSE" DOCTRINE
Unpublished Decision

Antonio Limarco fled Peru 30 years ago and received asylum in the United States. He was living in the United States legally. As part of a plea agreement, he pled guilty to DUI and possession of methamphetamine. In accordance with the agreement, he served the mandatory time on the DUI and received probation on the drug charge. In addition, the State agreed that his probation could be transferred to his home state of California. Although as part of the plea colloquy he signed, Limarco was advised :

> *"I understand that if I am not now a United States citizen, a conviction of a criminal offense may result in deportation from the United States, incarceration by immigration officials for indefinite period of time until I am deported, exclusion from admission to the United States and/or denial of naturalization and citizenship in the United States"*

his attorney suggested to him that this was just "boilerplate" and that he did not believe he would be deported for a case for which he received probation.

Low and behold, because he was convicted of a drug offense (other than possession of less than 30 grams of marijuana), Limarco was arrested by immigration officials and scheduled for deportation.

He sought to withdraw his guilty plea under the doctrine of "frustration of purpose." This is a contract law term that applies to the situation, after a contract is made, where a party's principle purpose is substantially frustrated without his fault by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made. Under this doctrine, the person's remaining duties to render performance under the contract are discharged.

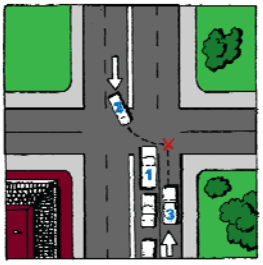
Lemarco argued that the purpose for which he entered the agreement was the promise of probation in California. The purpose was frustrated by the plea itself and the State's performance became worthless due to the intervening arrest by ICE.

In *State v. Lemarco*, Slip Copy, 2010 WL 3211674 (Kan. App. August 6, 2010) the Court held that the doctrine of frustration of purpose was not applicable in this case and insinuated that it would probably never be applicable in a criminal case where the prosecution is required to perform as promised. In this case, the State recommended probation, as promised, and the defendant received probation. The agreement specifically mentions the possibility of deportation. Therefore, the non-occurrence of the frustrating event (deportation) was not a basic assumption upon which the contract was made.

However, based on the recent case of *Padilla v. Ke*ntucky, 599 U.S. ___(2010) (*See also*, Verdict, Spring 2010, p. 14), the Court held that there may be a valid ineffective assistance of counsel claim which would allow the defendant to withdraw his plea. It remanded the case to the district court to conduct a hearing on whether, but for counsel's erroneous advice, Limarco would have taken the case to trial.

DRIVER WHO WAIVES ANOTHER DRIVER ON MEANS NOTHING MORE THAN "I WON'T HIT YOU"
Unpublished Decision

Medlin v. Shephard, Slip Copy, 2010 WL 3211908 (Kan. App. August 6, 2010), is a civil case, but one worth mentioning because it is a traffic collision involving an allegation that the driver of a truck was responsible for a collision because he made a hand signal to an oncoming driver indicating, in the driver's view, that it was OK to turn. The driver turned and collided with a vehicle that was proceeding straight in the thru lane next to the truck driver.



Relying on *Dawson v. Griffin*, 249 Kan. 115 (1991), the Court held that reliance upon a driver's hand gesture is unreasonable **as a matter of law** unless a party can come forward with some specific evidence that the signaler intended the gesture to mean something more than "I won't hit you." A driver turning left has a nondelegable duty to yield to oncoming traffic. The driver's reliance on the truck driver's alleged hand wave as a guaranty of safety was unjustified as a matter of law (meaning this is not something the jury gets to decide).

The truck happened to be a City truck and the plaintiff further argued that this created a "vestige of authority" upon which the driver could rely. The Court disagreed and found that absent some evidence regarding the truck driver's intent, summary judgment was proper. The truck driver owed no duty of care to the driver.

The Verdict

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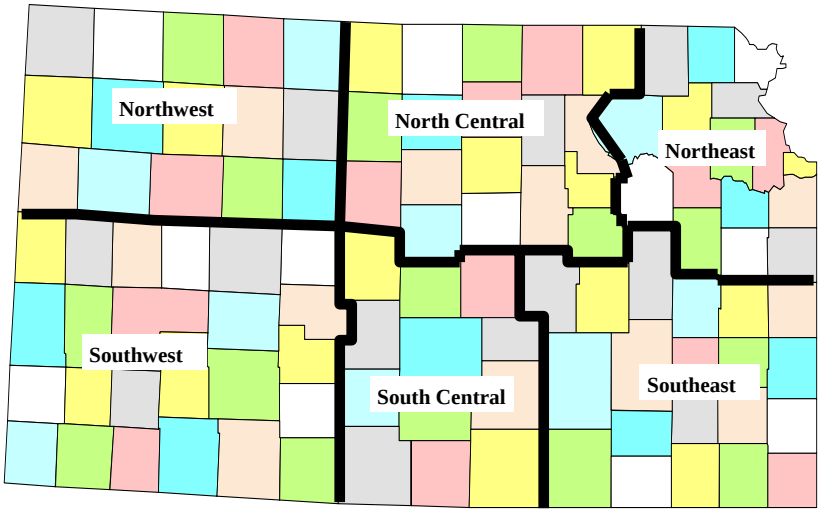

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