# The Verdict

The Official Publication of the Kansas Municipal Judges Association

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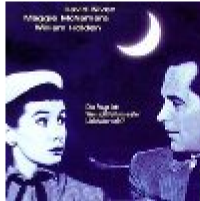
# 50th Issue

## A Step back in time

One hundred years ago a new medium was introduced in Kansas, the moving picture. This was a time in our history when we were concerned about the moral degradation that would be caused by a pool hall (*City of Burlingame v. Thompson*, 74 Kan. 393 (1906)), so needless to say these new moving picture shows were of grave concern. To address these concerns, the Kansas Board of Review was established. Its job was to review every movie and its associated posters and advertising before it could be shown in Kansas. It was unlawful to sell or exhibit any movie in Kansas unless it had first been submitted to the Board.



The Board, whose offices were in Kansas City, Kansas, would examine each film and furnish a certificate of approval to films that met its criteria for moral purity. The certificate would have to be displayed on the screen before the movie began for no less than 30 seconds. It cost $2 to submit a film for review (about $44 in today's dollars). Board members and their inspectors had the right to enter any theater to check for compliance and to prevent any film or poster regarding a film from being displayed if it had not been approved. The Board could prohibit the showing of the entire film or could simply require that certain sections be deleted or "bleeped." To be prohibited material had to be "cruel, obscene, indecent or immoral, or such as tend to debase or corrupt morals." Newsreels were exempted from the Board review and certification (only because the Board had tried to edit unfavored politicians out of newsreels and

(Continued on page 17)

## 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.*

**SEPARATE CRIME AFTER ILLEGAL ENTRY BY POLICE DOES NOT REQUIRE SUPPRESSION**

Deputies were called to "keep the peace" while a person was leaving a residence with her property, part of a dispute between roommates. The female had called to request the assistance of police in leaving. The male was still inside the residence and apparently very upset. When the female went inside the residence, the deputy followed her in, although he was not specifically invited to do so. He testified that he thought she wanted him to because of the problems between the two parties. Upon entry into the home, the male occupant came around the corner carrying an assault rifle,

(Continued on page 4)

## SPOTLIGHT ON: ROBIN LEWIS

Robin Lewis, *Gardner,* was born in Olathe, Kansas the daughter of a postal carrier and court employee. Her parents still live in Olathe. She has one older sister, who lives in Topeka. She graduated from Olathe High School and went on to attend Washburn University where she received a degree in Criminal Justice and a law degree.

After law school she began a career with the Johnson County District Attorney's Office that spanned 13 years, moving up through the various divisions of the office until she was trying serious felonies, including murder. She started her own practice in Olathe in 1995, which she maintains today. She commented, *"Someone told me once that you don't develop your law practice, it develops you, and that is certainly what happened in my case."* She handles divorces where custody is not in dispute and criminal defense work.

Shortly after starting with the D.A.'s office in 1982, she was

(Continued on page 2)

# Spotlight on: Robin Lewis

*(Continued from page 1)*

called to a crime scene when a young detective with the Sheriff's Office by the name of Frank Denning warned, *"Don't step there, that's part of the brain matter."* Well, it was apparently love at first sight and 5 years later they were married. Frank is now the elected Sheriff of Johnson County and much of her spare time is spent attending functions with him. Professionally, the paths rarely cross because he is involved primarily in administration these days. She also serves on the Johnson County Visioning Committee.

Robin's hobbies have expanded over the years. She said she was passionate about golf for awhile, then she and Frank purchased some horses and got involved in Cutting competition. They live in a more rural part of Johnson County. When her horse passed away and their time to care for the horses started to diminish, they relinquished Frank's horse and moved on to another adventure, drag racing, a passion Frank pursued when he was younger.

Frank's brother is president of a drag racing organization in Great Bend, so she and Frank race in Great Bend, Topeka and at KCIR in Kansas City. She has taken the courses she needs to qualify for a drag racing license. In describing for the local newspaper what it was like the first time she tried the sport with Frank, Robin said:

*"I love carnival rides, like roller coaster rides, and (driving this car) beats any carnival ride I have ever been on. The Great Bend track used to be an air strip. They have this one long strip, not the race track, but an area where you get the car tacked and warm it up. He drove it, not even full throttle, basically it was half throttle and, oh man, it is very exhilarating. It was a hoot; it gives you those butterfly feelings in your stomach. I really enjoy it."*

Robin became judge in Gardner in 2003, following a brief stint as judge in Edgerton, which she had to give up when her husband became Undersheriff, since the sheriff's department provided police services for Edgerton. When asked about the KMJA, Robin was quick to comment on the conferences.

*"When I was in the District Attorney's Office I went to many conferences locally and around the country and the municipal judges conferences have been heads above any other conferences I've ever attended. I leave each year with new and helpful information and I really look forward to it. In addition the ability to communicate with other judges about common problems and concerns is invaluable. Everyone is so helpful and willing to share ideas."*

# Updates from O.J.A.

## CONFERENCE REMINDERS

**Municipal Court Clerks' Spring Conference**
March 25-26, 2010
Salina, KS

**Municipal Judges' Annual Conference**
April 26-27, 2010
Wichita, KS

**District Judges' Spring Conference**
June 10-11, 2010
Wichita, KS

**Municipal Court Clerks' Fall Conference**
September 23-24, 2010
Hays, KS

**Annual Judicial Conference**
October 18-19, 2010
Overland Park, KS

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## ADSAP REPORTS

The deadline for filing your ADSAP Report is

**January 20, 2010**

## CJE REPORTS

The deadline for filing your Annual CJE Compliance Report with the Office of Judicial Administration is

**February 1, 2010**

If you have any questions regarding the report, please contact Denise Kilwein at (785)296-2256.

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## ANNOUNCING NEW JUDGES!!

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

| | |
|---|---|
| -David Roberts | Pretty Prairie |
| -Greg Keith | Goddard |
| -William Pray | Leavenworth |
| -Charles Pike | Great Bend |
| -Claude Warren | La Cygne |
| -Particia Miklos | Bronson |
| -Shawn DeJarnett | Harper |

Judge Robin Lewis behind the wheel of the 1971 Chevy Nova that she and her husband (also pictured) race.

# Judicial Ethics Opinions

**JE-169**
***October 9, 2009***

The League of Women Voters of Kansas has invited the judge to attend a forum entitled: "DOES THE KANSAS JUDICIARY RELFECT THE DIVERSITY OF OUR STATE? IF NOT, WHY NOT?"

The forum will be held at the Topeka and Shawnee County Public Library. The keynote speaker at this forum will be the executive direction of the Institute for the Advancement of the American Legal System. The forum is partially funded by the Transparency and Integrity Fund of the Open Society Institute and the League of women Voters Education Fund.

The judge has researched both the Institute for the Advancement of the American Legal System and the Open Society Institute and found that both of these institutes appear to be non-partisan and aimed at improving the legal and judicial systems and that neither appear to be advocacy groups.

The question is whether the Kansas Code of Judicial Conduct would permit sitting judges to attend this forum.

Comment [4] of Rule 1.2 of the Code of Judicial Conduct provides, in part, that judges should participate in activities that support access to justice for all. Rule 3.7(A) of the Code of Judicial Conduct provides that a judge may participate in activities sponsored by organizations concerned with the law, the legal system, or the administration of justice. This forum is clearly an activity concerning the administration of justice. This judge may, therefore, attend the forum.

## Illinois Man Gets 6 Months in Jail for 1 Middle Finger

*Tuesday , November 03, 2009*
FOX NEWS

An Illinois man found out the hard way that giving a judge the middle finger while being sworn in isn't nice — and won't go unpunished.

Kane Kellett, 24, is now in jail for six months after he raised his right hand, middle finger extended, before Judge G. Martin Zopp in McHenry County Court, the Chicago Sun-Times reported Tuesday.

The Crystal Lake man was there Saturday on home-invasion charges. Since his nonverbal "outburst," he is serving half a year for contempt of court, according to McHenry County State's Attorney Louis Bianchi.

In the break-in case, Kellett is accused of burglarizing the house of an acquaintance and attempting to hit him over the head with a flashlight, the Sun-Times said.

Kellett was surly from the start, according to Bianchi.

*"When they brought him out of the lockup he looked very unhappy. He was looking down all the time,"* the state's attorney said. *"The judge asked him 'Sir, do you have an attorney?'* and he said *'F—- no.' "*

Zopp ignored that comment but after the middle-finger incident, Assistant State's Attorney Patrick Kenneally asked that the defendant be held in criminal contempt of court.

Zopp agreed, handing down the six-month sentence.

*"I'm hoping that this sends a message to all those who appear before our judges here that they must show some respect for the court and the court system,"* Bianchi said.

*"We must reject Horn's assertion that his ever-recovering memory should entitle him to an ever-evolving series of postconviction motions and hearings. If we were to accept each additional recovered memory as newly discovered evidence, one can only imagine how many motions and evidentiary hearings might be warranted."*

Judge Greene writing for the majority in *Horn v. State,* Slip Copy, 2009 WL 3270856, (Kan.App., October 9, 2009). This was in response to Horn's third K.S.A. §60-1507 motion following his murder conviction, alleging increasing amounts of recovered memory as "newly discovered evidence"

# Court Watch

(Continued from page 1)

pointed it at the deputy, and told him to *"Get the fuck out of my house."* The deputy left, but the male resident was charged with aggravated assault on a law enforcement officer. The district judge suppressed all the evidence obtained after the officer's unlawful entry into the house and the State appealed.

In *State v. Peterman*, ___Kan.App.2d ___(September 25, 2009), the Kansas Court of Appeals agreed with the district court that the officer had no right to enter the residence. He was not invited in by either resident and there was no indication that he was needed to immediately enter because of some sort of emergency. There was no indication that the female occupant who was gathering her things was in any immediate danger.

However, the Court found that when there is an intervening act by the defendant that is so separate and distinct from the illegal entry or arrest as to break the causal chain and dissipate the taint of the illegal entry, suppression is not required. This was such an act of free will by the defendant. In addition, there is a strong public interest in preventing and punishing force or threats of force against law enforcement, which overrides the limited objective of the exclusionary rule. And finally, the defendant had no reasonable expectation of privacy once he realized the officer was in his home.

The Court reversed the suppression ruling, reinstating the aggravated assault charge, and remanded the case for the trier of fact to determine if the defendant's actions were reasonable under the circumstances.

**WAIVER OF JURY TRIAL RIGHT MUST BE EXPLICIT**

Defendant was charged with fourth or subsequent DUI. During a status hearing his attorney stated, *"Judge, we're goin' to ask the court for a trial."* The judge inquired whether he was referring to a jury or a bench trial and the attorney responded, *"Trial to the court, judge."* No other comments were made and the case was tried to the court and the defendant was convicted.

On appeal, the defendant argued that he had not waived his right to a jury trial, even though he never raised this issue to the district court. In *State v. Bowers*, ___Kan.App.2d ___(September 25, 2009), the Kansas Court of Appeals found that the defendant's attorney's request for a bench trial cannot serve as a valid waiver of his right to a jury trial. An attorney may not waive a defendant's constitutional rights unless the record establishes the attorney has discussed the matter with the defendant and the defendant has voluntarily waived those rights.

Furthermore, the advisement regarding a jury trial must come from the court and not from counsel. The district judge failed to advise the defendant of his right to a jury trial or even raise the option. There is nothing in the record to indicate he was aware of his right to jury trial or had voluntarily and knowingly waived it. The conviction was reversed and the case was remanded for a new trial.

**MUST REGISTER AS AN OFFENDER IF A DEADLY WEAPON WAS USED IN A PERSON FELONY, EVEN IF YOU WERE NOT THE ONE TO USE IT**

K.S.A. §22-2402(a)(7) requires that a person register under the offender registration provisions of state law if the person was convicted of a person felony and the court makes a finding on the record that a weapon **was used** in the commission of the felony.

In *State v. Nambo*, ___Kan.App.2d___ (September 25, 2009), the Kansas Court of Appeals held that the defendant does not have to be in actual possession of the weapon for the statutory registration requirement to apply. Nambo had been convicted of aggravated robbery. He was with two other people and a gun was involved. Although he participated in the robbery, he did not hold it or use it himself during the robbery. Therefore, he argued, he should not be required to register under the act.

The Kansas Court of Appeals held in a case of statutory interpretation that the principle of accomplice liability, which is the public policy of the state as indicated in statutory and case law, makes it clear that an accomplice, aider or abettor is just as guilty as the principle. Therefore, in interpreting K.S.A. §22-2402(a)(7), it is irrelevant if the defendant was in actual possession of the weapon, if it was used in the commission of the crime for which he was convicted, he must register under the act.

**LAB FEE CAN ONLY BE IMPOSED IF LAB SERVICES WERE IN CONNECTION WITH CHARGES BEFORE THE COURT**

K.S.A. 2008 Supp. §28-176(a) permits imposition of a $400 lab fee when lab services are rendered *"in connection with the case."* When a defendant is charged with a nondrug offense, but lab testing is conducted on drugs found on the defendant's person at the time of the arrest, **but not charged**, the lab fee cannot be imposed.

In *State v. Aguilar*, ___Kan.App.2d ___(October 2, 2009), Aguilar was arrested for DUI and DWS. Officer's found marijuana on his person. It was sent to the lab for testing, but he was never charged with possession. The district court assessed the $400 lab fee on his DUI charge. The Court of Appeals agreed with Aguilar, that the lab fee cannot be assessed unless the lab services were rendered in connection with the charges before the court.

**ADMISSIBILITY OF HEARSAY STATEMENTS WHEN DECLARANT IS PRESENT BUT DOES NOT TESTIFY**

Sixteen year old girl tells her mother that her stepfather has been coming into her room and touching her sexually.

(Continued on page 5)

The Verdict

# Court Watch

(Continued from page 4)

Mother immediately confronts stepfather. Stepfather, Kim Kelley, goes to the police station and tells the police that he wants to report an incident involving his daughter. The officers lead him into a private room. He tells them that he touched his daughter's genitals while he was masturbating. The interview was not recorded in any way.

A detective then went to interview the daughter. She told the detective that her father had sexually assaulted her three times and attempted to do so a fourth time. She provided details. The accounts included penetration and an incident wherein she scratched his face and bit him, and one in which her pajama bottoms were torn. All incidents occurred within a week or two of the reporting.

Detectives also interviewed the mother. She relayed what her daughter had told her, as well as the fact that her husband had admitted touching her daughter. She said she told her husband he needed to report this to the police. She also said that she was aware that her daughter had made false sexual accusations against her husband before and that her daughter had a general reputation for lying.

Within a day of the reporting, the daughter went to the hospital for a sexual examination. The daughter provided more details to the nurse-sexual examiner. There were no signs of genital trauma, nor any seminal fluid on the torn pajamas.

Kelley was charged with three counts of rape and one count of attempted rape. At the preliminary hearing, the daughter testified consistent with her prior statements to her mother, detectives, and the nurse.

The case proceeded to jury trial and the daughter recanted all her allegations, testifying that it was all a lie and that the first three incidents never happened. The fourth incident she said occurred when they struggled when he was trying to wake her up to go to school one morning, explaining his scratches and bite mark and her torn pajamas. She said she had been angry at him for not allowing her to date and for taking away her cell phone.

The detectives that took her statement testified about their interview with the daughter. They also testified about their interview with the mother. Kelley was convicted by a jury of all four counts.

Kelley objects on appeal to the hearsay statements admitted by the detectives concerning what the mother said to them. The mother did not testify in the case, but was in the courtroom and "available for cross-examination."

In *State v. Kelley*, ___Kan. App.2d___(October 9, 2009), the Court of Appeals discusses the exception to the hearsay rule contained at K.S.A. 2008 Supp. §60-460(a):

*"A statement previously made by a person who is present at the hearing and available for cross-examination with respect to the statement and its subject matter, provided the statement would be admissible if made by declarant while testifying as a witness."*

In *State v. Fisher*, 222 Kan. 76 (1977), the Kansas Supreme Court ruled that in order for the exception to apply the declarant must have been actually called to testify and opened up for cross-examination before the hearsay statement is admissible. So, in this case that would mean the mother would have had to testify first and be subjected to cross-examination before the detectives would be allowed to testify about what she told them.

The Court then modified this rule in *State v. Davis*, 236 Kan. 538 (1985) to hold that while it may be better practice to call the declarant prior to the admission of their out-of-court statements by other witnesses, the failure to do so when the declarant does actually testify does not violate the Sixth Amendment. Therefore, the statements to the detectives would be admissible as long as mother was called to testify by the prosecution sometime during the trial.

Then came *Crawford v. Washington*, 541 U. 36 (2004) and *Davis v. Washington*, 547 U.S. 813 (2006) and the discussion of the right to confront witnesses as it relates to testimonial v. nontestimonial statements. As it relates to Kansas law, these cases basically held that it doesn't matter what exceptions Kansas may have (to wit: K.S.A. 2008 Supp. §60-460(a)), if the statements are testimonial they cannot be admitted unless the declarant testifies. The Kansas Supreme Court supported this view in *State v. Miller*, 285 Kan. 682 (2007) and *State v. Brown*, 285 Kan. 261 (2007). **The order of testimony still does not seem to make a difference, as long as the declarant testifies.**

If the statements are nontestimonial, the Confrontation Clause is not implicated, and the Court simply looks to see if any of the hearsay exceptions apply.

In this case, the mother's statements were clearly testimonial, made to police detectives. Therefore, the prosecution was required to call her as a witness. Her mere presence at the hearing was not enough. The Court could not find that the error was harmless and reversed Kelley's convictions and remanded the case for a new trial.

(Continued on page 7)

The Verdict

# Electronic Cigarettes

An electronic cigarette, otherwise known as a personal vaporizer, is a battery-powered device that provides inhaled doses of nicotine by way of a vaporized solution. It is an alternative to smoked tobacco products, such as cigarettes, cigars, or pipes. In addition to nicotine delivery, this vapor also provides a flavor and physical sensation similar to that of inhaled tobacco smoke, while no tobacco, smoke, or combustion is actually involved in its operation.

An electronic cigarette usually takes the form of some manner of elongated tube, though many are designed to resemble the outward appearance of real smoking products, like cigarettes, cigars, and pipes. A common design is also the "pen-style", so named for its visual resemblance to a ballpoint pen. Most electronic cigarettes are reusable devices with replaceable and refillable parts. A number of disposable electronic cigarettes have also been developed.

The electronic cigarette was first developed in Beijing, China in 2003.

They are available in a wide variety of flavors, including chocolate, strawberry, cherry, vanilla, coffee, caramel, orange and mint. They are available in different levels of nicotine, regular, lite and ultra-lite. You can even get regular or menthol. Some are available that contain no nicotine at all. A starter kit runs for about $150, which some say puts it out of the price range of most minors. A kit generally includes 5 cartridges; with each cartridge have the capacity equivalent of about 20 cigarettes, a lithium battery and a battery charger. Nicotine solutions sold separately for use in refillable cartridges are commonly referred to as "e-liquid" or "e-juice". Since they don't contain tobacco, sales to minors is not currently prohibited even though, as stated, nicotine is highly addictive and the delivery system is not always consistent about the amount of nicotine it delivers per "puff."

They are sold extensively on-line, and over 100 regional malls have kiosks displaying and selling e-cigarettes, including Oak Park Mall in Overland Park.

The FDA considers e-cigarettes to be a nicotine delivery system subject to its approval. Although their use is currently unrestricted in the United States, in July 2009, the FDA issued a press release discouraging their use and repeating previously stated concerns that electronic cigarettes may be marketed to young people and lack appropriate health warnings. It lists nicotine as a highly addictive substance and expresses concern that by providing flavors that appeal to young people, it will increase their later nicotine and tobacco use. Some experts express concern that the effects of inhaling pure nicotine are not fully known. Shipments are currently being detained at the border pending FDA testing and approval. The agency is currently being challenged in federal court by one of the e-cigarette distributors.

In September 2008, the World Health Organization (WHO) proclaimed that it does not consider the electronic cigarette to be a legitimate smoking cessation aid, and demanded that marketers immediately remove from their materials any suggestions that the WHO considers electronic cigarettes safe and effective. The WHO states that to its knowledge, *"no rigorous, peer-reviewed studies have been conducted showing that the electronic cigarette is a safe and effective nicotine replacement therapy. WHO does not discount the possibility that the electronic cigarette could be useful as a smoking cessation aid."* WHO Tobacco Free Initiative director ad interim Douglas Bettcher states, *"If the marketers of the electronic cigarette want to help smokers quit, then they need to conduct clinical studies and toxicity analyses and operate within the proper regulatory framework. Until they do that, WHO cannot consider the electronic cigarette to be an appropriate nicotine replacement therapy…"*

The Electronic Cigarette Association (ECA) tells its members that it cannot make health claims, cannot sell to minors, and they should not make smoking cessation claims. "*We do not market it as a smoking cessation device or healthy alternative. We market it as an alternative to smoking tobacco that kills 500,000 people a year"* ECA President Matt Salmon said. Several major brands are eliminating the flavors and making distributors sign a contract pledging not to sell or market to minors. Childproof packaging is currently used in Europe and expected to come to the U.S. in 2010.

They are currently banned in Australia, Brazil, Canada, and Panama. Several other countries restrict advertising or require a prescription. New Zealand has deemed them to be safe, but still restricts advertising. Legislation and public health studies are under way in several countries. In Britain, where they are unrestricted, they are called "Electro Fags." In Oregon, the attorney general filed a lawsuit against e-cigarette distributor, Smoking Everywhere, alleging the company made false claims about its product. In California, Governor Schwarzenegger vetoed a bill to ban e-cigarettes. Suffolk County New York passed a bill in August 2009 that subjects e-cigarettes to the same restrictions as regular cigarettes. Likewise, in December 2009, New Jersey passed a bill restricting their sale and extending the ban on smoking by minors to include e-cigarettes.

# Court Watch

(Continued from page 5)

**ONCE OFFICER SEIZES PURSE OR CIGARETTE PACK OUT OF CONCERN FOR HIS SAFETY, ABSENT SOME OTHER INDEPENDENT SUSPICION, HE CANNOT OPEN THE PURSE OR CIGARETTE PACK AND EXAMINE ITS CONTENTS**

Landlord reports a burglary. He tells police there is a female in an apartment from which he has evicted the occupant. Officers arrive, guns drawn, to the unlocked apartment. Inside, they find two females who are packing up boxes. One is the girlfriend of the former occupant and the landlord confirms this. She tells the officers that her boyfriend was not evicted, he was simply asked to leave and she was finishing up the packing for him since he was in jail. Landlord confirms that he did not actually evict the boyfriend.

Girlfriend, Vicki Johnson, asks if she can get a cigarette from her purse, which is beyond her reach. The officer tells her she cannot, because of his concern for his safety. However, she retrieves the cigarette pack anyway. The officer then either grabbed the pack and looked inside, or looked in her purse, place the cigarette pack on top of the purse and then looked in the pack. He testified it was his experience that prostitutes or people involved in drugs often carry a razor blade or an Exacto knife in a cigarette pack. However, he testified that he had no reason to believe that Ms. Johnson was a prostitute or drug user. He found a glass crack cocaine pipe in the cigarette pack. He then searched the rest of her purse and found cocaine in a pill bottle.

In *State v. Johnson*, ___Kan.App.2d ___(October 9, 2009), Ms. Johnson argued the district court should have suppressed the contents of the cigarette pack and purse on the basis that the officer had no basis to search them. The Kansas Court of Appeals agreed although it admits it is a "close call."

It found that up to the point of the search, there was no indication that the defendant was armed or dangerous. Her story to the police was confirmed by the landlord. She did ignore his directive not to touch her purse. However, the entire encounter "arguably occurred in close quarters and fairly rapidly." Based on this, the officer did have sufficient suspicion to take *some* action, but his actions exceeded the permissible scope of an officer safety search.

The retrieval of the cigarette pack was the functional equivalent to her retrieval and possession of her purse. Once a purse is no longer in the owners possession, a protective search of the inside of the purse is not justified pursuant to *Terry*. Once the purse, or in this case the pack of cigarettes, was seized, there was no more basis for the officer to fear for his safety.

Judge Hill wrote a dissent in which he stated:

*"The majority concludes, after the fact, that since Officer Tucker had not suspected Johnson was involved in the drug trade before he seized the cigarette pack, the search of the cigarette pack was impermissible since it was no longer in her control. Does that mean that an officer can lawfully seize a container for his or her protection but then not examine its contents to discover if there is indeed danger? If that indeed is the rule, I pray the container has no exploding device."*

**SELF-DEFENSE INSTRUCTION IS NOT WARRANTED UNLESS THE DEFENDANT HAS USED ACTUAL PHYSICAL FORCE TO DEFEND HIMSELF**

Brother and sister got into a heated argument in mother's hospital room. Although the argument involved pushing paper at each other and loud cussing, neither sibling used actual physical force. At one point, the brother allegedly pulled a knife on his sister and threatened to kill her if she returned to their mother's home. He testified that he did this because she was so close to him and "in his face" that he was afraid she was going to hit him. He was charged with criminal threat and aggravated assault. He asked for a self-defense instruction, but the district court denied the request . After his conviction, he appealed to the Court of Appeals which held that as a matter of law the brother was not entitled to a self-defense instruction because no physical force was used. The Kansas Supreme Court agreed in *State v. Hendrix*, ___Kan. ___ (October 23, 2009).

The statute in question, K.S.A. §22-3211 states:

*"A person **is justified in the use of force** against an aggressor when and to the extent it appears to him and he reasonable believes that such conduct is necessary to defend himself or another against such aggressor's use of unlawful force."*

The Court found the statute is clear. If Hendrix had actually used force against his sister, he could get a self-defense instruction, but since he just threatened her with the use of force, the instruction is not available. This ruling is required, the Court opined, by the plain language of the statute.

Justice Davis wrote a lengthy dissent, which Justice Luckert joined in, chiding the majority for the absurdity of this result.

"*Consider the following example: One evening, a large man approaches a woman in a menacing manner and threatens, "I'm going to hurt you!" Worried for her life, the woman takes a gun from her purse, points it at her assailant, and says, "Stay where you are!" The assailant turns and runs. Assume for the sake of the example that the woman is subsequently charged with aggravated assault. While she successfully repelled her attacker with constructive force, she is not entitled to a self-defense instruction according to the majority opinion. Had she actually shot her assailant, she may very well have been entitled to that instruction under that same rationale. This bizarre result cannot have been intended by*

(Continued on page 8)

# Court Watch

(Continued from page 7)

*the legislature in its enactment of K.S.A. 21-3211...the majority assumes that the term "force" includes only "physical force…" This interpretation is not based on the plain language of the statute, as [the statute] is silent as to what types of force it encompasses. The generic term "force" may include both "actual force"—that is, physical force—and "constructive force"—that is, the threat of actual force. See Black's Law Dictionary... Statutes should be interpreted in a reasonable manner as long as such interpretation is consistent a statute's plain language...I would conclude that the legislature intended to include constructive force within its definition of self-defense. Thus, in the hypothetical example ...I would conclude that the woman's use of force to repel her assailant by pointing the gun fits the legislature's definition of self-defense."*

**KANSAS SUPREME COURT WEIGHS IN ON ADMISSION OF LAB RESULTS IN COMPLIANCE WITH THE CONFRONTATION CLAUSE**

In June, 2009, the U.S. Supreme Court entered its decision in *Melendez-Diaz v. Massachusetts*, ___U.S. ____ (2009) finding that in order to admit lab reports in drug cases live testimony from the analyst must be presented in order to comply with the defendant's constitutional right to confront the witnesses.

In *State v. Laturner*, 38 Kan.App.2d 193 (2007), the Kansas Court of Appeals made a similar ruling and held the Kansas notice and demand statute (K.S.A. §22-3437) unconstitutional as it relates to criminal cases. The Kansas Supreme Court accepted an appeal in *Laturner*, but stayed its decision pending the outcome of the *Melendez-Dias* case. That case having been decided, the Supreme Court has now spoken on the issue by ruling in the *Laturner* case. *State v. Laturner*, ___Kan. ___ (October 9, 2009).

The Court made several important rulings:

1. The Court held that in any case in which the right of confrontation arises under the Sixth Amendment, live testimony from the lab analyst is necessary, unless the analyst is unavailable and the defendant has had a prior opportunity to cross-examine him or her.
2. It overruled *State v. Crow*, 266 Kan. 690 (1999), which found K.S.A §22-3437 to be constitutional.
3. It found parts of K.S.A. §22-3437 to be unconstitutional and severed the offending provisions. Particularly, it found that the requirement that the defendant state the grounds for his objection to any proffered certification and that said objection meet certain listed standards, was to onerous a burden on the defendant's Confrontation Clause rights. Therefore, those provisions were unconstitutional as applied to a criminal case.

The "new" statute reads:

*Whenever a party intends to proffer in a criminal or civil proceeding, a certificate executed pursuant to this section, notice of an intent to proffer that certificate and the reports relating to the analysis in question, including a copy of the certificate, shall be conveyed to the opposing party or parties at least 20 days before the beginning of a hearing where the proffer will be used. An opposing party who intends to object to the admission into evidence of a certificate shall give notice of objection and the ground for the objection within 10 days upon receiving the adversary's notice of intent to proffer the certificate. A failure to comply with the time limitations regarding the notice of objection required by this section shall constitute a waiver of any objections to the admission of the certificate. The time limitations set forth in this section may be extended upon a showing of good cause.*

**TRAUMATIC BRAIN INJURY ≠ MENTAL ILLNESS SUBJECTING A DEFENDANT TO INVOLUNTARY COMMITTMENT**

*"We begin by describing the path which must be traversed to comport with the statutes governing a defendant's competency to stand trial, albeit with the knowledge that our journey will dead end at the edge of a precipice which only the legislature can bridge."*

So begins Justice Johnson's opinion in *State v. Johnson*, ___Kan. ___ (October 30, 2009).

This case involved a collision that Shawn Johnson caused, while he was intoxicated, that resulted in his car colliding with a tree and killing his passenger. Johnson was hospitalized with severe injuries, including a traumatic brain injury. He was charged with involuntary manslaughter and the case began a tortuous path to determine his competency to stand trial and assist in his own defense. Competing psychological reports were submitted, but the trial court held that the one that was most credible found that although Johnson could understand the nature and purpose of the criminal proceedings against him, he would be unable to make or assist in making his defense due to his severe deficits in memory, nonverbal memory, sensory-perception and processing speed that resulted from his traumatic brain injury. The Court ultimately dismissed the charges.

K.S.A. §22-3303(1) states that a person is incompetent to stand trial when he is charged with a crime and, because of mental illness **or** mental defect is unable to understand the nature and purpose of the proceedings against him **or** to make or assist in making his defense. Johnson claims, based on the psychological report that he has a mental defect that prevents him from assisting in his own defense. The defendant, his attorney, the prosecutor or the judge can *sua sponte*

(Continued on page 9)

# Court Watch

(Continued from page 8)

raise the issue of competency at any time between the filing of the charging document and the pronouncement of sentence. If the judge has reason to believe the defendant is incompetent, the criminal proceedings are suspended and a hearing is held. If found to be competent, the criminal proceedings resume. The problem in the *Johnson* case arises if the defendant is found to be incompetent.

If the court finds the defendant to be incompetent to stand trial, the defendant must be committed to a state hospital for up to 90 days for evaluation and treatment. The facility is to determine if there is a reasonable likelihood that the defendant will attain competency in the foreseeable future. If there is such a likelihood, he stays in the institution for 6 more months or until he becomes competent, whichever occurs first. If there is no likelihood that he will become competent, the court is required to order the Secretary of SRS to commence involuntary commitment proceedings. However, based on fairly recent legislative changes, Johnson did not fit the statutory definition of a "mentally ill person subject to involuntary commitment." The definition of a "mentally ill person subject to involuntary commitment" was amended to specifically exclude persons with an organic brain disorder (like Johnson). *See,* K.S.A. §59-2946(f)(1). So, the order for SRS to commence involuntary commitment proceedings was a futile act.

K.S.A. §22-3303(3) does allow the court to revisit any determination of incompetency to determine if there has been a change in status. The district judge did so in this case and found that due to the fact that the effects of the trauma are "permanent and irreversible" the passage of time is not a reasonable ground to believe the defendant is competent and denied the State's motion for to revisit Johnson's competency. The Kansas Supreme Court found the district judge was correct and the charges remain dismissed. It overruled the unpublished Court of Appeal opinions and chastised the Court for not fully comprehending the issues and ordering the district court to follow through with a clearly futile act.

### MANDATORY MINIMUM FINES DO NOT REQUIRE AN EXAMINATION OF THE DEFENDANT'S FINANCIAL SITUATION

After an in-depth analysis of when the word "shall" is interpreted to be mandatory and when it is directory, (*see,* pg. 20, *supra*) the Kansas Supreme Court held in *State v. Raschke*, ___Kan. ___ (October 30, 3009) that although the concept of inflexible mandatory minimum fines is *"incompatible with the malleability inherently injected into fine setting by the consideration of defendant's financial circumstances,"* unless the legislature amends K.S.A. §21-4607(3) (which requires consideration of financial resources when assessing fines) to override mandatory fine provisions, financial resources do not need to be examined for imposing such mandatory minimums (in this case, the forgery statute mandatory minimums).

### *"YOU HAVE A BOMB IN THE PLANT. GET EVERYONE OUT"* = THREAT, NOT GOOD SAMARITAN WARNING

Ruben Rivera, a disgruntled former employee, called the Johns-Manville fiberglass insulation plant in McPherson and told the crew chief who answered the phone, *"You have a bomb in the plant. Get everyone out."* Then he hung up. The building was evacuated. No bomb was found.

In *State v. Rivera*, ___Kan.App.2d___(November 6, 2009), the defendant argued that this did not violate the criminal threat statute. K.S.A. §21-3419a defines a criminal threat is any threat to *"[c]ommit violence communicated with intent to terrorize another, or to cause the evacuation of a building."* The defendant claimed that his statement was simply a *"warning of an existing state,"* not a threat. He argued to be a threat it must include some forecast of future violence or criminal action, such as *"I will detonate a bomb"* or *"I am going to cause an explosion."* He was just being a Good Samaritan and warning the plant of a bomb.

The Kansas Court of Appeals did not buy it. *"It takes no stretch of the imagination to understand the caller's intent: by stating that a bomb was inside the plant and that everyone should get out, he made an innuendo or suggestion that he would make the bomb explode."* The Kansas Supreme Court had already held in a threat does not have to be in any particular form or use any particular words. It may be by innuendo or suggestion. Rivera's conviction stands.

### DRIVING BEHAVIOR, EVEN THOUGH NOT IN VIOLATION OF TRAFFIC LAWS, MAY STILL AROUSE REASONABLE SUSPICION FOR A TRAFFIC STOP

Lorenzo Knight was driving southbound on I-35 at 11:24 p.m. on a typical summer evening. The car crossed approximately 3 feet over the line separating the left lane of the highway from the shoulder. He weaved within his lane 2-3 times. He then crossed 1 foot over the dotted line on the right side of the lane. He was stopped by a police officer for violation of K.S.A §8-1522 (STO §46), failure to maintain a single lane. The officer eventually found a gun his car. Knight moved to suppress the evidence on the basis that the officer had no basis to stop his car.

In *State v. Knight*, ___Kan.App.2d___(November 6, 2009), the Court of Appeals examined in the facts in light of *State v. Marx*, 289 Kan. ___ (2009) (*See*, *Verdict*, Fall 2009, p. 16). In that case, the Supreme Court held that the prosecution is required to present evidence that it was practicable to maintain a single lane of travel (to wit: no obstructions in the roadway or weather conditions that would make maintaining a single lane impracticable).

(Continued on page 10)

# Court Watch

(Continued from page 9)

This is another example of "negative proof", wrote Judge Green. Negative proof in this case requires the prosecution to show the absence of any other possibility other than the claim that Knight violated the single lane rule. In this case, the prosecution failed to present evidence that it was unsafe for Knight to leave his lane of travel and failed to show that he failed to maintain his lane despite the fact that it was practicable for him to do so.

However, the prosecution argued that irrespective of a traffic violation, the officer's observations could furnish reasonable suspicion to justify a traffic stop. The officer's decision to stop was based on the time of day and the driving. These same factors have supported reasonable suspicion in other cases, irrespective of a traffic violation, the prosecution argued. The Court of Appeals agreed and found that the officer had an independent basis for reasonable suspicion other than the K.S.A. §8-1522 violation. The officer stated that he suspected the driver was either intoxicated or sleepy. The officer was justified in stopping the vehicle to investigate the defendant's possible intoxication.

**SUPREMES OVERRULE COURT OF APPEALS IN *MORLOCK*; TRAVEL QUESTIONS ARE PERMISSIBLE IN CONJUNCTION WITH TRAFFIC STOP**

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

In *State v. Morlock*, 40 Kan.App.2d 216 (2008), the Kansas Court of Appeals suppressed the evidence finding that the officer's questioning exceeded the scope of the stop and the consent was not separated enough in time to purge the taint of the illegally prolonged stop. Judge Leben wrote a lengthy dissent. *See*, the *Verdict*, Fall 2008, p. 7.

In *State v. Morlock*, ___Kan. ___(November 6, 2009), the Kansas Supreme Court reversed the Kansas Court of Appeals and adopted the rationale in Judge Leben's dissent. It found that an officer's inquiries into matters unrelated to the justification for the stop do not convert the encounter into something other than a lawful seizure, so long as those inquires do not measurably extend the duration of the stop. An officer is not required to disregard information which may lead him or her to suspect independent criminal activity during a traffic stop. If the responses of the detainee and the circumstances give rise to suspicions unrelated to the traffic offense, an officer may broaden the inquiry and satisfy those suspicions, graduating his or her responses to the demands of the situation. In this case, the questions did not measurably extend the stop. Many of them were asked while the detainees were searching for the rental agreement, which was a legitimate request as part of the traffic stop. The officer was entitled to follow up on suspicious answers.

**MUST OBJECT TO INTENT TO PROFFER LAB REPORT WITHIN 10 DAYS OF RECEIPT OR OBJECTION IS WAIVED AND REPORT IS ADMITTED**

In a possession of drugs case, the prosecution notified the defendant, pursuant to K.S.A. §22-3437(3) of its intent to use a lab report at trial in lieu of live testimony. The defendant did not object until 6 months later, 2 days prior to trial. The lab report was admitted during trial without the KBI analyst to testify about its contents.

In *State v. Murphy*, ___Kan.App.2d ___(November 13, 2009), the defendant argued that his right to confrontation had been violated pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004). The Kansas Court of Appeals held that, based on the Kansas Supreme Court decision in *State v. Laturner*, 289 Kan. ___ (October 9, 2009), see pg. 8, *supra*, and reading the statute as finalized by the Supreme Court, the defendant was required to object to the admission of the report within 10 days of receiving the notice of intent to proffer. His failure to do so constituted waiver.

**PROSECUTOR CANNOT COMMENT DIRECTLY OR INDIRECTLY UPON A DEFENDANT'S SILENCE**

Martye Madkins chose not to testify in his cocaine possession trial. He was a passenger in a car in which the driver was being stopped for an outstanding felony warrant. The allegation was that Madkins threw cocaine out the window as the police closed in on them. During closing statements the prosecutor made the following comment:

*"What you basically have, are two officers who were trying to arrest Kalvin Dotson for an outstanding federal warrant. You have no evidence to contradict that."* Later she said, *"And you've been provided absolutely no evidence today which would lead you to believe that the officers had some type of motive to fabricate this story."*

The defense objected and the judge intervened and advised the jury that the defendant is not required to testify and has no burden to prove his innocence. Notwithstanding this, the

(Continued on page 11)

# Court Watch

(Continued from page 10)

prosecutor proceeded to make the following statements during closing:

●"*There's been no evidence to suggest that Mr. Dotson gave anything to Mr. Madkins."*

●"*There hasn't been any testimony or any evidence by the State's witnesses to suggest, you know, that somebody else happened to be there or, you know, there's some other logical explanation but for what the officers testified, and [that] the defendant threw out a bag of cocaine out the window"*

●*"There has been absolutely no testimony except for—no evidence except for the lack of baggies and scales, to contradict the State's evidence that the defendant possesed this with the intent to sell."*

●*"You don't have anything to contradict these two officers' testimony."*

In *State v. Madkins*, ___Kan.App.2d ___ (November 20, 2009), the Court of Appeals held that prosecutor's comments were clearly improper, commenting on the defendant's failure to present evidence, which was his constitutional right. In addition, it found that the comments were, "at the very least" flagrant due to their repetitive nature particularly in light of the judge's admonition to the jury. However, under the facts of this case, the Court found them to be harmless.

**SCIENTIFIC DATA RELIED ON BY LAB ANALYSTS IS NONTESTIMONIAL THEREFORE DOES NOT IMPLICATE THE CONFRONTATION CLAUSE**

In a murder trial, the forensic scientist from the crime lab testified regarding the analysis of the DNA recovered from the crime scene. Once the DNA is obtained she enters the result into a national database and software connected with the database analyzes how rare or common that particular DNA profile is in the general population. In the particular case at bar, she testified that the blood recovered was consistent with that of the defendant and *"the probability of selecting an unrelated individual at random from the population whose DNA would match that DNA profile was 1 in 14.44 billion."* Blood consistent from the defendant's was also recovered from another spot at the crime scene and the chances of selecting someone else in the population other than the defendant to match the DNA profile was *"1 in 2 quadrillion."*

The defendant argued that the admission of this statistical probability evidence (called "population frequency databases") by anyone who was not an expert in that field, violated his right of confrontation.

In *State v. Appleby*, ___Kan. ___ (November 20, 2009), the Kansas Supreme Court held that population frequency data and the statistical programs used to make that data meaningful are nontestimonial. It noted that DNA itself is physical evidence and is nontestimonial. Thus, placing this physical evidence in a database with other physical evidence (other DNA profiles) does not convert the nature of the evidence. The acts of writing computer programs that allow a comparison of samples of physical evidence or that calculate probabilities of a particular sample occurring in a defined population are nontestimonial actions.

*"In other words, neither the database nor the statistical program are functionally identical to live, in-court testimony, doing what a witness does on direct examination. Rather, it is the expert's opinion, which is subjected to cross-examination, that is testimonial...several courts have reasoned that the Confrontation Clause is not violated if materials that form the basis of an expert's opinion are not submitted for the truth of their contents but are examined to assess the weight of the expert's opinion...Here...the database and the statistical program are accepted sources of information generally relied on by DNA experts. Based on this scientific data—which by itself is nontestimonial—the experts in this case developed their personal opinions...These experts were available for cross-examination and their opinions could be tested by inquiry into their knowledge or lack of knowledge regarding the data that formed the basis for their opinion. Consequently, the right to confront the witness was made available to Appleby."*

**BATTLE OF THE FIFTH V. THE SIXTH AMENDMENT REQUESTS FOR COUNSEL**

Kansas officers suspected a Connecticut man, Benjamin Appleby, of murder in Kansas. Appleby had warrant for his arrest in Connecticut for unrelated charges in Connecticut. Kansas detectives went to Connecticut to question Appleby. Connecticut detectives agreed to help Kansas officers by arresting Appleby at his home on the Connecticut warrant. They also assisted Kansas in getting a search warrant for his house and a mouth swab warrant for his DNA. All went as planned. Appleby was transported to the Connecticut police station. At this point, he knew nothing about the Kansas detectives' involvement or presence in another room. As far as he knew, this was only about the Connecticut warrant.

As the detectives began the booking process, Appleby asked (before being *Mirandized*) "if he was going to have an opportunity to talk to an attorney." The detectives replied, "Absolutely." He was read a notice of rights which listed the Connecticut charges he was arrested on. This form stated, "You may consult with an attorney before being questioned; you may have an attorney present during questioning, and you cannot be questioned without your consent." He signed the acknowledgment of rights form (it was not a waiver form).

(Continued on page 12)

# Court Watch

(Continued from page 11)

Next, Appleby was served with the DNA swab warrant. He asked if he could speak with an attorney regarding his right to refuse the mouth swab. He was told he did not have the right to refuse the swab, but he would be given an opportunity, at some point, to call an attorney after they were finished with the booking process. At least two more times Appleby asked if he would have an opportunity to speak with an attorney. He was advised that he wasn't being questioned at this time. And he wasn't, except for routine booking questions. After the Connecticut officers finished their booking process, they told Appleby that some detectives wanted to talk to him about an "unrelated matter." They asked if he was willing to speak with them. He agreed and went into a room with the waiting Kansas detectives.

He learned for the first time they wanted to talk to him about the Kansas murder. He told the Kansas detectives he wanted to speak with them and straighten out some details regarding his interview in Kansas some months earlier. He was told that he would be read his *Miranda* rights again because they were interviewing him "on a different charge from what he was arrested." He was *Mirandized* and agreed to answer questions. . After about an hour and a half, he confessed to the murder. At no time while he was with the Kansas detectives did he ask to speak with an attorney.

In *State v. Appleby*, ___ Kan. ___ (November 20, 2009), Appleby argued his confession should be suppressed because he asked for an attorney prior to his mouth being swabbed. The Kansas Supreme Court discussed the difference between the Sixth Amendment right to counsel and the Fifth Amendment right to counsel.

The Court held that the Sixth Amendment right to counsel *("In all criminal prosecutions the accused shall…have the assistance of counsel for his defense.")* is offense-specific and cannot be invoked once for all future prosecutions. As a result, the assertion of Sixth Amendment rights in one case does not prevent the admission of incriminating statements pertaining to other crimes to which the Sixth Amendment right has not yet attached. When does the right "attach?" According to the U.S. Supreme Court it attaches on the filing of formal charges, on arraignment, or on arrest on a warrant and arraignment thereon. *See*, *Brewer v. Williams*, 430 U.S. 387 (1977). In this case, even if his Sixth Amendment right to counsel had attached in the Connecticut case, it had not attached in the Kansas case. He hadn't even been questioned yet for that case when he inquired about when he would be able to talk to an attorney.

On the other hand, the Fifth Amendment right to counsel *("No person shall be … shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law*), is not offense-specific. Once a suspect invokes his Fifth Amendment right to counsel on one case, he may not be reapproached regarding any offense unless counsel is present. However, the Fifth Amendment right to counsel "attaches" when the accused is subjected to or will be imminently subjected to a custodial interrogation. The accused must be requesting the assistance of counsel in dealing with a custodial interrogation by law enforcement officers. The court must examine the timing, as well as the context and content of any request for counsel to determine whether an accused has unambiguously asserted said right.

In this case, Appleby was not questioned by the Connecticut police. He was only asked routine booking questions which have been found not to implicate *Miranda.* At the time he made his inquiries regarding counsel he only knew about the Connecticut case. The Connecticut detective actually told Appleby that he would not be questioning him about the case. Therefore, interrogation was not clearly imminent or impending in the Connecticut case and his inquiry regarding whether he would have a chance to talk to an attorney was not a clear and unambiguous declaration of said right. It was more a question about the process. Appleby clearly waived his Fifth Amendment rights prior to the only interrogation that took place, the Kansas interrogation.

*See*, pg. 16 *supra* for a portion of Justice Johnson's dissent on this issue.

**MOBILITY OF CAR PROVIDES EXIGENT CIRCUMSTANCES NECESSARY FOR WARRANTLESS SEARCH**

It was undisputed that officers had developed probable cause to believe that Dinah Sanchez-Loredo was involved in a methamphetamine-distribution network and that she was transporting illegal drugs in her car on the date she was stopped. Officers followed her vehicle until she entered their county and then stopped the car. No traffic violations were witnessed. They called a drug sniffing dog to the scene. It failed to alert on the car. They detained her for slightly over an hour while they obtained a warrant to search the car. They found one pound of methamphetamine.

The district court judge found that the officers had probable cause to search the vehicle, but that there were no exigent circumstances to justify the stop. If there had been, the district judge opined, the officers would have stopped the vehicle right away instead of following it for several hours until it entered their county.

In *State v. Sanchez-Loredo*, ___Kan.App.2d ___(November 25, 2009), the Court of Appeals held that the fact that the contraband was believed to be in a car was enough exigent circumstance.

A search without a warrant is allowed when probable cause is combined with exigent circumstances; in the case of potential evidence in a car, the mobility of the car provides the exigent circumstances. Thus, all that is required to search a vehicle under the automobile exception is probable cause to believe

(Continued on page 13)

# Court Watch

(Continued from page 12)

there is evidence of a crime in the vehicle. To stop a car, officers only have to have reasonable suspicion that the driver is committing, has committed, or is about to commit a crime, in this case transporting drugs.

The Court of Appeals found that the officers could have searched the car upon stopping it, without waiting for the warrant because they had probable cause to believe drugs were inside. Failure of the drug dog to alert to possible contraband did not eliminate the probable cause that the facts in the case had already supported. Finally, the fact that they detained the car to obtain a warrant was reasonable and did not violate the defendant's constitutional rights.

**GRATUITOUS INFORMATION REGARDING IMPLIED CONSENT ADVISORY, HARMLESS ERROR ANALYSIS**

Commercial driver was stopped for DUI in his private car. Police officer gave the correct implied consent advisory. We know from prior cases that when a commercial driver is stopped for DUI in a non-commercial vehicle, the police are not required to advise the driver of the impact on his or her commercial driver's license. However, in this case the driver asked and the officer responded that it would have the same effect on the CDL as it has on his regular driver's license (to wit: refusal = 2 year suspension and failure = one year suspension). In actuality, whether he took the test or not, as a second time DUI offender, he was going to loose his CDL for life. In other words, the officer gratuitously gave erroneous information to the driver.

The Kansas Court of Appeals in *Cuthbertson v. Kansas Dept. of Revenue*, ___ Kan.App.2d ___ (December 4, 2009), the driver appealed the lifetime suspension. The Court held that there are situations in which an officer's provision of erroneous information, particularly mandatory information, may result in the reversal of an administrative suspension or may result in suppression of breath test results.

It went on to hold that if an officer gives ***gratuitous*** information concerning **non-mandated** notices, as here, the information must be correct. However, if it is not correct, the Court is going to examine whether the driver has been prejudiced by the error. In this case, whether the driver took the test or not, the result to his commercial driver's license was going to be the same: lifetime suspension. Therefore, he was not prejudiced by the "non-mandated, erroneous" information. The collateral consequence of lifetime suspension was not the result of the driver being misinformed, but the result of his violation of the law. His administrative suspension stands.

**JUVENILE ADJUDICATIONS ≠ PRIOR CONVICTIONS UNLESS STATUTE SO PROVIDES**

If a person is adjudicated in juvenile court, that adjudication cannot be counted as a prior conviction in a subsequent sentencing under the adult criminal code, unless the statue specifically states that "adjudications" are included as well as convictions.

**EMERGENCY AID EXCEPTION TO THE WARRANT REQUIREMENT**

Officers responded to a complaint about a "crazy man" in a house. When they arrived on the scene they observed a damaged pick-up truck in the driveway, a damaged fence, three broken house windows, blood stains on the front of the truck and bloodied clothing outside the house. As the officers approached they could see the defendant inside the house screaming and throwing things around. The defendant had locked the back door and placed a couch in front of the front door to prevent entry. At the door, the officers noticed that the defendant's hand was bleeding and asked him if he needed medical attention and asked him to let them in. He responded that he was fine and he demanded that they get a search warrant if they wanted to enter his house. They entered the house by force and observed the defendant pointing a gun at them. He was arrested for assault with a dangerous weapon.

The Michigan Court of Appeals held that the officers actions were not justifiable. They concluded that a few drops of blood did not validate a serious, life-threatening injury and since the defendant was upright and conscience, he could have tended to his own needs. The officers were not concerned enough to call an ambulance, in fact they actually left the scene for several hours before returning. The defendant's motion to suppress was granted.

The U.S. Supreme Court, in a per curium decision, with Justice Stevens and Justice Sotomayor dissenting, held that the Michigan appellate court was wrong. *See*, *Michigan v. Fisher*, 358 U.S. ____ (December 7, 2009).

*"A straightforward application of the emergency aid exception...dictates that the officer's entry was reasonable. ..[T]he police officers here were responding to a report of a disturbance. ..[W]hen they arrived on the scene they encountered a tumultuous situation in the house—and here they also found signs of recent injury, perhaps from a car accident outside. ..[T]he officers could see violent behavior inside. Although [they]...did not see punches thrown...they did see Fisher screaming and throwing things. It would be objectively reasonable to believe that Fisher's projectiles might have a human target (perhaps a spouse or a child), or that Fisher would hurt himself in the course of his rage…*

*Officers do not need ironclad proof of 'a likely serious, life-threatening' injury to invoke the emergency aid exception…[the fact that they did not summon medical assistance] would have no bearing, of course, upon their need to assure that Fisher was not endangering someone else in the house. Moreover, even if*

(Continued on page 14)

# Court Watch

(Continued from page 13)

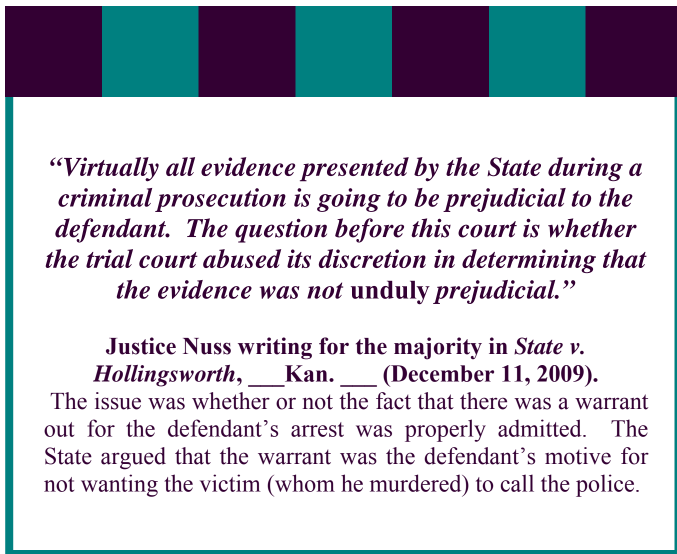
*the failure to summon medical personnel conclusively established that [the officer] did not subjectively believe, when he entered the house, that Fisher or someone else was seriously injured (which is doubtful),* ***the test, as we have said, is not what [the officer] believed, but whether there was an 'objectively reasonable basis for believing' that medical assistance was needed, or persons were in danger'…***

*It does not meet the needs of law enforcement or the demands of public safety to require officers to walk away from a situation like the one they encountered here. Only when an apparent threat has become an actual harm can officers rule out innocuous explanations for ominous circumstances. But [t]he role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties."*

The dissenters would have deferred to the factual findings of the trial judge, who heard the testimony, as to the reasonableness of the officers actions.

### USE OF CRACK COCAINE BY COUNSEL DOES NOT ESTABLISH INEFFECTIVE ASSISTANCE *PER SE*

Pursuant to a plea agreement, Cheron Johnson pled no contest to first-degree premeditated murder and aggravated robbery. It was undisputed that Johnson's defense attorney was using crack cocaine several times a week during the period of time he was representing Johnson. In *Johnson v. State*, ___Kan.App.2d ___(December 11, 1009), he attempted to have his plea set aside due to ineffective assistance of counsel, based on counsel's drug use. (The attorney was subsequently indefinitely suspended from the practice of law for using cocaine while on probation).
In spite of his drug use, all involved in the case (except the defendant of course) indicated that the attorney appeared competent throughout. He was in court when he was supposed to be, he returned phone calls, he appeared to be well-versed in the case. He met with the prosecutor to go over the evidence, he met with the defendant and his family. The Court noted that Johnson's co-defendant received an identical plea agreement without the crack-smoking attorney. The judge appropriately took the plea, with all the necessary advisories, and the defendant did not express any concerns at the time. He stated on the record that he was not threatened nor promised anything to enter the plea and he had no misgivings about his representation.



***"Virtually all evidence presented by the State during a criminal prosecution is going to be prejudicial to the defendant. The question before this court is whether the trial court abused its discretion in determining that the evidence was not* unduly *prejudicial."***

**Justice Nuss writing for the majority in *State v. Hollingsworth*, ___Kan. ___ (December 11, 2009).**
The issue was whether or not the fact that there was a warrant out for the defendant's arrest was properly admitted. The State argued that the warrant was the defendant's motive for not wanting the victim (whom he murdered) to call the police.

The Kansas Court of Appeals held that in order to succeed on an ineffective assistance of counsel claim, the defendant must show that (1) counsel's performance fell below the standard of reasonableness and (2) a reasonable probability exists that, but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial. A defense attorney's use of drugs or alcohol does not establish ineffective assistance of counsel *per se*. The issue is: was counsel's performance deficient and did that deficiency prejudice the defendant?

In this case, Johnson failed to meet his burden to show counsel's performance was deficient and even if it was, that he was prejudiced thereby.

### EVIDENCE OF PRIOR BAD ACTS TO PROVE INTENT IS INADMISSIBLE IF DEFENDANT DENIES COMMITTING THE ALLEGED ACTS

When a defendant wholly denies committing the acts alleged, admitting evidence of prior bad acts to show his intent is error. The defendant must have asserted an innocent explanation before intent will be considered a disputed material issue. If the defendant denies the incident ever took place, intent is not a material issue.

In *State v. Wells*, ___Kan. ___ (December 11, 1009), the Court found it was error to admit evidence in an aggravated criminal sodomy case that the defendant had tried to remove the victim's and the victim's sister's pajama bottoms on prior occasions. Wells denied that he ever touched the girl, not that there was an innocent explanation for his touching. Therefore, intent was not a disputed material fact and as a consequence, prior bad act evidence was inadmissible. The Court found that there was a reasonable likelihood that the improperly admitted evidence created an unfair inference that Wells had a propensity to commit the crime for which he was charged. His conviction was reversed.

### "DRIVING LEFT OF CENTER" COMPARED TO "FAILURE TO MAINTAIN A SINGLE LANE"

Officer saw defendant's vehicle cross the center line on the highway and then return to its lane. He stopped the vehicle for driving left of center in violation of K.S.A. §8-1514 (STO

(Continued on page 15)

# Court Watch

(Continued from page 14)

§38). He subsequently charged him with DUI and driving on a suspended license.

Prior to trial, the defendant filed a motion to suppress on the basis that the officer lacked reasonable suspicion for a traffic stop. The district court granted the motion finding that a one-time drifting across the lane does not give the officer sufficient reason to stop the vehicle. The court relied on *State v. Ross*, 37 Kan.App.2d 126, rev. denied 284 Kan. 950 (2007) which was a "fail to maintain a single lane" case involving K.S.A. §8-1522 (STO §46). K.S.A. §8-1522 requires that a motorist drive as "nearly as practicable" within his lane. Because of this language, the prosecution is required to present evidence that there was no reason for the driver to leave the lane. In addition, *Ross* involved a situation where there were two lanes going one direction and he crossed over the white fog line.

In *State v. Chavez-Zbarra*, ___Kan.App.2d ___(December 11, 2009), the Court of Appeals held that *Ross* and K.S.A. §8-1522 had no application to these facts. The defendant was charged with driving left of center, K.S.A. §8-1514. "Driving left of center" does not contain the same qualifying language as K.S.A. §8-1522. It is an absolute liability offense. The only proof required to convict is that the driver engaged in the prohibited conduct. There was no evidence presented by the defense that any of the statutory exceptions applied. There was no evidence that he was passing any vehicles traveling in the same direction and there was no evidence that there was any obstruction making it necessary for him to drive left of center.

The district court erred in suppressing the evidence.

**WRIT OF MANDAMUS AGAINST JUDGE**

S.M. had several juvenile offender cases in Shawnee County. Following her first appearance, the judge released her on "pre-adjudication supervision" which included an order to attend school with no unexcused absences as a condition of her release. She pled guilty to some charges and others were dismissed. At the sentencing hearing the judge was advised that S.M. had three unexcused absences from school during her supervision. The judge ordered her into detention for 15 days, (pursuant to the Court's policy of 5 days for each unexcused absence) all to be served during school breaks.

The case of *S.M. v. Johnson*, ___Kan. ___ (December 24, 2009) has little application to municipal courts because it involves juvenile detention hearings under the juvenile code, however it is mentioned here because the judge did not follow the appropriate statutory procedure to detain the juvenile. As a result, her attorney filed a writ of mandamus against the

# Court Watch

judge.

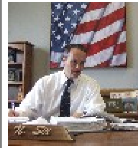
A writ of mandamus is an order by a superior court to order a lower court or government official to perform mandatory duties.

The Court pointed out that ordinarily a judge's discretion cannot be controlled by mandamus. The appropriate action if one is dissatisfied with a judge's ruling, is appeal. However, the Court noted that there are some exceptions: 1) the litigant has no remedy on appeal or could be denied a legal right or privilege by the judge's order; or 2) the petition presents an issue of great public importance.

In this case the Kansas Supreme Court held that even though by the time the case came for hearing, S.M. had served all 15 days, the issue was one that was capable of repetition by this judge or other judges and was of great public importance, therefore the Court's guidance was necessary.

Accordingly, in a somewhat rare move, the Kansas Supreme Court granted the petition for mandamus and directed the judge to follow the appropriate statutory mandates in the future.

# 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.*

**EXECUTIVE SESSIONS FOR EMPLOYEE EVALUATIONS WHEN CITY POLICIES ARE DISCUSSED**
**AG Opinion 2009-21**
*September 23, 2009*

The evaluation of an employee may lawfully take place in a properly called and conducted executive session. To the extent that the employee is being evaluated upon his or her performance relative to a policy or directive adopted by the governing body or agency, such a policy or directive may be discussed only within the context of the employee's performance. At what point discussion moves from permissible discussion to impermissible discussion of the policy itself will depend upon the facts.

The AG quoted from *State v. U.S.D. No. 305*, 13 Kan.App.2d 117 (1988) for recognition of the fact that sometimes two topics may become intertwined, one that is permitted as a topic for discussion in executive session, and the other that is only permissible in an open meeting. The Court held that if segregating discussion of the topics *"would have been burdensome and impractical, if not impossible, due to the common thread of the*

(Continued on page 22)

# Dissent or Tilting at Windmills?

In two cases this quarter, appellate judges took the opportunity to address what they believed to be the complicated and erroneous path that jurisprudence in the criminal arena has taken. First, Judge Green, in his dissent in *State v. Murphy*, ___Kan.App.2d ___(November 13, 2009) questioned the growing use and acceptance of the "Columbo" move.

### "BY THE WAY…DO YOU HAVE ANY DRUGS, ALCOHOL OR WEAPONS IN THE CAR?"

*"The precise question before us his how a reasonable person would interpret the remark, "By the way." Does it signal a need to continue the prior detention or does it indicate a desire to spark up a brand new conversation? "By the way" is an incidental remark thrown in, and tending the same way as the discourse itself." Evan's Brewer's Dictionary of Phrase and Fable 177 (Centenary ed. rev. 1981). I respectfully content that when the phrase is used shortly after a previous conversation, it indicates an afterthought and its common meaning is "and another thing" or "also." To a reasonable person, the use of the phrase after being told one is "free to go" would suggest a need to reengage the prior conversation for an afterthought. It is difficult for me to believe that a reasonable person under the totality of these circumstances would just walk back to his or her vehicle, blowing off the officer's remark, "By the way."*

*Finally, I take this opportunity to question the direction of our jurisprudence in this area. Starting from the proposition that respect for law enforcement is absolutely critical to our democracy, we should be mindful of how our case law may influence civil discourse between our citizens and law enforcement. Our law enforcement officers earn daily the appreciation and respect of all Kansans. An objective examination of the trend of recent decisions, however, might lead our citizenry to think that when encountered by a law enforcement official, they should say as little as possible, answer no questions until commanded to do so, decline any cooperation until commanded otherwise, and terminate the encounter even if walking away may seem quite rude and disrespectful.*

*I would argue that the defendant here demonstrated a healthy respect for law enforcement by his complete cooperation and, ultimately, by his offer of an apology and a handshake. His return for conversation with the officer based solely on the officer's remark, "By the way," was arguably a common courtesy and a further extension of his cooperation rather than ignoring or disrespecting the officer's authority. Based on the majority opinion, however, Murphy's common courtesy led to a forfeiture of his fundamental constitutional rights. It is unfortunate that we have encouraged indifference or disrespect rather than cooperation, given the fundamental need for a respectful attitude toward our law enforcement officers."*

The next case, was Justice Johnson's pointed dissent in *State v. Appleby*, ___Kan. ___ (November 20, 2009).

### DETAINEES SHOULD NOT BE REQUIRED TO POSSESS THE KNOWLEDGE OF CONSTITUTIONAL SCHOLARS AND THE ADULTERATION OF CONCEPT OF PREMEDITATION

*"Beginning with the suppression issue, I first acknowledge the majority's thorough and thoughtful analysis of the more recent post-Miranda decisions. In my view, such a detailed synthesization of the cases is testament to the manner in which appellate courts have worked diligently and creatively to unnecessarily complicate, and thus emasculate, the straightforward directive, pronounced in* Miranda *some 43 years ago and quoted by the majority, that* "a pre-interrogation request for a lawyer ...affirmatively secures [the] right to have one…"

*First, I would not require a detainee to possess the knowledge of a constitutional scholar well-versed in Fifth and Sixth Amendment jurisprudence. Rather, I would view the circumstances from the perspective of an objectively reasonable layperson interacting with an objectively reasonable law enforcement officer. ...*

*In that setting, Appleby asked Detective Jewiss about consulting with an attorney not once, but four times. The trial court found that Appleby had asserted his right to an attorney, albeit perhaps only for Sixth Amendment purposes. ... Without belaboring the point, I would simply submit that one might expect a detainee, who has been confronted in his home by a multitude of armed officers, arrested, and taken to jail, to propound a request for an attorney in a most polite and nonconfrontational manner ...* [and not appreciate the difference between a Sixth and Fifth Amendment request and their attendant ramifications]

*Finally, tilting at one last windmill, I must express my frustration with the complete adulteration of the rather simple concept of premeditation. In my view, that concept was aptly described in a portion of the definition proffered in* State v. Gunby, *282 Kan. 39, Syl. ¶ 9, 144 P.3d 647 (2006), which stated that "[p]remeditation is the process of thinking about a proposed killing before engaging in the homicidal conduct." Unfortunately, that case, and others, have gone further by opining that premeditation does not have to be present before the commencement of a fight, quarrel, or struggle and declaring that manual strangulation is strong evidence of premeditation. . . Apparently, the suggestion is that, even though a killer may commence the homicidal conduct of manual strangulation without having thought over the matter beforehand, he or she may be deemed to have premeditated the killing if there is a possibility that the killer ruminated upon what he or she was doing during the murderous act, but before it actually caused the victim's death. To the contrary, I would find that premeditation, as the very word contemplates, requires that the matter be thought over before commencement of the homicidal conduct, whether the killing method be shooting, stabbing, strangulation, or some other means.*

# A Step Back in Time

*(Continued from page 1)*

were quickly rebuffed by the legislature).

Violation of the law or of any Board regulation would carry a $25 for a first offense and up to $500 (over $11,000 in today's dollars) for each succeeding offense and up to 30 days in jail. Each day the uncensored film was shown constituted a separate offense.

The Board had three members each appointed by the Governor. The Chair received a salary of $2,400 per year and each other member $2,100 per year (about $54,000 in today's dollars). Over the years, the majority of Board members were middle-aged, married, women who had been supporters of the Governor, usually precinct committee leaders. Most lived in the northwest quadrant of the state. Rarely were men appointed as inspectors. In the beginning, an appeal of the Board's decision could be taken to a panel made up of the governor, the attorney general, and the secretary of state. This option was later deleted, requiring an appeal to go directly to the court system.

The Board was one of only seven such Boards in the country and was the last one standing in 1966 when it was finally legislatively abolished.

One of the first movies completely banned in Kansas was *Birth of a Nation*. The film, released in 1915, portrayed the Ku Klux Klan as heroic and patriotic and was designed to put blacks "in their place" after Reconstruction. The film, originally titled *The Clansman*, was "immoral," not because it was sexually suggestive, but because it inspired racial hatred and presented a "historically inaccurate" pro-Southern interpretation of the Civil War. It promoted white supremacy. (Up until 1970, the Klan used the film as a recruitment tool). But, the majority of films banned or edited over the next 40 years were due to sexually suggestive content.

After World War II, the Board increasingly was seen as an embarrassment to many Kansans as the public clamored for movies with the more adult subjects that were being made in Hollywood and shown in surrounding states that had abolished their censorship boards. The beginning of the eventual end of the Board came with a firestorm surrounding the Otto Preminger film, *The Moon is Blue.*

The film was based on a very successful play that had toured the country and been performed almost 1,000 times to great reviews. It is the story of a young architect (William Holden) who meets a woman (Maggie McNamara, who starred in the theater production) at the top of the Empire State Building and attempts, unsuccessfully, to seduce her throughout the course of the evening in his apartment. His lecherous upstairs neighbor (David Niven) and his jilted fiancée appear from time to time to talk endlessly about seduction, virginity and marriage. The dialogue is very suggestive and the words "virgin," "pregnant" and "seduction" were words not heard in mainstream movies up to that point. Within 24 hours of meeting her, the architect is back at the top of the Empire State Building proposing marriage. Such an immediate attraction and love for another person only comes around "once in a blue moon," thus the title.

In 1953, the year of its release, the Kansas Board of Review banned the film because of the "sexy words" and the fact that the entire theme of the movie was sex (a true statement). Maryland and Ohio had also banned the film. Preminger and United Artists first sued Maryland and got the censorship board's decision overturned. He then turned his attention to Kansas.

As a little background, just one year before the release of *The Moon is Blue*, the U.S. Supreme Court had taken up the issue of movie censorship in *Burstyn v. Wilson*, 343 U.S. 495 (1952). The case involved an Italian movie titled *The Miracle*. The issue was the constitutionality under the First and Fourteenth Amendments of a New York statute which permitted the banning of motion pictures on the ground that they were "sacrilegious." The Court held that the the free speech and free press guaranty of the First and Fourteenth Amendments did apply to motion pictures. However, this is not an absolute freedom to exhibit *"every motion picture of every kind at all times and all places."*

In seeking to apply the broad definition of "sacrilegious" a censor is *"set adrift upon a boundless sea amid a myraid of conflicting currents and religious views, with no charts but those provided by the most vocal and powerful orthodoxies… Under such a standard the most careful and tolerant censor would find it virtually impossible to avoid favoring one religion over another, and he would be subject to an inevitable tendency to ban the expression of unpopular sentiments sacred to a religious minority…the state has no legitimate interest in protecting any or all religions from views distasteful to them.."*

The Court went on to opine:

*"Since the term "sacrilegious" is the sole standard under attack here, it is not necessary for us to decide, for example, whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films. That is a very different question than the one before us."*

On the heals of *Burstyn* was *Superior Films v. Dept. of Education*, 346 U.S. 587 (1954). It involved a remake of the German film *M*. The Ohio censorship board had refused to license it on the basis that it might be harmful to "unstable persons of any age." The decision was simply a per curiam

*(Continued on page 18)*

# A Step Back in Time

*(Continued from page 17)*

decision stating only "The judgments are reversed." However, Justice Douglas wrote an impassioned **dissent** with which Justice Black concurred which concluded: *"In this Nation every writer, actor, or producer, no matter what medium of expression he may use, should be freed from the censor."*

So, the stage was set (or the scene was set). Preminger's case was *Holmby Productions and United Artists Corporation v. Mrs. Frances Vaughn, Mrs. J.R. Stowers and Mrs. Bertha Hall, et. al* 117 Kan. 728 (1955). Vaughn, Stowers and Hall made up the Board of Review that banned *The Moon is Blue*. The State argued censorship on the basis of obscenity was allowed. The Kansas Supreme Court agreed and held that the words "cruel, obscene, indecent or immoral, or such as tend to debase or corrupt morals," have an accepted, definite and clear meaning and furnish no ground for declaring the statute unconstitutional. The Court pointed to the language used by Justice Clark in *Burstyn* and interpreted it to mean that "obscene" material was excepted from the Court's ruling. It also pointed to Justice Douglas's dissent to show that the majority's position was the opposite of his. It concluded that the statute and the Board's actions based thereon to be constitutional.

Of course, this was just increasing publicity for Preminger and his film. He appealed to the U.S. Supreme Court. The case was argued by Paul Wilson, Assistant Attorney General (his second trip to the Court following his appearance a few months earlier in *Brown v. Board of Education*). In a per curiam, two sentence opinion, the U.S. Supreme Court entered the order "Judgment reversed" citing *Burstyn* and *Superior Films*. *Holmby Productions v. Vaughn*, 350 U.S. 870 (1955). *The Moon is Blue* starting playing in Kansas to huge crowds.

Many thought this would be the death of the Board of Review. The State started to incur hefty legal bills as a result of challenges to the Board's continued censorship. In fact, in 1955 legislation was introduced to subject the new television medium to the Board's review powers, but it was killed in the Judiciary Committee. A group of legislators inserted a section in an obscure car registration bill that would repeal motion picture censorship in the state. It was passed by both houses and sent to the Governor for signature. It was signed and the Board was scheduled to shut its doors on July 1, 1955. The Governor was flooded with correspondence in opposition to the demise of the Board. In May, the Attorney General filed a "friendly suit" seeking an injunction against publishing the law because it had more than one subject in violation of the Kansas Constitution (cars and movies don't go together). The Supreme Court held that the bill was void as in violation of the state constitution. It took eleven more years to shut down the Board even though bills were introduced virtually every session. The Board continued to ban and edit at will.

Then, in 1966, an unlikely person came upon the scene to hammer the final nail into the coffin of the Board, former Governor John Anderson, Jr. who had appointed the Board members just a few years earlier.

In *State ex rel. Londerholm v. Columbia Pictures Corp.*, 197 Kan. 448 (1966), Columbia Pictures had distributed the films *Bunny Lake is Missing* and the *Bedford Incident* without submitting them to the Board for review under the theory that since the U.S. Supreme Court had found the Maryland Motion Picture Censorship Law to be unconstitutional in *Freedman v. State of Maryland*, 380 U.S. 51 (1965), the Kansas law, which was virtually identical, was also unenforceable. The Attorney General sought injunctive relief to prevent exhibition of the films until the Board had reviewed them. Former Gov. Anderson represented Columbia Pictures.

The Kansas Supreme Court followed in lock step the U. S. Supreme Court decision in the *Freedman* case. It found that the burden to prove that the film is unprotected expression must be on the censor. The Kansas Motion Picture Censorship Act violated the constitutional guarantee of freedom of expression in that, upon administrative disapproval, the exhibitor must assume the burden of instituting judicial proceedings and persuading courts that the film is protected expression. In the meantime, the exhibition of the film is prohibited and there is no assurance of a prompt judicial determination. To be constitutional, the Court opined, the exhibitor must be assured, by statute, that the censor will, within a specified brief period, either issue a license or go to court to restrain showing of the film. Any restraint imposed in advance of a final judicial determination on the merits must be very short. The Kansas procedural scheme did not comport to such a process. Three days later, Gov. Avery shut it down.

It wasn't until 1968 that the Motion Picture Association of America adopted its rating system. Although it does not control the content of the film, it warns parents about the acceptability of it for their children.

Other cases would follow in Kansas district and appellate courts, but they were of an injunctive nature asking the Court to find a film "obscene" and in violation of K.S.A. §21-4301 (promoting obscenity) and K.S.A. §22-3901 (maintaining a public nuisance). *See, State v. A Motion Picture Entitled "The Bet, et al and a Motion Picture Entitled "The Sexual Therapist," et al*., 219 Kan. 64 (1976). Many of us remember the fanfare when *I Am Curious Yellow* debuted in 1967 and Johnson County Judge Herbert Walton was required to view the film to determine whether it violated the community standards of Johnson County. A handful of cases were decided in the late 1970's involving the obscenity statute and its application to particular movies, but none since then. In the last few years, grand juries have been empanelled in various counties in Kansas to review whether local establishments are in violation of the state's obscenity laws by selling pornographic items, including movies, but few, if any, indictments have been returned. It appears that after a 100 year run, movie censorship is dead in Kansas.

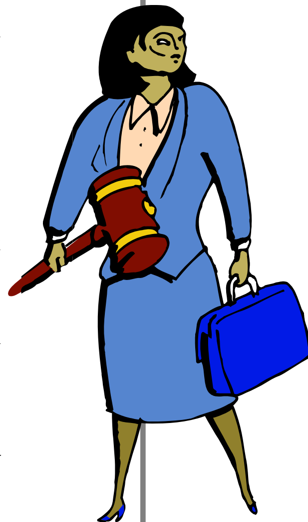
**Special thanks to Mary Feighny with the Kansas Attorney General's Office for the idea for this article!**

# PRIVATE JUDGING MAY BE ON TAP IN RHODE ISLAND

By Eric Tucker, Associated Press, August 23, 2009

Divorce can be a time-consuming process, often requiring couples to miss work to meet with lawyers or make court dates.

But a state law being considered by Rhode Island's highest court would allow divorcing couples and people involved in other types of lawsuits to pay a retired judge to preside over a private trial or other hearings -- on their own time and out of public view.



Supporters say private judging speeds the legal process for people who want quick resolutions to personal disputes.

But civil liberties groups and open government advocates are concerned it would cut off access to the courts and thrust issues of public interest behind closed doors, creating a "two-tiered" system where people able or willing to pay for a judge can get faster service.

*"The public has the right to know about any court proceedings, period,"* said Barbara Meagher, who teaches journalism at the University of Rhode Island.

A Rhode Island law enacted in 1984 allows retired judges to be hired for private trials and grants their rulings the same authority as those of sitting judges. But the statute remained dormant and effectively untested until last year when a retiring Family Court judge, Howard Lipsey, sought guidance from the state Supreme Court on how to implement it.

The issue is in limbo now that the court, which heard arguments in January, adjourned for the summer without finalizing guidelines. A bill that would have repealed the law, known as the Retired Justice Trial Act, was shelved, leaving the question with the court.

Lipsey, who still hears cases four days a week for free and wants the right to continue working after he's fully retired, said private judging would most benefit couples seeking an uncontested divorce who have agreed on custody rights and property and want their dissolution finalized.

*"I see people waiting and waiting and waiting"* to have their cases heard, Lipsey said. Many people, he added, say *"I would love to be able to go in at 5 o'clock or 5:30 or on Saturday, when I'm not working."*

Forms of private judging have existed for years in other states, including California, and some say it's becoming more accepted as a way to ease case backlogs.

"*What we're watching is an increasing interest in enabling people to use private systems in lieu of public systems,"* said Judith Resnik, a professor at Yale Law School. *"What can be lost is the possibility of public understanding of ordinary conflicts."*

Under a draft of the Rhode Island guidelines, both sides in "any pending civil action" may hire a mutually agreed upon ex-judge to decide either all or part of a court case -- without a jury and in private. The parties would cover the costs of any supplies, such as a transcript, as well as the judge's fees.

Lipsey said cases of extreme public interest would invariably play out through the ordinary court system because society would demand transparency. But divorces and domestic cases are different, he said.

*"Why should a husband and wife have to bare their souls in public for something that they've agreed upon they don't want impacting upon their children?"* Lipsey asked.

He likens private judging to mediation and arbitration, which traditionally are held in private. But the Rhode Island law would allow for full-blown trials -- presided over by a former judge rather than lawyer -- on varied civil issues to be conducted in private, with decisions subject to appeal to the Supreme Court.

And Resnik said even domestic cases that may at first appear to concern private affairs -- such as the rights of a same-sex couple -- could still include issues of public significance.

The issue would have been moot had state lawmakers passed a

*(Continued on page 20)*

# Private Judges

(Continued from page 19)

bill repealing the private judging statute. Its sponsor, Rep. Al Gemma, attributes the bill's failure in part to the large number of lawmakers who are lawyers and don't want to aggravate judges.

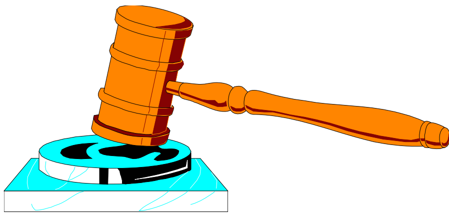
The Supreme Court was awaiting the outcome of that bill before acting, and now expects to revisit the issue this fall and possibly hold another public forum, said court spokesman Craig Berke.

Miriam Weizenbaum, a Rhode Island attorney who opposes the law, said the statute as written lacks safeguards for ensuring that the hired judges are accountable and impartial. She said she was troubled that decisions made in a private trial could, upon review by the Supreme Court, form the basis of established precedent.

*"It's like giving a private person the power to issue orders,"* she said. *"Private people shouldn't have the power of the court system."*

Though Lipsey and other retired judges stand to benefit financially by being rented out, Lipsey insisted money wasn't his motive, joking that he could work in a shoe store or open a Kosher deli if that was the case.

*"We already have what we have,"* Lipsey said. *"This is something that gives the public another option."*



**WANT MORE INFORMATION ABOUT THE KANSAS BOARD OF REVIEW?**

The Kansas State Historical Society maintains all the review cards issued by the Board from 1910 to 1966. You can also go on-line and enter the name of the film and find out what the Board had to say about it and what had to be deleted in Kansas. http://www.kshs.org Laws governing the Board were contained at K.S.A. §51-101 et seq and K.S.A. §74-2201 *et seq*. *See also*, *Banned in Kansas: Motion Picture Censorship, 1915-1966*, by Gerald R. Butters, Jr., 2007, University of Missouri Press (an excellent and in-depth analysis of the Board of Review).

# But, What I Really Meant Was...

**WHEN "AND" MEANS "OR"**

*"First, we must squarely address the drafters' use of the conjunctive "and" between the two directives, as did the California appellate court in* Butler. *That decision resolved the dilemma by declaring that "to carry out the legislative intention 'and' can be interpreted as meaning 'or.' ... Such a "black" means "white" declaration is difficult to reconcile with our statutory construction directive that "[o]rdinary words are given their ordinary meaning."*

*However, this court has utilized that same convenient rule of substitution where it discerned that the legislature was simply imprecise in its word choice. ...*

*"... The words 'or' and 'and' may be construed as interchangeable when, and if, it is necessary to effectuate the obvious intention of the legislature, as where the failure to adopt such a construction would render the meaning of the statute ambiguous or result in absurdities." 82 C.J.S., Statutes § 331.*

*We perceive that this is one of those rare occasions when the context of the entire statute counsels against placing an inordinate emphasis on the chosen connecting word."*

Justice Johnson writing for the majority in *State v. Marx*, ___Kan ____(September 18, 2009)

**AND WHEN "SHALL" MEANS "MAY"**

*"Raschke is correct that prior decisions of this court have interpreted the legislature's use of the work "shall" in some contexts as mandatory and in other contexts as merely directory. Its meaning is not plain, and construction is required....Given all of this background, the following factors are among those to be considered in determining whether the legislature's use of "shall" makes a particular provision mandatory or directory: (1) legislative context and history; (2) substantive effect on the party's rights versus merely form or procedural effect; (3) the existence or nonexistence of consequences for noncompliance; and (4) the subject matter of the statutory provision,* e.g., *elections or notice on charges for driving under the influence."*

Justice Beier writing for the majority in *State v. Raschke,* ___Kan. ___ (October 30, 2009).

## ALERT

**Graduated Driver's Licenses Go Into Effect January 1; Some Changes to Municipal Court Responsibilities**

**See page 35, *supra*, for more information**

# RESPONSE TO THEFTS OUT OF ORDER?

By MICHAEL MANSUR
*Reprinted from the* Kansas City Star

Imagine someone stealing your iPhone at the office. Now imagine three Kansas City police detectives coming to detain your colleagues after work, question them and ask them to submit to searches and DNA samples.

Unthinkable? Not if you're a judge of the Kansas City Municipal Court.

Court employees say they were asked to submit not only to DNA testing but also to polygraphs after the reported theft of the iPhone of Elena Franco, the municipal court's presiding judge. The same day, July 14, $79 in cash was reported stolen from the purse of Judge Katherine Emke.

Emke, Franco and Court Administrator Anthony Miller did not respond to phone calls seeking comment last week.

Of course, a theft from a judge's secure chambers is a serious issue, but some court employees questioned the response as a bit too much.

One court employee said it would be surprising if three detectives showed up to investigate if a normal employee's cell phone were taken. The employee requested anonymity because the court has told workers in general not to talk to the media.

Another employee said that cash has been reported stolen from other court offices, but no detectives have come to investigate.

Both employees said their belongings were searched but they did not undergo DNA tests or take polygraph tests.

Some employees with access to the secure second-floor judges' offices were detained after work the day of the thefts. Overtime was paid to those employees.

Capt. Rich Lockhart, spokesman for the Police Department, said he had not heard of any arrests in the case.

Sending three detectives to investigate such a theft is not typical, Lockhart said, but the case also involved secure judges' chambers. What's more, 19 employees had to be interviewed that day. *That's not a typical response, but it's not a typical crime, either,"* Lockhart said.

It has become fairly routine now to take DNA samples in such cases, as well as asking a suspect to take a polygraph, Lockhart said.

City officials said that security in the Municipal Court had become a growing concern in recent months.

*"There is a security issue, and we've been working on how to address it,"* said Chuck Eddy, the chief of staff in City Manager Wayne Cauthen's office.

*"It gets back to dollars and cents,"* Eddy added. *"We're trying to work out what is the best possible security for the funding"* the court has.

The judges have pushed for Kansas City to add police to the current security system of bailiffs and metal detectors. But police have estimated that to be a half-million-dollar expense, said Eddy, who added that the courthouse is secure now.

The city manager's office has proposed using retired or off-duty police officers.

Gerald Smith, the city's general services director, said he and his security staff hoped to work with the judges in coming weeks to improve security.

*"We've been working on a comprehensive plan, not just for municipal court, but the entire city,"* Smith said.

Might the response to the July thefts been a bit overboard?

*"It's always in the eye of the beholder,"* Eddy said. *"... We try to secure everything in City Hall, but if a theft occurs on the 22nd Floor (the City Council's offices) it's an even more monumental issue."*

Dave Severenuk, who oversees city security, said he wasn't aware of any other recent thefts in the courthouse. Court administrators would be required under city regulations to report thefts.

Cathy Jolly, the chairwoman of the City Council's Public Safety and Neighborhoods Committee, said she had been briefed only in recent days on the security issues in the court.

*""Our security staff has been aware of these issues and have been trying to address them,"* Jolly said. *"They've been trying for months and months."*

(Continued on page 22)

# Court Thefts

(Continued from page 21)

According to police reports of the incident, three detectives and at least one other police officer went to municipal court at 1101 Locust St. the afternoon of July 14. They interviewed court employees who had access to the secure area of the second-floor offices. They also took DNA samples from Emke's purse.

Franco told police she left her new iPhone on her desk in her secure chambers before she went to hear a morning docket about 9 am. When she returned at about 11:20 a.m., the new iPhone was missing.

That afternoon, Emke reported $79 was missing from her purse. She had left it in her secure chambers while she was in court. Neither judge locked her chamber door.

The area behind the second-floor courtrooms, where the offices of Emke and Franco are, can be accessed only by someone who enters the proper access code on a keypad.

**TEENS UNDER THE INFLUENCE —OF PARENTS**

Compared to teens who have not seen their parent(s) drunk, those who have are more than twice as likely to get drunk in a typical month, and three times likelier to use marijuana and smoke cigarettes.

The CASA survey found that 51 percent of 17-year olds have seen one or both of their parents drunk and 34 percent of 12- to 17-year olds have seen one or both of their parents drunk.

Teen drinking behavior is strongly associated with how teens believe their fathers feel about their drinking. Compared to teens who believe their father is against their drinking, teens who believe their father is okay with their drinking are two and a half times likelier to get drunk in a typical month.

2009 National Survey of American Attitudes on Substance Abuse XIV: Teens and Parents, conducted by The National Center on Addiction and Substance Abuse (CASA) at Columbia University.

# Attorney General Opinions

*connections of the [employees], whose privacy should be protected,"* the entire discussion could take place in executive session.

**INATERACTIVE COMMUNICATION UNDER THE KOMA**
**AG Opinion 2009-22**
*October 28, 2009*

"Interactive communication," for the purposes of the Kansas Open Meetings Act (KOMA), requires a mutual or reciprocal exchange between members of a body or agency subject to KOMA. Accordingly, "interactive communication" does not occur when a non-member of a body or agency communicates with a majority of that body or agency board and a member responds and shares the response with other members. Should there be further interactive communications among a majority of the members concerning the business of the body, and there is an intent by any or all of the participants to reach agreement on a matter that would require binding action, those communications are subject to KOMA.

**CITY CANNOT ADOPT ORDINANCE SUSPENDING A PERSON'S DRIVER'S LICENSE WHEN NO SUCH STATE AUTHORITY EXISTS**
**Informal Opinion**
*December 16, 2009*

In 2009 the legislature amended K.S.A. §21-4603d to authorize a district court to suspend a person's driver's license for a year when he or she was convicted of unlawful possession of certain substances and the possession occurred while transporting the substance in a vehicle. *See* **Verdict**, Summer 2009, p. 14. Since the statute amended applies only to district court cases, municipal courts are not required or allowed to order similar suspensions for possession cases heard in municipal court.

The Wichita City Attorney asked the Attorney General if the city could charter out of K.S.A. §12-4509 (the municipal court sentencing provision) and give its municipal court the same authority. The General opined that it could not. Quoting a 1983 AG Opinion, he concluded that a city cannot impinge on the state's authority to control and regulate driver's licenses. In addition, allowing such actions by cities would place an administrative burden on the Division of Vehicles and prior opinions have concluded that imposing administrative duties on state agencies exceeds the city's home rule authority to "determine [its] local affairs."

***" An accused is entitled to a fair trial, not a perfect one."***

*State v. Murdock,* 236 Kan. 146m 154 (1984); *State v. Chandler,* 252 Kan. 797, 801 (1993); *State v. Broyles,* 272 Kan. 823, 842 (2001); *State v. Ulate,* ___Kan.App.2d ___ (November 20, 2009).

# DRUG COURTS EVADE PITFALLS

BY RON SYLVESTER
Reprinted from The Wichita Eagle
September 30, 2009

Wichita has avoided most of the traps in its drug courts that are plaguing similar programs nationwide, local judges and lawyers said Tuesday.

Those involved in drug courts in Wichita and Sedgwick County District Court said they see little in common with the problems pointed out Tuesday in a two-year study by the National Association of Criminal Defense Lawyers.

That study concluded that such problem-solving courts have weakened the role of lawyers to represent defendants and forced the accused to give up their rights.

Drug courts provide an alternative to jail for people who have substance abuse problems.

The defense attorney who represents clients in Sedgwick County drug court says he doesn't feel like he plays a diminished role.

*"Our drug court is unique in that a defense attorney is always a part of the team,"* said attorney John Sullivan.

Sullivan said he has argued against people being released from the program and won.

*"If he's supposed to be quiet, no one has told John about it,"* said Judge Joe Kisner, who presides over the drug court.

Part of the difference is that Sedgwick County's drug court was developed with the help of criminal defense lawyers in Wichita.

Lacy Gilmour, a public defender, and Jim Pratt, who works for the law firm of Monnat & Spurrier, served on a commission that made the rules.

*"We actually had two defense attorneys and one prosecutor,"* Kisner said. *"We included the defense from day one."*

That's not the case nationwide, the study said. Many of the 2,100 drug courts that have been established in the past 18 years were put together by prosecutors, the study said.

The discrepancies between drug courts in Wichita and elsewhere in the country is part of the problem.

*"There are no uniform standards,"* Cynthia Orr, president of the National Association of Defense Lawyers, said Tuesday.

Sedgwick County's drug court is a voluntary program for people who are already on probation for a felony and have violated the conditions of their release because of a substance abuse addiction.

*"We are taking the ones we believe are higher-risk felons,"* Kisner said. *"They are already on probation, had at least one probation violation and are headed back to jail."*

The main requirement in Sedgwick County is that defendants remain on probation, so they will be free to receive treatment.

Currently, drug courts run for misdemeanor offenders in the city of Wichita and for convicted felons in Sedgwick County are one of the few ways people who can't afford treatment can get it.

*"As long as these cases are being funneled into the criminal justice arena, courts and judges will be looking for ways to effect the best outcomes for the defendant and the community at large,"* said Wichita Municipal Judge Bryce Abbott. *"Right now we are experiencing the best outcomes in our community through the use of specialty courts."*

**American's Problem-Solving Courts: The Criminal Costs of Treatment and the Case for Reform**

**September 2009**

In 2007, the National Association of Criminal Defense Lawyers, with seed money from the Foundation for Criminal Justice, created a task force to study the efficacy of the problem-solving court approach. After two years of meetings, and gathering of testimony and other forms of input, the NACDL released its report. It came out with several recommendations.

The report argues that substance abuse should be addressed as a public health issue—not a criminal issue. Addiction is an illness and should be treated as such instead of through punishment, the report suggests.

It recommends that a defendant should not be required to plead guilty before accessing treatment. Instead it advocates for a pre-plea, pre-adjudication program. It recommends that the admission criteria be objective and fair, with prosecutor's relinquishing their role as gatekeepers. And it pushes for a process that is open to all regardless of race, economic status or immigration status.

It further proposes that ethical rules should not change, and the drug court model should accommodate ethical rules. Defense attorneys have an obligation to their clients of loyalty, confidentiality and zealous advocacy, and adhering to those obligations is essential for a credible process.

Finally, it argues that drug courts should be used for high-risk defendants facing lengthy jail terms, with less onerous alternatives for low risk, low level offenders.

Read the full NACDL report on its website at:
http://www.nacdl.org

# The Temptations of Technology

*By Cynthia Gray*
*Reprinted with permission from the Judicial Conduct Reporter*
*Publication of the American Judicature Society, Summer 2009*

Electronic media such as e-mail and the Internet are a great benefit to individual judges and the judiciary in the performance of their duties, but the ease of communication and information-gathering can also facilitate violations of the code of judicial conduct.

For example, perhaps tempted by the then-relatively new technology, in 1997, a judge sent an ex parte e-mail message to an attorney in a juvenile dependency matter that read in part:

> "I am considering summarily rejecting [the father's attorney's] requests. Do you want me to let [the father's attorney] have a hearing on this, or do we cut [the attorney] off summarily and run the risk the third [district court of appeals] reverses?...I say screw [the father] and let's cut [the attorney] off without a hearing. O.K. By the way, this will self-destruct in five seconds…"

The attorney replied by e-mail: "Your honor, I don't feel comfortable responding ex-parte on how you should rule on a pending case." The judge's e-mail response was "chicken."

Several days later, the judge sent the attorney another e-mail in which he solicited the attorney's views on the advisability of having children in court, offering the attorney the opportunity to give an "unofficial" view. In a lengthy response, the attorney gave his views.

The California Commission on Judicial Performance found that the judge's *ex parte* messages suggested per-judgment and alignment with one side in a proceeding. *Public Admonishment of Caskey* (California Commission on Judicial Performance July 6, 1998) (cjp.ca.gov/pubdisc.htm). The Commission also found that the language used in reference to the father gave the appearance of bias and animus and was entirely inconsistent with a judge's obligations to be impartial and to maintain the dignity of the court. Finally, the Commission stated that by responding "chicken" to the attorney's refusal to communicate about a pending case, the judge displayed a joking attitude toward the attorney's ethical concerns.

**Internet Research**

The *Model Code of Judicial Conduct* prohibits independent investigations of the facts as part of the prohibition on *ex parte* communications, and, when the American Bar Association revised the model code in 2007, it added a new comment to Rule 2.9 that provided "the prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic." The reporters' notes explain that, "given the ease with which factual investigation can now be accomplished via electronic databases and the Internet, the risk that a judge or the judge's staff could inadvertently violate [Rule 2.9] has heightened considerably. The need for vigilance on the part of judge has increased accordingly."

The North Carolina Judicial Standards Commission publicly reprimanded a judge for being influenced by information he independently gathered by viewing a party's website while the party's hearing was ongoing, in addition to other misconduct discussed in the following section. *Public Reprimand of Terry* (North Carolina Judicial Standards Commission April 1, 2009) (www.nccourts.org/Courts/CRS/Councils/Judicial Standards/PublicReprmands.asp).

From September 9 through September 12, 2008, the judge presided over a child custody and child support hearing. On September 9, the judge used Google to find information about the mother's photography business, viewing samples of her photographs and finding numerous poems. When court reconvened on September 12, prior to announcing his findings in the case, the judge recited a poem, to which he had made minor changes, that he had found on the web-site. The judge told the Commission's investigator that he quoted the poem because it gave him "hope for the kids and showed that Mrs. Whitley was not as bitter as he first thought." The judge could not recall how many times he visited the site but stated that he may have visited it four times.

Following the conclusion of the hearing and after orally entering his order, the judge requested a bailiff to summon the attorneys to return to the courtroom. Only then did he disclose that he had viewed Mrs. Whitley's web-site. Based on a motion by the mother's attorney, the judge disqualified himself, his child custody and child support order was vacated, and a new trial ordered.

**Social Networks**

The New York Judicial Ethics Advisory Committee has advised judges that they could join an Intenet-based social network but warned the judges to exercise "an appropriate level of prudence, discretion and decorum" in how they use the network and to stay informed about new service developments that cold affect their duties under the code of judicial conduct. *New York Advisory Opinion 08-176* (www.nycourts.gov/ip/judicialehtics/opinions/08-176.htm). The committee explained:

> "Social networks...are Internet-based meeting places where users with similar interests and backgrounds can communicate with each other. Users create there own personal website—a profile page—with information about themselves that is available for other users to see. Users can establish "connections" with other users allowing increased access to each other's profile, including, in many cases, the ability to contact any connections the other user has and to comment on material posted on each other's pages."

The Committee noted that a judge "generally may socialize in

*(Continued on page 25)*

# Temptations of Technology

(Continued from page 24)

person with attorneys who appear in the judge's court," subject to the code, and that there is nothing "per se unethical about communicating using other forms of technology, such as a cell phone or an Internet web page." Therefore, the Committee stated, "the question is not whether a judge can use a social network but, rather how he/she does so."

The Committee cautioned that what a judge posts on his or her "profile page or on other users' pages could potentially violate the rules in several ways" and warned that a judge should recognize the public nature of anything he/she places on a social network and tailor any postings accordingly." Noting the "many mainstream news reports regarding negative consequences and notoriety for social network users who used social networks haphazardly," the Committee gave "a non-exhaustive list of issues that judges using social networks should consider."

> "The judge...should be mindful of the appearance created when he/she establishes a connection with an attorney or anyone else appearing in the judge's court through a social network. In some ways, this is no different from adding the person's contact information into the judge's Rolodex or address book or speaking to them in a public setting. But, the public nature of such a link (i.e. other users can normally see the judge's friends or connections) and the increased access that the person would have to any personal information the judge chooses to post on his/her own profile page establish, at least, the appearance of a stronger bond. A judge must, therefore, consider whether any such online connections, alone or in combination with other facts, rise to the level of a "close social relationship" requiring disclosure and/or recusal…"

The committee also reminded judges not to respond to inquires from users "who upon learning of the judge's identity, may informally ask the judge questions about or seek to discuss their cases, or seek legal advice" or comments on pending cases.

The same North Carolina custody hearing discussed in the previous section, during a meeting in the judge's chambers, Judge Terry and Charles Schieck, the attorney for the father, spoke about Facebook, an internet social networking web-site. Jessie Conley, the attorney for the mother, was present but stated she did not know what Facebook was and that she did not have time for it. The judge and Schieck designated themselves as "friends" on their Facebook accounts so that they could view each other's account.

The judge and the attorney had several exchanges on Facebook. For example, the judge posted on his Facebook account that he had "two good parents to choose from" and "Terry feels that he will be back in court," referring to the case not being settled. Schieck then posted on his account, "I have a wise Judge." During a break in the proceedings the next day, the judge told Conley about the exchanges between Schieck and himself. The next day, the judge wrote on his Facebook account, "he was in his last day of trial." Schieck then wrote, "I hope I'm in my last day of trial." The judge responded, stating, "you are in your last day of trial."

**Electronic Politics**

Judges have also used technology to engage in inappropriate political or campaign activity.

- A judge used a county computer to forward an e-mail containing a political message from George Bush's campaign, with a subject box that read, "Support G.W. Bush." *Public Admonition of Katz* (Texas State Commission on Judicial Conduct December 19, 2000).

- During a judge's 2004 judicial campaign, his campaign committee co-chair sent three e-mails from the campaign e-mail account (prefixed with "judgekrouse") that requested donations to the judge's campaign. The e-mails were written in the first person and two concluded with "Merle" (the judge's first name) in the typed signature line. *In re Krouse*, Stipulation, Agreement, and Order of Reprimand (Washington State Commission on Judicial conduct May 5, 2005) (www.cjc.state.wa.us).

- A judicial candidate sent attorneys a cell phone text message that stated: *"If you are truly my friend then you would cut a check to the campaign! If you do not then its time I checked you. Either you are with me or against me!" Inquiry Concerning Davis*, Order (Kansas Commission on Judicial Qualifications July 18, 2008).

***EDITOR'S POSTSCRIPT***

In a recent opinion, the Florida Judicial Ethics Advisory Committee decided it was time to set limits on judicial behavior on-line. When judges "friend" lawyers (on Facebook or similar social networking sites) who may appear before them, the Committee said, it creates the appearance of a conflict of interest, since it "reasonably conveys to others the impression that these lawyer 'friends' are in a special position to influence the judge." Likewise, judges cannot allow attorneys who may appear before them to add the judge as their 'friend.' The full opinion can be found at:

http://www.jud6.org/LegalCommunity/LegalPractice/opinions/jeacopinions/2009/2009-20.html

# Unpublished Opinions

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

### REVOCATION OF BOND V. FORFEITURE OF BOND

***Unpublished Opinion***

Willis Bail Bonds posted a $15,000 bond for Feliciano Anguiano. Three weeks after he was released, an affidavit was filed with the judge asking that Anguiano's bond be revoked for failing to comply with the conditions of the bond (not reporting to his court services officer and failing to take drug tests). The judge issued a warrant for Anguiano's arrest, but did not revoke the bond. At the hearing on the bond revocation, Anguiano appeared and the judge "reinstated the bond" with new conditions. A few weeks later, an affidavit was again filed with the judge alleging that Anguiano had not complied with the new bond conditions. Again, the judge issued a warrant for his arrest, but did not revoke the bond. Anguiano failed to appear for this hearing and his bond was ordered forfeited and a new warrant issued. Two weeks later, a motion for judgment on the bond was filed.

The district judge made a finding that at the first hearing she did not really revoke his bond, as her order said, but had actually just reaffirmed the original bond and added some more conditions, conditions that were not material changes to the prior bond. This is important because had she "revoked" the bond, the bonding company would no longer have any obligation on the bond, unless it agreed to be so bound. It had not done so in this case, so it argued that it should not have to pay the bond forfeiture. If the bond had not been revoked, but new conditions added, the bonding company would have to be consulted if the new conditions constituted a material change to the bond. It would then have the option of surrendering the bond, and being relieved from all obligations thereon. Of course, the bonding company argued that even if the judge didn't really mean what she said, she still imposed conditions that materially changed the terms of the bond. The case is further complicated by the fact that two other judges had notations in the file. One indicated that Anguiano had in fact appeared at the last hearing (the one that resulted in a bond forfeiture), but left. The first warrant had been signed by yet another judge and someone had written "Bond Revocation" on the warrant.

In *State v. Anguiano*, Slip Copy, 2009 WL 3082586 (Kan. App. September 25, 2009), the Kansas Court of Appeals held that the district court judge did not revoke Anguiano's bond, but simply added additional conditions, conditions that did not materially alter the obligation of the bonding company. One condition that had been added was that the defendant live with his mother on the Indian Reservation. The bonding company argued that this made it difficult for them to arrest him and bring him to court. The Court rejected this argument citing state and federal case law that allows service of warrants on reservations. The Court of Appeals also clarified that a failure to appear that necessitates a forfeiture is a failure to appear in court, not a failure to comply with a condition of the bond by not appearing at the office of his court services officer who was handling his pre-trial bond supervision or failing to appear at the lab to get his urine tested. The fact that the judge issued a warrant for Anguiano's arrest is not dispositive of the issue regarding revocation of the bond. *"The issuance of the arrest warrant for Anguiano is merely the first step in a procedure which may or may not result in revocation of the bond."* The district court's decision to forfeit the bond and hold the bonding company liable for the $15,000 stands.

### JURISDICTION WHEN VEHICLE TRAVELING THROUGH SEVERAL COUNTIES WHEN TEXT MESSAGE SENT

***Unpublished Opinion***

Timothy O'Farrell was charged in Douglas County with aggravated battery against Veranda Miller. He was prohibited from contacting Miller during the pendency of the case. After the preliminary hearing, he sent Miller text messages and an email. The prosecution amended the complaint to add two counts of violating a protective order. He appealed his conviction, arguing that the prosecution could not prove that he sent the text messages from Douglas County. The evidence showed that he sent the text messages while he was driving to Lawrence from Overbrook (which is in Osage County). Because no evidence was presented proving which county he was in when he sent the message, he argued his conviction should be overturned.

In *State v. O'Farrell*, Slip Copy, 2009 WL 3081369 (Kan. App. September 25, 2009), the Kansas Court of Appeals relied on K.S.A. §22-2608 which states:

*"If a crime is committed in, on or against any vehicle or means of conveyance passing through or above this state, and it cannot readily be determined in which county the*

*(Continued on page 27)*

(Continued from page 26)

*crime was committed, the prosecution may be in any county in this state through or above which such vehicle or means of conveyance has passed or in which such travel commenced or terminated."*

Since O'Farrell testified he sent the message when he was driving to pick up his friend Randy from work in Douglas County, jurisdiction was established in Douglas County and any county between Osage and Douglas. It also rejected O'Farrell's argument that K.S.A. §22-2608 is unconstitutional. The conviction was affirmed.

**NO BASIS TO SEARCH CAR FOLLOWING ARREST FOR DWS**

***Unpublished Opinion***

Crystal Witmer was stopped by police for expired tag. The officer smelled alcohol on her breath and asked her to step from the vehicle. She passed all field sobriety tests. However, when the officer ran her driver's license he discovered it was suspended. She was arrested an placed in a patrol car. The officer then searched her car incident to her arrest, looked in the glove box and found some pills that later turned out to be hydrocodone, for which she had no prescription.

In *State v. Witmer*, Slip Copy, 2009 WL 3082577 (Kan. App. September 25, 2009) the issue was whether the police had any authority to search her car and glove box. The Court of Appeals found that the officers had no reasonable basis to believe that there was any evidence of the crime of driving on a suspended license in the car. She was handcuffed in a patrol car and presented no danger to the officers and she could not reach anything in the car. Based on the recent decision of *Arizona v. Gant*, 556 U.S. ___ (2009), the pills must be suppressed. The search was unlawful.

**CIVIL LAWSUIT FOLLOWING NOT GUILTY FINDING IN DISTRICT COURT FOR VIOLATION OF "DO NOT PASS" SIGN**

***Unpublished Opinion***

Linus Baker was driving his SUV north on Highway 69 in Overland Park when he passed two signs that read "Do Not Pass." The left lane of the two lane multi-lane roadway was being closed ahead due to construction. Baker was the only vehicle in the left lane. The other drivers had merged into the right thru lane and were backed up, traveling about 10-20 mph. Baker drove past all of these car in the left lane at 60 mph until he reached the actual point where the left lane was closed. He was charged with violating the no passing ordinance. (STO §42). He was convicted in municipal court. He appealed to the district court where the district judge dismissed the charges. The district judge found that the ordinance was designed for two lane, two direction highways, not divided multi-lane roadways. He also found the ordinance was vague as applied to divided highways.

Baker then filed a civil action against the City, the Chief of Police, and the City Prosecutor. He sought declaratory and injunctive relief prohibiting the use of "no passing" zones and enforcement of the ordinance on multi-lane divided highways. He also sought compensatory damages and sought to represent and certify a class of Overland Park drivers who had been previously prosecuted under the same circumstances. He asked that their convictions be vacated, their fines reimbursed and their court costs paid. The defendants filed a motion to dismiss on the basis that Baker had not presented a case or controversy. In addition, the City argued that injunctive relief was not necessary because he obviously had an adequate remedy at law since he was successful in getting the charges against him dismissed. The defendants also argued that he had not alleged any identifiable cause of action or basis of liability. The district court dismissed the case and Baker appealed.

In *Baker v. City of Overland Park*, Slip Copy, 2009 WL 3083843 (Kan. App. September 25, 2009), the Court affirmed the district court's dismissal for numerous reasons set out in the opinion. Primarily, he was unable to establish that he faced a reasonable probability of irreparable future injury if injunctive relief were not granted. And, there was no case or controversy properly established regarding the defendant nor his proposed class to support declaratory relief.

**EVIDENCE REQUIRED FOR FAILURE TO MAINTAIN A SINGLE LANE**

***Unpublished Opinion***

Officer is directly behind a truck at 1:00 a.m. He observes the driver weave within his lane, cross the dividing line and nearly strike the curb. No other vehicles were in the area. The officer testified that based on his training these actions were indicators of possible alcohol impairment so he stopped the car. The driver was eventually charged with felony DUI. However, the issue in *State v. Sullivan*, Slip Copy, 2009 WL 3378215 (Kan. App. October 16, 2009) was whether or not sufficient evidence had been presented to justify the stop of the vehicle.

The Court of Appeals found that based on *State v. Marx*, ___Kan. ___ (2009), the prosecution must present more information than an observation of a lane breech in order to use "failure to maintain a single lane" in violation of K.S.A. §8-1522. *See*, Verdict, Fall 2009, p.16. The Court upheld the district court's granting of the defendant's motion to suppress.

**OUT-OF-STATE CONVICTIONS DO NOT COUNT FOR DETERMINING PRESUMPTIVE PRISON OR PRESUMPTIVE PROBATION FOR BURGLARY**

***Unpublished Opinion***

Because Tom Kelly had two out-of-state burglary convictions,

(Continued on page 28)

# Unpublished Opinions

(Continued from page 27)
he received presumptive prison instead of presumptive probation. He challenged the district court's interpretation of K.S.A. 2006 Supp. §21-4704(1), which requires presumptive prison when a person has a prior conviction of K.S.A. §21-3715 or K.S.A. §21-3716. His convictions were not for violation of these statutes, but for similar burglary statutes from another state.

In *State v. Kelly*, Slip Copy, 2009 WL 3378205 (Kan. App. October 16, 2009), the Court of Appeals found that since many statutes specifically refer to the application of out-of-state convictions (i.e, driving while suspended, K.S.A. 2008 Supp. §8-262(d); DUI, K.S.A. §8-1567(e), (f), (g) and domestic battery, K.S.A. 2008 Supp. §21-3412a(b)(2)(3)) and the burglary statute does not, out-of-state convictions do not count. They were counted in his criminal history as required by K.S.A. 2006 Supp. §21-4711(e), but they are not to be used to determine presumptive prison or presumptive probation as set out in K.S.A. 2006 Supp. §21-4704(1). *"If this is truly an oversight as implied by the State, then the remedy lies with the legislature and not the courts."* The defendant gets probation.

**FOR SPEEDY TRIAL PURPOSES, THE DEFENDANT IS ONLY CHARGED A "REASONABLE TIME" FOR THE PROSECUTION TO RESPOND TO HIS MOTION TO SUPPRESS**

***Unpublished Opinion***

Haldor Harms was charged with a felony DUI and was arraigned on November 30. The case was continued by the defendant a few times and on March 30 the defendant filed a motion to suppress. A few more continuances followed and on June 5 the State moved for a continuance to have more time to respond to the motion and due to a family emergency being experienced by the prosecutor. The judge continued the case for three months. The issue in *State v. Harms*, Slip Copy, 2009 WL 3428574 (Kan. App. October 23, 2009) was whether that entire three months should be charged to the State.

The law is clear that when a defendant files a motion, only a reasonable time to process the motion may be charged against the defendant. The Court found in this case the time should not be charged to the defendant. The State had two months to respond to the motion before it requested a continuance to respond. There was no allegation that the State had insufficient time to respond, just that it needed more time and that the prosecutor had a family emergency. A record was not made concerning why there was a need for a three month continuance. Therefore, the State is unable to sustain its burden to establish that the continuance was necessitated by the defendant's motion to suppress. The case was properly dismissed for denial of speedy trial.

**MARGIN OF ERROR IN INTOXILYZER READING**

***Unpublished Opinion***

Ruth Tucker was arrested for DUI. She blew exactly .08 on the Intoxilyzer 5000. The Intoxilyzer is tested with a known solution. If the test results are between .073 and .089, the machine is deemed to be in satisfactory working condition. In other words, the results can deviate up to 2% from the known solution and still be considered accurate. Three days before her test, the known solution tested at .074 and a few days after her test, the known solution tested at .078. She argued that the state had not established that her test result was .08 or more and the test results were further bolstered by the improper admission of the HGN results.

In *State v. Tucker*, Slip Copy, 2009 3428611 (Kan. App. October 23, 2009), the Kansas Court of Appeals held that "*the state is not required to prove that the driver's intoxication level has reached the .08 threshold within a certain margin of error."* Even if the HGN results were admitted in error, the Intoxilyzer reading of .08 was sufficient to uphold the conviction. Any error admitting the HGN was harmless.

**HEARSAY MAY BE INTRODUCED AT PROBATION REVOCATION HEARING**

***Unpublished Opinion***

Donald Southern was charged with violating his probation based on his arrest for domestic battery. Police had been called to the victim's house on a 911 call. She identified her assailant as Donald Southern on the 911 call. The victim greeted the officers at the door with fresh injuries.

The victim did not testify at the probation revocation hearing. Instead, the State presented evidence through the 911 dispatcher and through the police officer that arrived on the scene. The defendant objected and argued that the statements concerning who the victim said her abuser was were hearsay and inadmissible based on *Crawford v. Washington*, 541 U.S. 36 (2004).

In *State v. Southern*, Slip Copy, 2009 WL 3428585 (Kan. App. October 23, 2009), the Kansas Court of Appeals reiterated existing case law that probationers are entitled to minimum due process rights, and a district court must evaluate: (1) the explanation offered by the State as to why confrontation is undesirable or impractical, and (2) the reliability of the evidence offered by the State in lieu of live testimony. *"Stated another way, the district court must 'balance the probationer's right to confront an adverse witness against the grounds asserted by the government for not requiring confrontation."*

Although the Court pointed out that no reason appeared in the record as to why it was undesirable or impractical for the victim to testify, the district court referred in its order to the fact that the State had given a sufficient explanation. The remaining evidence was sufficiently reliable for its introduction into evidence in place of the victim's testimony. Southern's confronta-

(Continued on page 29)

(Continued from page 28)
tion rights were not denied.

**ADMISSIBILITY OF HOSPITAL DISCHARGE SUMMARY AND ADMISSIBILITY OF BLOOD DRAW TAKEN FOR DIAGNOSTIC PURPOSES**

***Unpublished Opinion***

Steven Logan ran his car off the road and into a fence post on a rainy night in April. He smelled of alcohol, admitted drinking and ended up being transported to the hospital by paramedics. Upon arrival at the hospital an initial blood draw was done for hospital diagnostic purposes that revealed a blood alcohol content of .244. A later blood draw was done at the request of the arresting officer which was sent to the KBI lab and revealed a .184 blood alcohol content. Logan ended up trying to rip out his IV's and leave the hospital. He was eventually released to his wife. The doctor completed a discharge summary with a listed diagnosis of "alcohol intoxication."

In *State v. Logan*, Slip Copy, 2009 WL 3428564 (Kan. App. October 23, 2009), the admissibility of the lab results of the first blood draw and the admissibility of the doctor's discharge summary were discussed. The defendant argued that this evidence was hearsay and violated his rights under the Confrontation Clause. It should be noted that since no contemporaneous objection was made to the introduction of this evidence, the Court of Appeals actually held that it could not consider these issues. However, it went on in *dicta* to discuss them.

As to the first blood draw, the nurse that drew the blood testified and the prosecution laid the proper foundation for its admission. Since it was done by the hospital's in-house laboratory for diagnosis and treatment the Fourth Amendment is not implicated and the results were nontestimonial.

As to the discharge summary, the Court opined that it was a business record which was properly admitted as such through the testimony of the attending nurse. The discharge summary was a part of routine hospital procedure made contemporaneous with his treatment and subsequent discharge. The information therein was independently corroborated by other witnesses who did testify. It was not impermissible opinion evidence. Although it did provide a medical opinion regarding Logan's physical state, it was based on facts that could be personally perceived. It falls under the *"permissible realm of expert opinion testimony in that it aided the jury by interpreting technical facts and assisted the jury in arriving at a reasonable factual conclusion from the evidence."*

In addition, the discharge summary was not testimonial and therefore the Confrontation Clause was not implicated. *"Although the doctor might have suspected that his diagnosis would later be available for prosecution of DUI, it was not made a law enforcement officer or governmental official, it was made in the course of Logan's treatment...and was intended for hospital staff, hospital records, and Logan, not the police."*

**FAILING TO DRIVE ON THE RIGHT HALF OF THE ROADWAY**

***Unpublished Opinion***

K.S.A. §8-1514 (STO 38) states that *"upon roadways of sufficient width a vehicle shall be driven upon the right half of the roadway."*

Garden City police officer observed a vehicle that did not use its turn signal when turning onto the street. He momentarily lost sight of the vehicle. He caught up with a vehicle he thought might be it, but he wasn't sure. He observed this vehicle swerve to avoid a couple dips in the road following the stop sign. This maneuver itself wasn't that unusual and was a common method used by drivers to avoid damage due to the dip, however when this vehicle swerved back it overcorrected and went into the oncoming lane of traffic, corrected, and then did it again.

The officer said he believed the driver had driven on the wrong side of the road (K.S.A. §8-1514 (STO §38) and failed to maintain a single lane (K.S.A. §8-1522 (STO §46). Once stopped probable cause was developed for a DUI arrest. Based on *State v. Ross*, 37 Kan. App.2d 126, *rev. denied* 284 Kan. 950 (2007), the district court suppressed the evidence from the stop based on the inapplicability of K.S.A. §8-1522 (STO §46). The lanes on the street were not marked at all and the statute requires two or more clearly marked lanes. However, the district judge did not address the applicability of K.S.A. §8-1514 (STO 38).

In *State v. English*, Slip Copy, 2009 WL 363095 (Kan. App. October 30, 2009), the Court of Appeals agreed that there was insufficient evidence to find the defendant violated the fail to maintain a single lane, but held that there was sufficient evidence that he violated K.S.A. §8-1514 (STO 38), failure to drive on the right half of the roadway. Therefore, the stop was proper and the DUI evidence comes in.

*See also*, *State v. Chavez-Zbarra*, ___Kan.App.2d ___ (December 11, 2009), p. 14, *supra*.

**THE CASE OF THE DRUNK JUROR**

***Unpublished Opinion***

Bryan Dobbels was being charged for a 4th time DUI offense. During trial, a juror approached the judge's administrative assistant and told her that the male juror sitting next to her smelled of alcohol. She brought the matter to the judge's attention who asked the parties how they wanted to proceed. The prosecution suggested simply replacing the juror with the alternate. The defendant wanted to *voir dire* the juror. The intoxicated juror was brought into chambers with the parties and admitted consuming 3 ounces of vodka over the lunch hour. The juror who reported the incident was questioned and indicated that she could continue to be fair and impartial and

(Continued on page 30)

# Unpublished Opinions



*(Continued from page 29)*

that she had only mentioned it to one other juror. That juror was questioned, and she also said she could be fair and impartial. The intoxicated juror was replaced by the alternate. Although it is clear that the intoxicated juror committed jury misconduct, the district judge handled the situation appropriately. *See*, *State v. Dobbels*, Slip Copy, 2009 3630915 (Kan. App. October 30, 2009).

**DRUG STOP V. TRAFFIC STOP**

***Unpublished Opinion***

Reno County Drug Enforcement Unit was following defendant because they believed her to be involved in drug activity. Based on her actions on a particular day, which officers had probable cause to believe indicated she was involved as a drug currier, detectives stopped the vehicle she was riding in while they waited for the search warrant to be finalized. They kept the vehicle stopped for a little over an hour waiting for the warrant. Once the warrant was obtained, they searched the car and found methamphetamine.

The defendant argued in *State v. Moore*, Slip Copy, 2009 WL 3630922 (Kan. App. October 30, 2009) that the officers did not observe any traffic offenses, therefore they had no basis to stop the car. The Court of Appeals disagreed finding that this was not a routine traffic stop, it was a drug stop. The officers had sufficient probable cause to stop the vehicle for suspicion of drug activity. Even though obtaining the search warrant was probably not necessary given the probable cause they already had and the vehicle exception to the warrant requirement, obtaining a search warrant and the delay associated therewith did not turn a good stop into a bad one.

*See also*, *State v. Sanchez-Loredo*, ___Kan.App.2d ___ (November 25, 2009), supra, p. 12.

**MASTURBATION IN JAIL CELL IS VIOLATION OF LEWD AND LASCIVIOUS STATUTE**

***Unpublished Opinion***

Defendant had a habit of masturbating in his jail cell whenever the guards made their pre-announced rounds of the jail. The guards did not consent to these displays by the defendant and warned him several times to stop. The jail also disciplined him for these acts. Finally, enough was enough, and the defendant was charged with eight counts of lewd and lascivious behavior in violation of K.S.A §21-3508(a)(2). See also, UPOC §4.1(b).

The statute states that lewd and lascivious behavior includes *"publicly exposing a sex organ or exposing a sex organ in the presence of a person who is not the spouse of the offender and who has not consented thereto, with the intent to arouse or gratify the sexual desires of the offender or another."*

In *State v. Sawyer*, Slip Copy, 2009 WL 4639488 (Kan. App. November 25, 2009), the defendant argued that the privacy of his jail cell was not a "public display" and therefore he could not be convicted of the charges. The Kansas Court of Appeals disagreed and pointed out that while K.S.A. §21-3508(a)(1) requires a "public" display, subsection (a)(2) does not. Therefore, the State was not required to prove that the exposure occurred in a public place. His intent can be inferred from the surrounding circumstances in that it was clear he knew or should have known that he was exposing himself to someone other than his spouse without their consent with the intent to gratify his own sexual needs.

**ENTRAPMENT AND THE OUTRAGEOUS GOVERNMENT CONDUCT DEFENSE**

***Unpublished Opinion***

Donald Bratton began corresponding over the internet on a "sex" website with an under-cover Overland Park police detective who was posing as a woman interested in hooking up with men on the internet. The detective had a membership on the sex site that only allowed her to respond to contact with other website members, not initiate it. Bratton made contact with the detective about 20 times over the course of a three month period. They exchanged emails, some but not all of which were sexually suggestive. After they arranged a date to meet in person, the detective told Bratton, *"I don't remember if I told you or not, but my donation amount is 150 Washingtons for an hour of non-stop entertainment and fun."* This was the first discussion of money in exchange for sex. Within 2 hours of the email, Bratton responded that he felt the donation sounded reasonable and he couldn't wait for

*(Continued on page 31)*

***"We do not find it inherently pernicious to tell jurors not to do things they should not do...Williams argues that giving the no-sympathy instruction nullified the effect of his testimony and undermined his defense. What defense?...He admitted he left the ...residential facility intentionally and without permission and went to...Texas. His defense seems to be: sure, I did it, but I'm a nice guy and I was just trying to help out my family; and besides, my ISO is a jerk and the rules at the residential center are unreasonable...In essence, Williams claims the court should have legitimized this plea for sympathy by refusing to inform the jurors that sympathy should not enter into their deliberations."***

Judge McAnany writing for the majority in *State v. Williams*, ___Kan.App.2d___(September 25, 2009).

# Unpublished Opinions

(Continued from page 30)

them to meet. They arranged the date, time and place of their rendezvous and continued to discuss it over several more emails. When Bratton knocked on the hotel room door, the detective answered it, still posing as the "Belinda" that Bratton had been corresponding with on the internet. She asked if he had the money with him. He put it out on the table , they discussed condoms, and he was arrested. Bratton was charged and convicted of attempting to patronize a prostitute.

Bratton first argued the "outrageous government conduct defense," which has been recognized in Kansas although it has never prevailed in a case. It states that *"governmental participation in a criminal enterprise reaches an intolerable degree when it constitutes a denial of fundamental fairness, shocking to the universal sense of justice, in violation of the due process clause of the 5th Amendment to the U.S. Constitution."* The factors used to identify outrageous government conduct are:

1. the type of activity under investigation;
2. whether the government instigates the criminal activity in question or whether it infiltrates a preexisting criminal enterprise;
3. whether the government directs or controls the activities or merely acquiesces in their criminality; and
4. the causal relationship between the challenged government conduct and the commission of the acts for which the defendant stands convicted.

The outrageous government conduct defense is an offshoot of the entrapment defense and intent and predisposition to commit the crime plays a role in the analysis. These are factual determinations for the fact finder.

In *State v. Bratton*, Slip Copy, 2009 WL 4639504 (Kan. App. December 4, 2009), the Court of Appeals agreed that the predisposition analysis needed to focus on Bratton's intent and expectations at the time he began corresponding with "Belinda." It opined that to measure predisposition later, after a government had engaged in outrageous conduct, could reward the government for any outrageous conduct that succeeded in creating a predisposition to commit a crime.

The defendant argued that the mere fact that he was on a sex website and had contact with "Belinda" could not lead a rational factfinder to conclude he had a predisposition to patronize prostitutes on the site. However, the Court of Appeals found his use of the site to meet women to have sex with was material in the analysis. The very first cursory mention of prostitution by "Belinda" resulted in his prompt agreement to the terms. After money was discussed, he continued to push for a specific date and time. There was no hesitancy or reluctance or undue persuasion. Therefore, it held there was sufficient evidence for the trier of fact, the district court judge, to conclude that Bratton was predisposed to such behavior.

Bratton also argued "entrapment." The entrapment defense is codified in Kansas at K.S.A. §21-3210 and states that *"A person is not guilty of a crime if his criminal conduct was induced or solicited by a public officer...for the purpose of obtaining evidence to prosecute such person, unless the public officer...merely afforded an opportunity or facility for committing the crime in furtherance of a criminal purpose originated by such person or co-conspirator."* Once inducement by the government has been proven, the defendant's previous intent or predisposition to commit the crime must be shown to rebut the entrapment defense. The Court of Appeals found that based on the facts of the case, a rational fact finder could find that Bratton was pre-disposed to hiring prostitutes for sex. The OPPD merely afforded the opportunity.

### TOLLING OF STATUTE OF LIMITATIONS DURING ABSENCE FROM STATE

***Unpublished Opinion***

In January 2003 defendant was arrested for DUI. In April 2003 a complaint was filed in district court and an arrest warrant issued for defendant. In June 2003, defendant moved from Kansas. In November 2008, the defendant returned to Kansas and the warrant was served.

(Continued on page 34)

***MORE FAMOUS KANSANS***

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***Independence, KS***
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**Greg Kincaid, Author**
***Olathe, KS***
*Lawyer and author of best-selling novel "A Dog Named Christmas" which premiered on November 29,2009 as a Hallmark Hall of Fame movie.*

**Eric Stonestreet, Actor**
***Kansas City, KS***
***"Cameron" on ABC TV program, Modern Family***

**Robert Wolfley, Great-Great-Great Grandfather of Pres. Barak Obama**
***Olathe, KS***
*Civil War Veteran, buried in Olathe Memorial Cemetery*

# ABA Traffic Court Seminar

*By Hon. James Campbell, Ottawa*

The American Bar Association Judicial Division Traffic Court Program was held in Providence, Rhode Island, from October 13 - 16. Four KMJA members were in attendance and Judge Karen Arnold-Burger was one of the featured presenters for the conference. The other Kansas Judges in attendance were Dennis Reiling of Oskaloosa, Jon Willard of Olathe and James Campbell of Ottawa.

This conference, held annually, provides an unequalled opportunity for municipal judges to receive training from some of the best and brightest jurists in the country. The presenting judges specialize in the same types of cases we most likely encounter: traffic and DUI. The conference provides not only the opportunity to receive training, but - as with our state conference- the opportunity to share with other judges facing the same challenges and learn new ways to deal with common problems.

The 2009 conference began with presentations dealing with pro se litigants, photo enforcement and judicial ethics and elections. The highlight of the first day was a presentation by Trooper Michael McGlynn from the Rhode Island State Police. His topic was "How Speed Detection Devices Work." After the presentation, Trooper McGlynn and three of his officers escorted the participating judges to the interstate highway behind the hotel for hands-on training with radar guns, car mounted radar and lidar, a new laser-based speed detection device becoming more common. With three Rhode Island State Police cars parked alongside the road with red and blue flashing lights and a line of people with various speed detection devises in plain sight, no high speed infractions were detected, nor any citations issued.

On the second day of the conference a mock DUI trial was held with the judges casting electronic votes on the outcome of various objections and rulings. There was a lively discussion between the judges, particularly when there were variations of state law involved. The afternoon session was dedicated to the scientific and judicial aspects of handling sentencing with drug and alcohol cases where addiction is involved. Dr. Robert Swift of Brown University provided remarkable insight into the physiological and physical aspects of addiction. Dr. Swift spoke regarding the latest information on the brain and how various factors can lead to a greater possibility of addiction. Dr. Swift also spoke about various treatments and provided research data on treatment and the success rates of programs. Dr. Swift's presentation was complemented by the Honorable Elaine Bucci from the Rhode Island Traffic Tribunal who discussed opportunities to use treatment in sentencing to reduce the rate of individuals who re-offend.

The final day of the session offered programs dealing with teenage drivers and case flow management. Additionally, Judge Karen Arnold-Burger, presiding judge of the Overland Park Municipal Court, spoke on the impacts of racial profiling in the legal system as a whole, and more particularly on the role of the judiciary in providing that most important balance to insure equal justice for all.

The quality of the conference was exceeded only by the hospitality shown to the visiting judges by our host, Judge Robert Pirraglia and by the people of Rhode Island.

The judges were provided a walking tour of downtown Providence on the first day of the conference, with small groups being escorted by members of the Rhode Island Historical Society. The groups met up later at the Rhode Island Supreme Court where Chief Justice Paul Suttell welcomed the gathering and invited them to tour the justices' conference chambers.

On Wednesday evening the judges were received at the Rhode Island State House for a reception featuring the Colonial Guard. Members of the Guard provided entertainment with a drum and fife corps while a magnificent buffet was provided. The evening was highlighted by a procession to the Grand Reception Hall where Judge Pirraglia presented the Speaker of the Rhode Island House of Representatives and the Majority Leader of the Senate who each made remarks to the august group.

The final evening of the conference offered the opportunity for the judges to take a bus tour of historic Newport, Rhode Island. Although hampered by wet weather, the group received a personal tour of The Breakers, the summer home of the Vanderbilt family. Although only used for two months out of the year, the spectacular mansion was built with the finest materials of the day. The home exemplifies the conspicuous consumption of "The Gilded Age" and let us look back on that storied time in America's past.

The Honorable Vic Fleming of Little Rock, Arkansas, made a public invitation to the group to attend the 2010 ABA Traffic Court Seminar in his hometown. The seminar will be held October 13-15, 2010 at the Capital Hotel.

**Dennis Reilling, Jon Willard, Karen Arnold-Burger and James Campbell at the Rhode Island State House as part of the 2009 ABA Traffic Court Seminar**

# NEW COURT FOR MENTALLY ILL IS WELL-RECEIVED

BY RON SYLVESTER Wichita Eagle
November 16, 2009

Judge Bryce Abbott said he was glad to see the woman walking to his bench in Wichita Municipal Court. *"It's so nice to see someone who's not in handcuffs,"* Abbott told her.

She had been charged with her second case of driving under the influence. She'd kept all the appointments with her caseworker for the previous two weeks and was following through with her treatment as required by the city's new mental health court.

Funded by a federal grant from the Department of Justice, mental health court helps those charged with misdemeanor crimes who have severe mental illnesses.

Rather than being sent to jail, those who are eligible are given probation and monitored weekly or biweekly to make sure they follow treatment plans.

It's the latest effort by Wichita and Sedgwick County to keep people with mental illnesses from going to jail.

It costs the county $65 a day to keep an inmate in jail, and the cost of supplying medication can soar to $600 a day for someone with a severe mental illness.

Keeping people on probation or in other services costs a fraction of that.

A month into the mental health court program, there's not enough data to show how well it's working. But so far, those involved are encouraged.

*"We're already seeing diversions from jail on a weekly basis,"* said Jason Scheck, program director of the Sedgwick County Offender Assessment Program with Comcare, the county's community mental health provider.

More than 30 people have appeared in Abbott's mental health court, which meets weekly in courtroom D at City Hall.
None of the defendants' names are being used to protect their medical privacy.

*"What's really surprised me is the number of people who have accepted treatment,"* Abbott said after court.

Others weren't as fortunate as the woman who appeared before the judge without handcuffs. Three people had to provide a urine analysis, or UA, for drugs prior to last Monday's court and flunked — meaning they violated the terms of their probation. They were led into court in handcuffs for Abbott to decide whether to revoke probation.

*"We've got three UAs and all of them are hot,"* Abbott said.
The number of people with mental illnesses who end up in jail or prison has been growing nationwide for 20 years, studies show.

Kansas has reacted by training law enforcement officers — beginning in the Wichita area — to better respond to the mentally ill in crises.

Scheck said about 150 people have been taken to mental health services instead of jail by police trained in crisis management.

Mental health court is the next step in trying to divert people from jail.

Those at last week's docket faced charges including intoxicated driving, inhaling chemicals to get high, and filing false police reports.

*"You are taking some medications that don't go along very well with getting high,"* Abbott told one man who tested positive for cocaine and marijuana.

The man had been sentenced to a year in jail but was released on probation.

Doing drugs was a violation of his probation and could have resulted in him being sent back to jail.

Daryl Handlin, a social worker with Comcare, told the judge that the man had suffered some health problems consistent with his medications mixing with street drugs.

*"I don't want to go to jail for a year,"* the man said.

*(Continued on page 34)*

**Judge Abbott presiding over Wichita's new Mental Health Court**

# Mental Health Court

*(Continued from page 33)*

*"That's what I'm trying to help you keep from doing,"* Abbott told the man. *"You keep going with us, and before you know it you'll be at the end of that year. But you've got to work with us."*

The mental health court assigns its clients to caseworkers and mental health professionals. It helps them get into treatment programs. Prosecutors and public defenders work together in the best interests of the defendants.

*"I wouldn't argue with treatment, because that's what's best for them,"* said Nic Means, the city public defender who works with mental health court clients. *"Some people just need help getting control of their lives."*

This is the state's first mental health court, but Abbott said other cities are showing interest. Officials from El Dorado have scheduled a visit next month to see how the court works, Abbott said.

*"The problem is the people who provide services in the community aren't connected with the jail,"* Abbott said. *"And that's where a lot of people end up. We help connect them."*

The hope is to get people the help they need before their crimes become serious enough that they end up in prison.

*"The thought is if you can get people soon enough, they'll get the services they need before they get caught up in the system,"* said Dawn Shepler, a parole officer who specializes in mental health needs.

During Monday's proceeding, Abbott told one man to go to Comcare's Crisis Intervention Services to spend the night. He directed Comcare to have a caseworker walk the man to the Social Security office to apply for disability.

The man qualified for financial help but had never applied for it. Through mental health court, he could get the financial aid to help pay rent and find transportation.

Abbott said that in the first month, he's sent one person to jail for not following the program's rules. Four other people were sent to a state mental hospital for in-patient treatment.

*"They were too serious for us to help them in the community,"* he said.

Last week, Abbott gave another man his freedom.

The man got out of jail, picked up by social workers who will begin working with him.

*"There are all sorts of services available in this community, and we're really the gateway for helping people find them,"* Abbott said.



# Unpublished Opinions

*(Continued from page 31)*

The district court dismissed the case, holding that 5 years constituted an unreasonable delay in service of the warrant, therefore the 2-year statute of limitations was not tolled.

The Kansas Court of Appeals disagreed and in *State v. Bailey*, Slip Copy, 2009 WL 5062439 (Kan. App. December 18, 2009) held that pursuant to K.S.A. §21-3106 the statute of limitations was tolled during the defendant's absence from the state. The charges were reinstated.

***Editor's Note:*** *The statute of limitations was subsequently changed to 5 years. See, K.S.A. §21-3106 (4) and K.S.A. §21-3105. The statute still contains a provision tolling the statute of limitations for periods the defendant is absent from the state or periods the defendant is concealed or conceals the crime. K.S.A. §21-3106(5).*

### BREATH TEST PAPER JAM

***Unpublished Opinion***

Defendant was arrested for DUI and taken to station for breath test. The officer followed the protocol for administration of the test. He was a certified operator and the machine was certified. The unit was working properly and a test was received within two hours of the defendant's operation of a vehicle. The machine displayed the reading, but when it went to print the result the paper jammed in the machine. The officer logged the result, .154, in the Subject Test Logbook. Defendant was charged with a second offense DUI.

Prior to trial the defendant moved to exclude the test results due to the lack of a printout confirming the result. He argued that because K.S.A. 2006 Supp. §8-1001(p) (now K.S.A. 2008 Supp. §8-1001(u)) requires that *"upon the request of any person submitting to testing under this section, a report of the results of the testing shall be made available to such person"* the production of the intoxilyzer printout was a foundational requirement for the admission of the breath test results.

The Kansas Court of Appeals held that the prosecution had established the foundation required by the existing caselaw and therefore the result was admissible. *State v. Ayala*, Slip Copy, 2009 WL 5063262 (Kan. App. December 18, 2009). The officer was certified, the machine was certified, and the testing procedures were done in accordance with KDHE requirements.

The fact of the printer jam, the Court held, merely goes to the weight, not the admissibility of the breath test result. The defendant did receive a copy of the logbook page on which the officer recorded the result.

*(Continued on page 35)*

# Unpublished Opinions



*(Continued from page 34)*

The Court stated that although the parties did not argue "best evidence" rule, that was probably the more appropriate issue. The best evidence rule states that to prove the content of a writing, no evidence other than the writing itself is admissible. *See*, K.S.A. §60-467.

However, even using a "best evidence" analysis the Court would have likely held that the formal printout was "lost or destroyed without fraudulent intent" which would have allowed secondary evidence to establish the content of the writing (to wit: the logbook entry and the officer's testimony regarding his observation of the screen).

### MERE FACT THAT DEFENDANT IS IN OFFICER'S PATROL CAR DOES NOT MANDATE *MIRANDA* WARNINGS ON A ROUTINE TRAFFIC STOP
***Unpublished Opinion***

Defendant was pulled over for pulling a trailer without working taillights. As soon as the officer got close to the defendant, he noticed a strong odor of alcohol on his breath and his bloodshot and watery eyes. The officer asked for the defendant's driver's license and asked him to have a seat in his patrol car. The officer told him he was going to write him a warning ticket for the taillight infraction. While in the patrol car, three minutes after the truck was originally stopped, the officer asked the defendant whether there were any open beers in the truck. The defendant replied in the negative. The officer then asked the defendant how much he had to drink that day and the defendant admitted that he had a few, but nothing in the last 30 minutes. The officer told the defendant that he was worried about how much he had to drink and the defendant then responded that he had four beers in the preceding hour and a half.

Seven minutes after the stop, the officer was checking the defendants truck for open containers and found an open beer bottle that was almost empty. He gave sobriety tests and a PBT and eventually arrested the defendant for DUI. He blew .099 at the station.

The defendant argued that all evidence obtained after he stepped into the patrol car should be suppressed because the officer did not give him his *Miranda* warnings.

In *State v. Smith*, Slip Copy, 2009 WL 5062492 (Kan. App. December 18, 2009) the Court of Appeals held that while it is true that a police car is frequently used as a "temporary jail," that is not what happened here. *Miranda* warnings aren't required simply because the defendant is being questioned in a patrol car. Whether a person is in "custody" for purposes of Miranda is an objective standard , which tests how a reasonable person in the suspect's shoes would have understood the situation. As the U.S. Supreme Court held in *Berkemer v. McCarty*, 468 U.S. 420 (1984), *Miranda* warnings aren't required in a routine traffic stop unless the suspect is "subjected to restraints comparable to those associated with formal arrest."

The defendant thought he was getting a warning ticket for a traffic infraction. No weapons were drawn, no handcuffs used. The length of the stop was short, a conversational tone was used and the two of them even joked a bit. There was no show of force and absolutely no indicia of "formal arrest."

## Graduated Driver's Licenses Go Into Effect January 1; Some Changes to Municipal Court Responsibilities

The graduated driver's license provisions adopted by the Kansas Legislature in 2009 took effect January 1, 2010. A review of the new requirements can be found at **www.ktsro.org**; **www.rsrevenue.org**; and **www.ksdot.org**. Each of these sites contain easy-to-read charts that can be printed out and provided to the public.

Teens entering the licensing system on or prior to January 1, 2010 (whether it is for a farm permit, restricted license or full license) would fall under the old guidelines. In other words only those drivers entering the system after January 1, 2010 will be required to adhere to the new guidelines. So there will be some 14, 15, 16 and 17 year olds that are not held to the new standards. It will take 4 years before everyone is held to the new standard.

Among other changes, under the **new** provisions, use of wireless devices while driving are prohibited until the teen completes the six-month period of passenger and late night driving restrictions. Full unrestricted driving privileges will not be available until age 17 if all the prerequisites have been met.

K.S.A. §8-291 was also amended. Prior to January 1, 2010, if a person was convicted of driving in violations of the restrictions on his or her license (whether it was an age restriction, glasses restriction, or some other restriction) the Court was required to suspend the driver for a minimum of 30 days and a maximum of 2 years on a first offense and a minimum of 90 days and a maximum of two years on a second offense. Under the amendments, a special suspension provision is used if a person is convicted of violating one of the new age-related restrictions (farmer', learner's or restricted), the Court must suspend on a first offense for 30 days, a second offense for 90 days and a third or subsequent offense for one year. There is no discretionary maximum.

***Editor's Note:*** *This special provision would take precedence in the case of a "driving in violation of restrictions ticket" (STO §195) over the Court's discretion under K.S.A. §8-2117(a) to suspend (or restrict) the driving privileges for up to one year for any person who is under the age of 18 who commits a traffic offense. A* ***"traffic offense"*** *is defined at K.S.A. 2008 Supp. §8-2117(d) and K.S.A. §19-4708. See also, Verdict, Winter 2009, p. 17.*

# The Verdict

Winter 2010 Issue 50`

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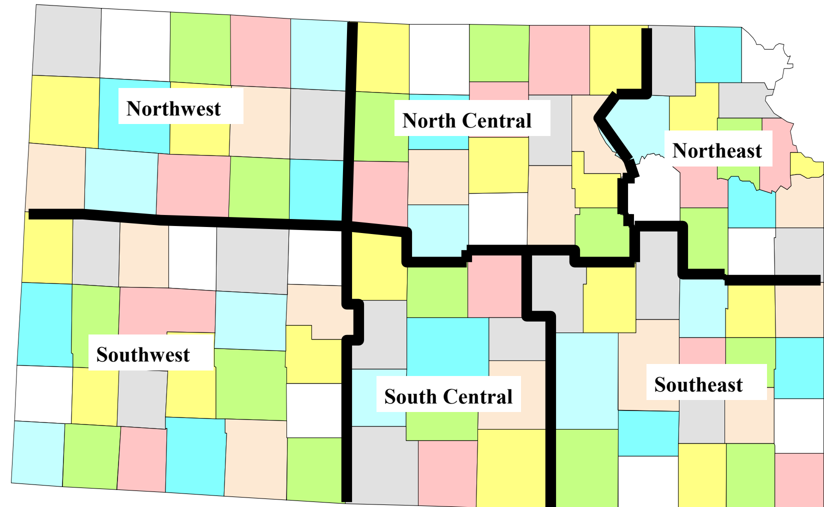


Interested in serving on the KMJA Board of Directors? At the April 2010 meeting the following positions will be up for election:

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

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Treasurer……………………………………………………Kay Ross (Plainville)
Past-President………………………………………………John McLoughlin (Cimarron)

### *Directors:*

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

### MUNICIPAL JUDGES' TESTING AND EDUCATION COMMITTEE

Tom Buffington…………Marquette
Jay Emler………………..Lindsborg
Cathy Lucas…………….Sublette
Karen Arnold-Burger………Overland Park
James Wells…………………Topeka
Steve Ebberts………………Topeka
Lee Parker…..Andale
Brenda Stoss…..Salina

### MUNICIPAL COURT MANUAL ADVISORY COMMITTEE

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