



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



## A STEP BACK IN TIME

In 1969, *Bob and Carol and Ted and Alice* was nominated for four academy awards. It explored the issues of sexual permissiveness and couples swinging. Starring Natalie Wood, Elliott Gould, Robert Culp and Dyan Cannon, it was considered a ground-breaking exploration of the promiscuity of the 60's. However, almost 50 years earlier, the Kansas Supreme Court dealt with a similar topic, although a bit more delicately, involving Laban and Helen and Bill and Bonnie in *Harmon v. Harmon*, 111 Kan. 786 (1922).

Laban and Helen Harmon moved to Independence, Kansas shortly after their marriage. Laban was 24 and Helen was 21. Laban was an accountant for a large corporation in Independence. They had a daughter while there, Hortence. Laban became prominent in the community and Helen was involved in the church and was a substitute teacher. Independence was a thriving city of over 12,000 residents at the time, with several large businesses, 20 restaurants and 40 grocery stores.

*(Continued on page 12)*

*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.*

### EYEWITNESS SHOW-UP, WHEN IS IDENTIFICATION IMPERMISSIBLY SUGGESTIVE?

Timothy Edwards and his wife were on the way to the hospital. His wife was driving and he was in the passenger seat. On one side of the highway Edwards saw an officer behind a car on the shoulder. On the other side, he observed two men on the side of the road next to a van, which had attached to it a trailer with a car loaded on it. He watched one of the men walk down a slope toward a drainage ditch and stuff a luggage bag into a drainage pipe. They kept looking nervously across the highway at the police. He saw them for a total of about 15 seconds. Edwards called 911 and reported the activity he observed.

Police responded to the scene and found two men next to a van and trailer, with the hood up and smoke coming out of the van. It had a Mexican license plate and the two men had Mexican driver's licenses. The men told the officer that

*(Continued on page 5)*

## SPOTLIGHT ON: ANDREA BEKEMEYER

Judge Andrea Bekemeyer, Hunnewell and South Haven, was born in Norwich, Kansas. Her father was a NASA engineer and her mother a homemaker. She has two brothers and one sister. Her parents are both still living in the College Hill area of Wichita. After graduating from Norwich High School, she headed off to Princeton, but was soon back in Kansas where she graduated with a degree in Business Administration from Wichita State University.

In 1988, at the young age of 23, she married David, a contract engineer, and they proceeded to have 8 children, all of which she has home-schooled. They range in age today from 11-22. Three are in college. One followed her mother from Princeton to WSU, where she is working on a Master's Degree in Psychology. The other two are currently attending Cowley Community College, one focusing on art and the other history.

Andrea is an avid scrap booker. She has her own website at

*(Continued on page 2)*

# Spotlight On: Andrea Bekemeyer

<http://www.scrapadilly.com>. She also loves to cook and hopes to take classes at the Culinary Institute in Overland Park soon. You also may have seen her smiling face on television or on billboards in Kansas City, Topeka, Wichita and Omaha. She has become the face for Dillons (and Kroger) Fuel Rewards. (See billboard below). You can watch her commercial on youtube at:

<http://www.youtube.com/watch?v=4PfuFOtxVwU>



However, she assures us she is not getting rich from her fame. Her sole payment was a \$25 Dillons gift card. She believes she was selected when they saw her with her huge shopping cart. She estimates she spends \$1,500 per month, with her large family. It should be noted that she is not described by name or as a judge in any of the ads.



Andrea also volunteers for her church, First Southern Baptist of Wellington.

Judge Bekemeyer was appointed in 1994 as municipal judge in both Hunnewell and South Haven. Both courts meet once per month. She likes the fact that her judicial positions allow her to stay in touch with the community. However, since the courts meet in the evening, it allows her to stay home with her kids during the day.

As for the KMJA, Andrea said she loves the annual conferences. The camaraderie that she has developed with her fellow judges has been a wonderful plus. She is also very grateful that the Municipal Judges Manual has been placed on the web.

### DID YOU KNOW?

- During their first year of driving, teenagers are involved in three times as many fatal crashes as all other drivers.
- Teens have the lowest rate of seat belt use.
- 37 percent of male teen drivers involved in fatal crashes were speeding and 26 percent had been drinking.
- An increase in the number of teen passengers, under an unsupervised teen driver, directly increases the crash risk.

**Source:** Center for Disease Control and Prevention, Teen Drivers Fact Sheet, 2010

## Updates from O.J.A.

### ANNOUNCING NEW JUDGES

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

- |                   |            |
|-------------------|------------|
| -William Thompson | Cuba       |
| -Peggy Svaty      | Brookville |
| -Shawna Miller    | Hoyt       |

### RETIREMENTS

Judge Randy McGrath, *Lawrence*, and Judge Kathleen Burr, *Mulberry*, have announced they will be retiring from the bench.

Judge Burr wrote: *"I have enjoyed my 20 year tenure but decided it is time that I hang up my robe, so to speak, and leave things to younger people. I have met some really nice people during my time and have enjoyed the conferences"*

### 2011 CONFERENCE

The Conference will be held April 18-19 at the Topeka Ramada Inn. You will received the registration materials mid-January.

### CJE REMINDER

Your 2010 CJE Compliance Form is due in the Office of Judicial Administration by February 1, 2011. Please call Denise Kilwein at (785) 296-2256 if you have any questions.

Judge McGrath is retiring after 12 years as a full-time judge and his parting comments to the KMJA can be found on page 27, *supra*.

Happy trails to Judges McGrath and Burr, they will be missed!



Judge Katie McElhinney, *Lenexa*; Judge Vic Fleming, *Little Rock*, Arkansas, and Judge Steve Ebberts, *Topeka* enjoy the Governor's Reception held at 2010 ABA Traffic Court Program in Little Rock.

## NEW WAYS TO HOOK KIDS ON ALCOHOL



On November 22, 2010 the Kansas Department of Alcoholic Beverage Control (ABC) notified liquor retailers to pull Four Loko, the controversial caffeine-and-alcohol beverage—along with some competitors’ similar but lesser-known

drinks—from store shelves. Initially, the Department said it would wait for the Legislature to take action. At least four other states have banned caffeinated malt beverages. But a recent decision by the federal Food and Drug Administration cleared the way for the ABC to invoke its authority to immediately pull products that are dangerous to consumers.

These drinks came under fire after students at Central Washington University had to be hospitalized and a 19-year-old Michigan man suffered a heart attack after drinking the beverages.

Four Loko, Four MaXed, and Joose are all similar products. They differ from traditional coffee-containing drinks because they are much stronger and target a younger, less-mature drinking population. Each can contains the alcohol content of about a bottle of wine and the caffeine of three cups of coffee. The caffeine masks the depressant effect of the alcohol, so users tend to consume more.



With Four Loko losing it’s mojo, the latest craze hitting the nation’s colleges comes in the innocuous packaging of a favorite desert topper, but with an 18 percent alcohol content.

It’s called Whipahol, a booze-infused whipped cream with as much alcohol in one can as three beers. That’s 30 proof, about the same as Bailey’s Irish Whiskey. Students call it “getting whipped.”

Companies such as Whipped Lightening and Cream are pumping out flavors such as German Chocolate, Hazelnut Espresso and Strawberry Colada. Their websites suggest topping cocktails, shooters and deserts with the sugary hootch to class up any social gathering.

Concerns are mounting, however, that the less-than-urbane undergrad is instead blasting the aerosol-powered dairy product down their gullets and using it to top off other alcoholic sweets like Jell-O shots, creating the same fear as that surrounding Four Loko’s caffeine content: The alcohol is masked

### The Verdict

by sugar, leading to severe over consumption.

Though you have to be at least 21 to buy it, Whipahol is quickly finding its spot among other libations.

*“I’m amazed at the amount we’ve sold,”* a store manager told the Boston Herald. *“I thought these would be one of those kitschy things we pulled off the shelf in six months, but within the first week we had already sold out the initial order.”*



**Discussing a defense motion for dismissal based upon violation of speedy trial rights, Justice Johnson, writing for the Court in *State v. Edwards*, \_\_\_ Kan. \_\_\_ (November 24, 2010), had this to say about the seemingly cavalier judicial treatment of the issue:**

*“At stake for the State, i.e., for all of the citizens of this sovereignty, was the question whether a person charged with first-degree murder would be set free without ever having a jury determine if he was guilty. At stake for the defendant was the protection of his statutory right to a speedy trial, and obviously, his immediate freedom. Notwithstanding the potential consequences, the judge chose to memorialize his ruling by hand writing on a preprinted Motion Minutes Sheet on which the checkmark next to ‘overruled’ was explained by the unsatisfactory statement, ‘Per the record.’”*

## Prohibiting the Use of Medical Marijuana by Persons Granted Probation

In the Fall 2010 issue of *The Judges' Journal*, a publication of the American Bar Association-Judicial Division, Judge Fred Rodgers, a frequent presenter at our KMJA Annual Conference (the guitar-playing judge), has penned a wonderful article about the issues that arise when you have a person on probation that may be legally using medical marijuana. Judges are encouraged to read the full article, but what follows is a summary of Judge Rodgers' conclusions.

Fourteen states currently have laws that allow for the possession and sale of marijuana for medical purposes. In addition, Arizona allows physicians to prescribe it and Maryland specifically allows lawful medical use as a defense in a prosecution for illegal possession of marijuana. Thirteen more legislatures are currently considering legalization bills. Such a bill was introduced in Kansas last year by Rep. Gail Finney (D-Wichita).

To complicate matters, federal laws still prohibit the possession of marijuana and in *Gonzales v. Raich*, 545 U.S. 1(2005), the U.S. Supreme Court held that federal prosecutors may still prosecute medical marijuana patients even in states with what have been termed "compassionate-use" laws.

So what's a judge to do? Probation is a privilege, not a right. Common terms of probation include not violating any local, state or federal laws. Marijuana possession is illegal at a federal level and illegal in some states. In addition, often a probationer is prohibited from consuming any alcohol or any illegal or non-prescribed drugs. Should it make a difference if the drug prescribed, though illegal, is medically therapeutic?

Judge Rodgers points out that there have been a variety of holdings on the topic around the country. Some have prohibited revocation of probation based on "violation of the law" when a probationer is legally using medical marijuana in a particular state. See, *People v. Tilehkooh*, 113 Cal. App. 4th 1433 (2003); *State v. Nelson*, 195 P.3d 826, 833-34 (Mon. 2008); and *City of Garden Grove. Superior Court*, 157 Xal.App.4th 355 (2007). In contrast, others have affirmed such restrictions. See, *State v. Vincent*, 193 P.3d 730 (unpublished, Hawaii, 2009) and *People v. Bianco*, 93 Cal.App.4th 748 (2001).

He concludes by recommending that judges use the following checklists in determining whether prohibition of medical marijuana is a proper condition of probation or release on bail, based on *People v. Lent*, 541 P.2d 545 (Cal. 1975).

### The Verdict

#### Checklist 1: Probation

**Question: Is a probation condition requiring abstaining from medical marijuana:**

1. reasonably related to the crime for which defendant was convicted?
2. reasonably related to preventing future criminal conduct given a demonstrated likelihood that defendant will possess marijuana for nonmedical purposes, or in greater quantities than permitted for medical purposes under law?
3. reasonably related to preventing a demonstrated tendency on defendant's part to become addicted to drugs?
4. reasonably related to promoting the defendant's success in a court-ordered substance abuse treatment program?

Any "yes" answer weighs in favor of ordering the defendant to abstain from medical marijuana as a condition of probation.

#### Checklist 2: Release on Bail Conditions

**Question: Is a condition of release requiring abstaining from medical marijuana:**

1. reasonably related to the crime for which defendant was arrested?
2. reasonably related to the likelihood of defendant's making all court appearances and remaining law-abiding while out on bond?
3. reasonably related to the likelihood that defendant may possess marijuana for nonmedical purposes, or in greater quantities than permitted for medical purposes under law?
4. reasonably related to preventing a demonstrated tendency on defendant's part to become addicted to drugs?
5. reasonably related to promoting the defendant's success should s/he be sentenced to a court-ordered substance abuse treatment program?

Any "yes" answer weighs in favor of ordering the defendant to abstain from medical marijuana as a condition of pretrial release on bail.



*"When it comes to the future there are three kinds of people: those who let it happen, those who make it happen, and those who wonder what happened."*

**Dr. John M. Richardson, American academic**

# Court Watch

(Continued from page 1)

they had just bought the car at auction and they were taking it back to Mexico for resale when the van broke down. When the officer mentioned the bag, both men became extremely nervous and started looking around. One man even glanced toward the ditch. The officer prevented the men from getting in the van and when he looked in the van he saw an electronic relay box with electrical tape. According to the officer, this typically leads to a hidden compartment, a big indicator of drug trafficking. Officers found 42 pounds of marijuana in the bag in the ditch. There was more indicia of drug trafficking in the van.

Upon arresting the two men, the police called Edwards and asked him to return to the area to identify the men. He was asked over the phone to describe which man had the bag. He stated the older one with the mustache. Only one of the men had a mustache and he was the older of the two. Once Edwards arrived, the two men were taken out of the patrol car and placed where Edwards could see them. The police had Edwards stick his head out the window to see them. He pointed out the one with the mustache as the one who hid the bag, Calderon-Apracio. At trial, Calderon-Apracio had shaved his mustache, but Edwards still identified him as the man he saw stuffing the bag into the drainage pipe.

On appeal, Calderon-Apracio argued that his due process rights were violated by an unnecessarily suggestive show-up identification. In *State v. Calderon-Abrasio*, \_\_\_ Kan.App.2d \_\_\_ (October 29, 2010), the Court of Appeals found that the defendant had failed to object to the identification procedure at trial, prohibiting its consideration. In addition, it was clear that he had focused his trial strategy on the reliability of the identification, cross-examining Edwards on the distance, the speed, etc..

However, the Court does go on to find that the show-up was not impermissibly suggestive. This was not your typical show-up (one victim-witness, one suspect). Edwards was an independent caller, not a victim. He was not shown one person, but two and had to identify which one was stuffing the bag in the pipe. The two men were still in the location where Edwards had seen them, not the situation where someone has fled the scene and the witness has to identify the person caught sometime later. The two men admitted to being with the van when it broke down. Finally, only 25 minutes elapsed between Edwards observations and his arrival on the scene and, once he arrived, he did not hesitate in pointing out Calderon-Apracio as the person stuffing the bag in the pipe.

## EVIDENCE NECESSARY TO SUPPORT FAILURE TO APPEAR CHARGE

Terry Diaz posted a bond for a felony drug charge. He signed the appearance bond, which alerted him that his appearance date was December 8, 2006. Diaz met with his attorney,

## The Verdict

David Gilman, who, Diaz claims, told him he did not need to appear in court on December 8 because they were going to go to trial. Diaz did not appear. No one asked for a continuance.

K.S.A. §21-3814 states that “*aggravated failure to appear is willfully incurring a forfeiture of an appearance bond and failing to surrender oneself within 30 days following the date of such forfeiture by one who is charged with a felony and has been released on bond for appearance before any court of this state...*” Forfeiture of an appearance bond occurs when the defendant fails to appear “*as directed by the court and guaranteed by the appearance bond.*” K.S.A. §22-2807(1),(2).

On December 8, the district court forfeited Diaz’s bond and issued a warrant for his arrest. By December 10, Diaz knew a warrant had been issued for his arrest and he did not turn himself in within 30 days of forfeiture. Instead, he left town and went to Mexico. Over the next 8 months, his attorney died and Diaz was eventually apprehended by border authorities, waived extradition, and returned to Kansas. He was charged with aggravated failure to appear and convicted by a jury.

On appeal, Diaz argued that he did not have the required mental state for the offense, to wit: willfulness, because he was operating under a mistake of fact, the mistake being that his attorney told him he didn’t have to appear. A mistake of fact is a defense if it negates the crime’s required mental state.

In *State v. Diaz*, \_\_\_ Kan.App.2d \_\_\_ (October 29, 2010), the Court of Appeals pointed out that the criminal intent can be established by proof that the **conduct** of an accused person was intentional. Crimes that only require intent to commit the conduct are general-intent crimes and the general rule is that mistake of fact is not a defense to general-intent crimes. Some crimes, however, require more than an intent to do the conduct, these specific-intent crimes require an additional intent to achieve a particular consequence or harm. Mistake of fact is traditionally a recognized defense to specific-intent crimes.

Aggravated failure to appear is a general-intent crime. The state is only required to prove that Diaz intended not to appear and did not turn himself in. Therefore, his mistake of fact has no bearing on his guilty or innocence of the charge. Incorrect legal advice is not sufficient to establish a mistake of fact. He may not have thought his actions were wrongful, but his actions were in violation of the statute. He knew at least on December 10 that a warrant had been issued for his arrest. “*A reasonable person who believes that he was wrongfully penalized for not attending would have taken steps to investigate what happened and clear his name.*” Diaz did not take

(Continued on page 6)

# Court Watch

(Continued from page 5)

such steps in this case.

Interestingly, the Court states that if his defense had been that he wrote the day down wrong, he would not have had the intent to miss the hearing. But under these facts, he intended to miss the hearing, he just didn't think it was wrong for him to do so.

**TO JUSTIFY EXTENDING A LAWFUL TRAFFIC STOP FOR A CONSENSUAL SEARCH, THE OFFICER MUST HAVE A REASONABLE SUSPICION OF CRIMINAL ACTIVITY; ROUTINE PAT-DOWN SEARCHES WITHOUT ANY SUSPICION ARE UNCONSTITUTIONAL**

Officer Bell observed Billy White behind the wheel of a vehicle which was stopped at a stop sign with its left turn signal on. However, the driver did not turn after his stop, but went straight. Officer Bell conducted a traffic stop.

The officer obtained identification and insurance from White. There were no active warrants, but White did have some unspecified narcotics offense on his record. Officer Bell asked White if he could search the vehicle "to make sure there was nothing illegal inside." By this time, a second officer had arrived on the scene. White agreed to a search. Officers had him step to the rear of the vehicle during the search. The search of the vehicle did not uncover any evidence. White was cooperative throughout.

While at the rear of the vehicle, the second officer conducted a pat down search of White. When asked why, the officer stated that "It's officer safety. That's just what I've done since I've started out here. Just make sure nobody has weapons on them when I'm talking to them." He testified that he does pat downs routinely whenever anyone is asked to step out of a car.

The pat-down produced marijuana, several empty baggies and \$1,432 in cash. White was charged with possession with intent to sell among other related charges. He filed a motion to suppress, which was denied and he was ultimately convicted.

In *State v. White*, \_\_\_Kan.App.2d \_\_\_ (November 12, 2010), the Kansas Court of Appeals held that the motion to suppress should have been granted.

It held that the traffic stop was justified at its inception. The officer was justified to take White's identifying information back to his patrol car and run a warrant's check. However, when nothing came up the officer illegally extended the scope of the initial traffic stop by even asking for consent to search. In order to justify extending the stop for even a con-

sensual search, the officer had to have a reasonable suspicion of criminal activity. Otherwise, without reasonable suspicion, he was required to effectively end the traffic stop (to wit: give ticket or warning, give driver's license back, tell defendant he was free to go, etc.) before requesting to search.

Likewise, since the search was illegal, asking him to step from his car and patting him down was also illegal. In addition, even if White had been lawfully asked to step from his car, a pat-down cannot be conducted unless the police have a reasonable suspicion that the suspect is armed and dangerous. Here, White was cooperating fully; there was nothing to indicate it was a high-crime area; it was still light outside; there was no indication that White had any weapons offenses on his record; and it is unknown whether the officer conducting the pat-down even knew of White's narcotics offenses. Therefore, there was no fear for officer safety and a mere standard operating procedure of patting everyone down who gets out of the car will not withstand constitutional scrutiny.

**PROSECUTOR CANNOT TELL JURORS TO CONSIDER "WHAT THEY FEEL IN THEIR HEARTS" IN DETERMINING GUILT**

James McMillan was tried for the murder of his neighbor. During closing statements, the prosecutor said:

*"And basically, what it comes down to is this, if you, in your hearts and in your minds, after hearing all the evidence and taking all the evidence into consideration, you feel in your hearts and in your minds that the State has proven each and every element of the crime charged, you have reached that reasonable doubt standard and you must find the defendant guilty."*

In *State v. McMillan*, \_\_\_Kan.App.2d \_\_\_ (November 12, 2010), the Court of Appeals held that this was an incorrect definition of reasonable doubt and re-stated its oft given admonition that prosecutors should avoid trying to explain reasonable doubt in their own words. The Court sets out an extensive history of courts and prosecutors trying to go outside the instructions to define reasonable doubt, with mixed results. However, it found in this case, the error was harmless based on the very strong evidence of McMillan's guilt.

**A MUNICIPAL COURT DUI COMPLAINT IS SUFFICIENT IF COMPLIES WITH K.S.A. §8-2106(B) OR K.S.A. §22-3201**

John Sybrant was arrested for DUI. He was charged in municipal court with operating a vehicle while the alcohol concentration in his breath or blood was in excess of the legal

(Continued on page 7)

**"But a law enforcement officer cannot 'routinely' perform a pat-down every time the officer personally encounters a citizen and expect the courts to sanction such a blatant constitutional violation."**

*State v. White*, \_\_\_Kan.App.2d \_\_\_ (November 12, 2010)

## Court Watch

(Continued from page 6)

limit. He pled no contest and was convicted (the per se violation). He appealed to the District Court, where he was convicted by a jury for operating a vehicle under the influence of alcohol to the extent that he could no longer safely operate the vehicle.

On appeal, Sybrant argued, for the first time, that the complaint was defective for several reasons.

First, the defendant argued that the complaint was defective because it did not contain information required by K.S.A. §8-2106(b). That statute states that a law enforcement officer **may** prepare and deliver a traffic citation if the person is stopped for a violation of the uniform act regulating traffic on the highways which is a misdemeanor or a traffic infraction. The citation is required to contain “*a notice to appear in court, the name and address of the person, the type of vehicle the person was driving, whether hazardous materials were being transported, whether an accident occurred, the state registration number of the person’s vehicle, if any, a statement whether the vehicle is a commercial vehicle, where the person is licensed to drive a commercial motor vehicle, the offense or offenses charged, the time and place when and where the person shall appear in court, the signature of the law enforcement officer, and any other pertinent information.*”

K.S.A. §12-4205a states that a complaint and notice to appear in municipal court **may** be made in the form set out in K.S.A. §8-2106(b) and if it is, it will be deemed sufficient. He argued that since the complaint did not contain the information set out in K.S.A. §8-2106(b), it was defective.

The Court of Appeals in *City of Arkansas City v. Sybrant*, \_\_\_ Kan.App.2d \_\_\_ (November 12, 2010), pointed out that in *State v. Boyle*, 21 Kan.App.2d 944, 947 (1996) it had found that municipal court offenses issued for nontraffic offenses must comply with K.S.A. §22-3201. K.S.A. §22-3201 requires that “*the complaint...must be a plain and concise written statement of the essential facts constituting the crime charged...drawn in the language of the statute*” and must set out the statutory citation. The Court held that it could not find any reason that a traffic citation could not be deemed sufficient for purposes of prosecution if it complied with K.S.A. §22-3201. Since this one did comply with K.S.A. §22-3201, it was sufficient.

Next he argued that the complaint was defective because it did not charge him in the alternative with operating under the influence of alcohol, it only charged him with the per se violation.

The Court of Appeals found that by raising the issue of a defective complaint for the first time on appeal, Sybrant must

establish that the defective complaint impaired his ability to prepare a defense, prevents him from raising a double jeopardy argument in a subsequent proceeding and limited his constitutional right to a fair trial. The Court found that Sybrant did not object to the alternative DUI instructions given to the jury and based his whole defense on rational explanations for the defendant’s driving behavior. Given that there is no possibility that he would be subjected to further prosecution under the per se violation and that there was no prejudice, the fact that he was convicted of the alternative DUI charge does not require reversal.

### DENIAL OF RIGHT TO SELF-REPRESENTATION IS A STRUCTURAL ERROR IN THE PROCEEDINGS REQUIRING REVERSAL

Also in *City of Arkansas City v. Sybrant*, \_\_\_ Kan.App.2d \_\_\_ (November 12, 2010), on the morning of trial right before jury selection was to begin, Sybrant, orally through his court-appointed attorney, asked to represent himself. He gave two reasons for his request: (1) he did not want to pay an attorney; and (2) he did not believe that his attorney could adequately prepare for trial.

Correctly at this point, the district judge warned Sybrant of the dangers of self-representation, including his lack of familiarity with the rules of criminal procedure, his lack of understanding about witness examination and his general lack of legal sophistication. In rejecting his request, the district court judge pointed out that even if he were proceeding *pro se*, the Court would require his court-appointed attorney

(Continued on page 8)

off the mark.com by Mark Parisi



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## Court Watch

(Continued from page 7)

remain to assist him. The judge assured the defendant that he could confer with his attorney as much as he needed to during the trial.

Again, after trial, Sybrant filed a motion for new trial based on the district court's refusal to let him represent himself. In denying the motion, the district judge pointed out the untimely nature of Sybrant's request and that his concerns regarding court-appointed counsel were adequately allayed by the court.

The Court of Appeals held that the court must use a balancing test when finding whether or not a request for self-representation is timely, including an analysis of quality of counsel's representation, the length and stage of the proceedings, prejudice to the defendant, the potential for disruption and delay, and jury confusion by a change in representation. Since the district court did not address all of these considerations and the fact that a defendant's lack of legal sophistication is not a valid ground for denying self-representation, the record did not support the district judge's actions. Since denial of the right to self-representation is a constitutional structural error in the proceedings, reversal is required.

### STATUTE OF LIMITATIONS IS AN AFFIRMATIVE DEFENSE THAT IS WAIVED IF NOT RAISED

In *State v. Stilington*, \_\_\_Kan. \_\_\_(November 19, 2010) the Kansas Supreme Court reiterated that the running of the statute of limitations is an affirmative defense in Kansas. If it is not raised at the time of trial, it is waived. Therefore, in the Stilington case, the defendant was convicted of one count of rape that was outside the applicable statute of limitations. Since he did not raise it at trial, he was barred and his conviction and sentence was legal.

### THE FACT THAT THERE WAS A DNA "HIT" IS NOT TESTIMONIAL

Cory Elkins was convicted of raping two women in Lawrence. Neither woman could identify her attacker, but DNA of the suspect was collected and entered into the national DNA index, the Combined DNA Indexing System (CODIS). The CODIS generated a match between the two cases, indicating that the attacker was likely the same person. Cory Elkins was in jail in California when his DNA sample was taken pursuant to his incarceration. A match was made to Cory Elkins. The KBI obtained a new DNA sample from Elkins and confirmed the match. Elkins was charged with both rapes. All the KBI analysts involved testified at trial, as well as all persons who obtained samples from Elkins and the victims, with the exception of the people in California who first collected Elkins' sample and put it in the CODIS data-

base.

On appeal Elkins argued that allowing the KBI DNA Analyst to testify about the CODIS "hit" linking him to the crimes violated his Sixth Amendment right to confrontation. He argued that the "hit" was testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004). He argued that this information was similar to KBI drug reports at issue in *State v. Laturner*, 289 Kan. 727 (2009). He argued that he should have been allowed to cross-examine the CODIS analyst from California who took his DNA sample there and entered his DNA into the database.

In *State v. Elkins*, \_\_\_Kan.App.2d \_\_\_(November 19, 2010), the Kansas Court of Appeals pointed out that the CODIS database consists of two elements: (1) the data contained in the database, and (2) the computer program and the algorithms by which the computer manipulates the data so as to enable it to recognize and to report similar items of datum. In *State v. Appleby*, 289 Kan. 1017 (2009) the Kansas Supreme Court made it clear not only that the statistical calculations obtained from CODIS are not testimonial, but that the DNA data in the database itself are not testimonial.

In finding that the "hit" information was not testimonial, Judge McAnany, writing for the majority, reasoned as follows:

*"An analogue to the present issue can be expressed in the following scenario. The prosecution witness testifies that he saw the defendant at the scene and looked at the clock on the wall to determine it was 2 p.m. The defendant objects on confrontation grounds, arguing that if this testimony is to be admitted, the defendant is entitled to examine (1) a clockmaker to determine if the gears and levers in the clock were working properly so that the clock could measure time correctly, and (2) the person who last set the clock to determine if the clock was set for the correct time. The gears and levers in the clock mechanism move to produce an output that consists of the hands of the clock being in a particular position. This is analogous to the CODIS computer program that generates "hits" and the statistical probabilities that are the output of the database. The person who last set the clock and thereby entered the data (the then current time), which the gears and levers of the clock manipulate to determine the time at a later event, is analogous to the California official who entered Elkins' DNA into the system.*



*Appleby makes clear that neither is the product of a testimonial declaration. Elkins would require the production of the person who set the clock before the admission of testimony about the time. In oral argument, his appellate counsel conceded that this would be Elkins' position in this analogous situation. Why stop there? By what standard did the clock-*

(Continued on page 9)

# Court Watch

(Continued from page 8)

*setter set the clock? We had better get testimony about the reference clock used to set the clock as well, maybe going back to the United States Master Clock maintained by the United States Naval Observatory.”*

### KANSAS SUPREME COURT RECOGNIZES GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE IN PRE-GANT CASES

A police officer who knew her license was suspended, stopped Candy Daniel for driving on a suspended license. She was arrested, handcuffed, and patted down. Nothing was found. She was placed in the back of the officer’s patrol car. The officer then searched her vehicle. He found her purse, but could not search it due to inclement weather. He took it to the police station and found drugs in it. The search was classified as a “search incident to an arrest” and at the time it was conducted, pre-*State v. Henning*, 289 Kan. 136 (2009) and *Arizona v. Gant*, 556 U.S. \_\_\_ (2009), it was lawful pursuant to K.S.A. §22-2501(c) as well as existing caselaw at the time. But by the time the case was heard on appeal, such searches had been declared unlawful by the aforementioned cases.

The issue in *State v. Daniel*, \_\_\_ Kan. \_\_\_ (November 19, 2010) was whether the Kansas Supreme Court was going to allow the drug evidence to be introduced under the good faith exception to the exclusionary rule. The Kansas Court of Appeals has recognized such an exception in *State v. Karson*, 44 Kan.App.2d \_\_\_ (2010) and in *State v. Carlton*, No. 103,086 (2010) (unpublished with a pending petition for review). In *Daniel*, the Kansas Supreme Court followed suit and found that if it can be determined that the officer conducting the search incident to arrest was acting in objectively reasonable reliance on K.S.A. §22-2501(c), the evidence obtained would be admissible under the good faith exception to the warrant requirement. Such was the case here. The evidence is admissible. Justice Johnson filed a dissent.

### KANSAS SUPREMES WEIGH IN ON PROBABLE CAUSE FOR DUI ARREST AND MIRANDA WARNINGS DURING TRAFFIC STOPS

William Smith was stopped by the highway patrol for a faulty tail light on his trailer. As the trooper approached, Smith got out to try to fix the tail light. Nothing unusual was noted in his attempts, however, when those efforts failed, the trooper approached him to give him a ticket.

Upon approach, the trooper smelled the strong odor of consumed alcohol and noticed Smith’s eyes were bloodshot and watery. He asked Smith to sit in his patrol car while he wrote out the ticket. While in the patrol car, the trooper asked

Smith if he had been drinking. He admitted he had a “few” and that he had quit drinking 30 minutes earlier. An open beer bottle with contents was found on the floor of Smith’s truck and a full can of beer was in the rear seat cup holder.

The trooper asked Smith to perform several field dexterity tests. Smith correctly recited his ABC’s, and missed one number when counting backwards, but immediately corrected himself. He exhibited one clue on the one-leg stand (considered a pass) and two clues on the walk-and-turn test. Smith took, and failed, the PBT. The trooper took him to the station where he recorded a .099 on the intoxilyzer test.

In *Smith v. Dept. of Revenue*, \_\_\_ Kan. \_\_\_ (November 19, 2010), the Supreme Court held that the evidence was sufficient for the trooper to arrest Smith and take him to the station for the intoxilyzer test. In addition, the trooper was not required to give Smith *Miranda* warnings in the patrol car before asking him if he had been drinking. During a traffic stop, an officer is not required to *Mirandize* an individual before asking routine investigatory questions, even though the individual is not free to leave during the lawful detention.

### ATTENUATION DOCTRINE APPLIED TO WARRANT ARREST FOLLOWING BAD STOP

Topeka Officer Whisman was on routine patrol when he noticed a legally parked vehicle with its lights on and stopped to investigate. He discovered it had an expired 30-day tag. Another officer arrived on scene. At this point, Joseph Moralez came out onto a second floor balcony of a nearby apartment and asked officers what they were doing. They asked if the vehicle belonged to him. Being unable to hear each other from the balcony, Moralez came down to the parking lot.

Moralez identified the owner of the vehicle as Melody Legate, who was upstairs in the apartment. He offered to go get her, but the officers asked him to stay with them. He testified that he felt free to leave at this point.

Legate came down to the parking lot to discuss the expired tag with the officers. Moralez was not part of this conversation, but stood nearby. Officer Whisman asked Moralez for his identification “just to document him as a witness.” Moralez gave Officer Whisman a Kansas ID card, and Legate was able to provide the officer with a driver’s license.

Officer Whisman checked both Moralez and Legate for warrants and was informed by dispatch that Moralez possibly had a county warrant. Officer Whisman ordered him to “stay right there” until the warrant could be confirmed, which it was. Sixteen minutes after the initial observation of the vehicle, Moralez was arrested on the warrant.

Moralez told Officer Whisman that he had a bag of marijuana in his right front pocket. The officer searched Moralez

(Continued on page 10)

## Court Watch

(Continued from page 9)

incident to the arrest and seized the marijuana from his pocket.

In *State v. Moralez*, \_\_\_Kan.App.2d \_\_\_ (November 24, 2010), Moralez argued that his motion to suppress the marijuana should have been granted on the basis that (1) the encounter with law enforcement was an unlawful detention, not a voluntary encounter; and (2) the discovery of the outstanding warrant did not purge the taint of the unlawful police conduct.

The Court of Appeals found that although Moralez testified that at all times he felt free to leave, under Kansas caselaw Moralez' subjective state of mind is not a relevant factor to consider. *State v. Thompson*, 284 Kan. 763 (2007). The test for determining whether a police-citizen encounter is voluntary is an objective one. Likewise, Officer Whisman's subjective belief that Moralez was free to leave is not a relevant factor because Whisman never conveyed this belief to Moralez. The Court found that the district court failed to make sufficient findings of fact to objectively gauge whether the encounter was voluntary or not. If that were the sole issue, the Court said it would remand for further findings.

However, the district judge found that even if the encounter was not voluntary, the discovery of the warrant purged any taint of the unlawful police conduct and justified the search

**He was friendly at first, but he soon called Hayden a “snitch bitch hoe”<sup>FNI</sup> and hit her in the head with the back of his hand.**

<sup>FNI</sup>. The trial transcript quotes Ms. Hayden as saying Murphy called her a snitch bitch “hoe.” A “hoe,” of course, is a tool used for weeding and gardening. We think the court reporter, unfamiliar with rap music (perhaps thankfully so), misunderstood Hayden's response. We have taken the liberty of changing “hoe” to “ho,” a staple of rap music vernacular as, for example, when Ludacris raps “You doin' ho activities with ho tendencies.”

*U.S. v. Murphy* 406 F.3d 857, 859 (C.A.7 2005)

incident to an arrest. So, the Court of Appeals focused on that assumption.

The case is controlled, the majority opined, by *State v. Martin*, 285 Kan. 994, cert. denied \_\_\_U.S. \_\_\_ (2008). In *Martin*, the Court found held that “[u]nder the attenuation doctrine, courts have found that the poisonous taint of an unlawful search or seizure dissipates when the connection between the unlawful police conduct and the challenged evidence becomes attenuated.” In order to determine whether there is sufficient attenuation of the causal chain so as to dissipate the taint, a court must analyze three factors: “(1) the time elapsed between the illegality and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.”

In this case, just as in *Martin*, the Court found that the first factor weighed in Moralez' favor, because little time had elapsed. The second factor, weighed in the State's favor because the discovery of the warrant was an intervening circumstance which mandated an arrest. The focus then, as in *Martin*, is on the third factor, the purpose and flagrancy of the misconduct.

The Court of Appeals upheld the district court's determination that this was not flagrant misconduct. The officers were properly investigating an expired tag. Moralez initiated the contact by coming down from the apartment balcony to speak with the officers. The officer properly asked for Moralez' information as a documented witness to the expired tag violation. Even if the decision to run Moralez for warrants was just a “fishing expedition” it did not, like the Supreme Court in *Martin*, believe this rose to the level of flagrant conduct. Finally, the intrusion on Moralez' privacy was brief and the conversation cooperative. The intrusion was significantly less than the police intrusion in *Martin*, making this case virtually indistinguishable.

The discovery of the warrant was an intervening circumstance which sufficiently attenuated the taint of the unlawful detention so as to permit the admission of the marijuana evidence.

New appellate judge Gordon Atcheson wrote a 40-page dissent to the decision, beginning with “my colleagues fail to correctly apply the ‘attenuation’ analysis mandated in *State v. Martin*...[and] [m]ore broadly, I question whether *Martin* reflects sound Fourth Amendment jurisprudence.” The rest of the dissent is thorough and extensive analysis of Fourth Amendment jurisprudence, pre- and post-Revolutionary War police practices and his reasons for believing the Kansas Supreme Court erred in *Martin*.

At its most basic, Judge Atcheson argues that had Officer Whisman simply taken down Moralez' name and address and then returned his ID card to him and told him he was free to leave, he would see no problem with the officer's subsequent running of Moralez' identification for warrants.

(Continued on page 15)

**Three KU Women Among World's Most Powerful**

Three University of Kansas alumna are among the 25 most powerful women in the world in 2010, according to Forbes magazine. Only KU, Princeton, Harvard and Yale have three graduates each in the top 25.

Cynthia Carroll, chief executive officer of Anglo American, was ranked 14th, followed by Sheila Bair, chair of the Federal Deposit Insurance Corp., in 15th place. Kathleen Sebelius, U.S. secretary of health and human services and former governor of Kansas, ranked 23rd.



Carroll is credited with restructuring Anglo American, one of the world's largest mining companies, and re-establishing it as a global leader in business despite the downturn in the commodities market. Carroll distinguishes herself from other executives through her focus on corporate social responsibility initiatives, like offering HIV/AIDS testing and counseling to families of miners and disposing of mining water more judiciously. Carroll earned a master's degree in geology at KU in 1982. Last year, she ranked #4 on the list.

As a result of the financial-reform bill signed into law this summer, Bair oversees the nation's banks and has the power to take apart any financial institution that doesn't have enough capital to continue operating. She examines ways to evaluate banks' creditworthiness without relying on the three major credit agencies. Bair has also authored books about money for children. She earned a bachelor's in philosophy in 1975 and a law degree in 1978 from KU. Last year, she ranked #2 on the list.



Sebelius is charged with implementing the health care reform law passed in March. She is responsible for roughly 1,300 provisions in the law and will determine what "essential" health care means. Her budget for 2011 is \$911 billion. She also helped launch a national fitness challenge with First Lady Michelle Obama in September. Sebelius received a master's in public administration in 1980 at KU.

Falling out of the top 100 this year was a fourth KU grad, Linda Zarda Cook, a Shawnee native who earned a bachelor's

degree in petroleum engineering from KU in 1980. She ranked 43rd in 2008. She has since amicably resigned as executive director of gas and power for Royal Dutch Shell.



*"Montes provides no authority for the proposition that escaping for a block or so does not constitute the crime of aggravated escape from custody.*

*Further, the fact that Montes was apprehended certainly does not mean that the crime was merely an attempt and not the completed crime of aggravated escape from custody. If that were the case, there could never be a prosecution for escape from custody because in every such case the defendant is ultimately apprehended and brought back into custody before the escape from custody charge is filed"*

*State v. Montes, Slip Copy, 2010 WL 5139847, 3 (Kan.App. December 3,2010)*

**Dangerous roads**

Here are the top 20 nations where Americans have died recently and the nations' total road fatalities in 2007.

	<b>Americans killed in vehicle accidents, 2003-June 2010</b>	<b>Est. deaths in vehicle accidents, 2007</b>
Mexico	682	22,103 <sup>1</sup>
Thailand	56	16,240
Dominican Republic	52	1,691
Germany	39	4,949
Spain & Andorra	39	4,104 (Spain) <sup>1</sup>
Costa Rica	37	688
India	35	196,445
Italy	33	5,669 <sup>1</sup>
United Kingdom	32	3,298 <sup>1</sup>
Australia	31	1,616
Canada	31	2,889 <sup>1</sup>
China	31 <sup>2</sup>	220,783
Philippines	29	17,557
Greece	26	1,657 <sup>1</sup>
Brazil <sup>1</sup>	24	35,155
Vietnam	24	14,104
Honduras	22	959
Iraq	22	11,059
Kuwait	19	482 <sup>1</sup>
El Salvador	18	865
<b>Total</b>	<b>1,822</b>	<b>—</b>

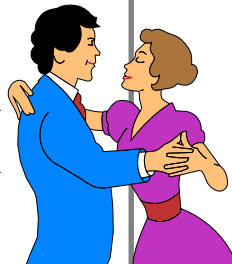
1 — 2006 data; 2 — includes one fatality a U.S. pathologist's autopsy said was a murder and a Chinese forensic doctor said was a pedestrian in a vehicle accident; Sources: USA TODAY analysis of State Department data, World Health Organization

## Step Back in Time

(Continued from page 1)

After a time, Laben and Helen met another young couple, Bill and Bonnie Daugherty. They all became very close and were together almost every evening. The Court describes their relationship as follows:

*“They danced, attended picnics, and went auto riding together. Bill usually danced with Helen; Laban with Bonnie. In the automobile, [Laban] usually drove, and [Bonnie] rode in the front seat with him. [Helen] and her child and [Bill] rode in the rear. In their homes, at late hours of the night [Laban] and [Bonnie] often sat on the porch while [Helen] and [Bill] danced inside in the dark to the music of the phonograph. Sometimes they sat outside while the [Laban] and [Bonnie] danced inside under the same circumstances. Laban and Bonnie liked the same kind of dances, waltzes; while Helen and Bill preferred “fox trots.” At times [Laban] and [Bonnie] went auto riding late at night, while [Helen] stayed at home to put the child to bed, and [Bill] stayed with her. Again, it would be [Helen] and [Bill] who would go riding together, leaving [Laban] and [Bonnie] at home. And thus the intimacy of the two couples grew, until it passed all reasonable bounds.”*



Laban hatched the idea that perhaps Helen “had violated her marital fidelity” with Bill. He shared these thoughts with Bonnie. Bonnie “avowed her disbelief of anything of the sort.” As Bonnie and Laban went riding at night together they would argue this topic, until they decided they would test the premise.

Late one night, Laban and Bonnie announced they were going for a ride. They got in the car and “drove rapidly around a short block and returned to the house to surprise Helen and Bill in adultery. Then there were tears of the young women, of course; and they and the young husbands discussed what should be done. It was agreed that the incident should not be made public, that [Helen] should go back to her parents in Illinois, that she should renounce custody of her little daughter, and waive her rights to her husband’s property.” Laban and Bill went that very night to Laban’s office and reduced this agreement to writing and Helen signed it. The families spent the remainder of the night together and the next day Helen and Hortence went to Illinois.

Helen was led to believe that if she did not resist Laban’s divorce action, Bill would likewise divorce Bonnie and she and Bill could then marry. However, Helen started to get distraught over the potential loss of her daughter, and became “unmanageable.”

Bill, worrying that the whole thing would become public, wrote her and implored her not to dispute the divorce and

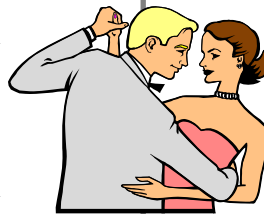
told her that if she did, and the matter become public, he would have nothing to do with her anymore.

Bill and Laban went to Illinois to try to “reason” with her and to get Hortence. Helen expressed her concern that her family in Illinois would wonder why Hortence was no longer there and that if she and Laban divorced, they would wonder why he wasn’t paying her alimony. So she asked for alimony payments. Laban told her he was having financial difficulties but he would give her \$50 per month (\$530 in today’s dollars) and Bill agreed to throw in another \$25 per month.

The Court went on:

*“Space forbids further details of this marital shipwreck. It has to be added, however, that [Bill’s] seduction of [Helen] did not alter in any noticeable degree the bosom friend comradeship which had theretofore existed between [Laban] and [Bill]. He visited at Daugherties’ went riding with the Daugherties, and danced with [Bonnie], though less frequently. The two men cooperated zealously to constrain [Helen] not to make a fight in court for the custody of her child. They held before her the impending exposure of her shame before her parents and the public, but the mother instinct in defendant was not to be coerced whatever the consequences.”*

So, the case did end up going to trial (witnesses and all) and the trial court denied the divorce, finding that Helen’s adultery was committed with Laban’s knowledge, connivance and consent. The trial court ordered custody of Hortense to Helen. Laben appealed to the Kansas Supreme Court, arguing that it was error to find that the mere fact that he conspired to catch Helen in adultery by leaving and driving around the block constituted connivance sufficient to deny the divorce. The Supreme Court had no use for Laban’s argument:



*“The connivance as shown by the evidence began long before that incident. The persistent and unusual intimacy of these four young people, the late hours, the night rides, plaintiff with Daugherty’s wife, defendant with Daugherty, the sex instinct arousing dances and embraces in the dark, in all of which plaintiff acquiesced, and to which his similar conduct gave passive assent, if not encouragement--these and the other incidents above led to the overthrow of his wife’s marital fidelity. This course of conduct may not inaptly be designated as a form of connivance; at least it is persuasive evidence from which a finding of connivance can be deduced. Plaintiff testified that it never occurred to him that in taking the many night auto rides with Bonnie, leaving defendant and Bill to their own devices, taking his wife every other night to Daugherty’s house to dance with and embrace Bill in the dark and to go riding with Bill, while he himself similarly and alternately danced and went night riding with Bonnie, and receiving the Daugherties on alternate nights in*

(Continued on page 13)

## Step Back in Time

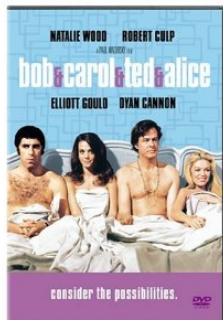
(Continued from page 12)

plaintiff's home for similar practices--notwithstanding all these matters it never occurred to him that he was leading his wife into temptation and giving Daugherty most unusual opportunities for her seduction. The trial court was not bound to believe such testimony. **No doubt there are such guileless and unsuspecting simpletons in the world, but they are hardly to be found among men of plaintiff's intelligence and business and social standing.** Plaintiff cannot be heard to say that he did not know the conventional standards of right conduct which respectable society has reared and crystallized into a moral code to guide and keep its members in the path of virtue; and it is neither cant nor preaching to say that plaintiff himself persistently violated that code when night after night he left his wife with Bill Daugherty while he and Bonnie Daugherty waltzed in the dark and went auto riding and otherwise gave her the example which led to her infidelity. He knew his wife better than anybody. She was the mother of his child. He must have known that the absurd lengths to which his extraordinary intimacy, informality, and unconventionality with the Daugherties had grown, as well as defendant's, was bound to culminate in some such manner as it did." [Emphasis added]

Therefore, the Court upheld the denial of the divorce for connivance and referred to Laban's "reprehensible conduct." In allowing Helen to continue to have custody of Hortense, the Supreme Court did conclude with the following admonition:

"...except for [Helen's] temporary infatuation for her paramour, she was a good mother; and, moreover, while the evidence does not show nor hint--and we have no inclination to infer--that [Laban's] infatuation for [Bonnie] had extended to a similar infidelity, yet his persistent habit of dancing in the dark and auto riding with another man's wife, and his affected innocence or blunted sense of the impropriety in such conduct, left it far from clear that the child--and that child a daughter too--would be any better off in his care than in its mother's care. The court's order is only temporary. If it transpires that the mother has not mended her ways, and if the father does not develop a better sense of how to occupy his leisure time, it may be necessary for the court, charged as it is with the discretionary exercise of the state's power as *parens patriae*, to deprive both of its custody, and bestow it upon some one who can better appreciate and discharge a parent's responsibilities."

Nothing else is known about the two couples or Hortense. However, just like the movie, surely their lives were forever changed by crossing over the boundaries between friendship and love.



## Judicial Ethics Opinions

JE-70  
October 22, 2010

The judge has been asked to give a one to two hour presentation on appellate procedure as part of a program entitled, "Civil Procedure: A View from the Bench" presented by a for-profit organization that sponsors seminars throughout the United States. Presenters at these seminars normally receive an honorarium or some kind of benefit such as complementary seminar tickets or discounts on products which the judge states would be declined.

This presentation at a seminar presented by a for-profit organization would be a direct violation of Rule 1.3 of the Kansas Code of Judicial Conduct (Rule 601B) which provides in pertinent part:

"A judge shall not lend the prestige of judicial office to advance the...economic interests of...others..."

Further, Comment [1] to Rule 3.1 recites, in part, that "...judges are permitted and encouraged to engage in educational ...activities not conducted for profit..."

We are, therefore, of the opinion that the proposed presentation by the judge would violate the Kansas Code of Judicial Conduct.



**Front Row:** Judge Steve Ebberts, *Topeka* and Judge Katie McElhlnney, *Lenexa*. **Back Row:** Judge James Campbell, *Ottawa*; Judge Dennis Reilling, *Oskaloosa*, and Judge Jon Willard, *Olathe* at the ABA Traffic Court Program, October 13-15, 2010 in Little Rock, Arkansas.



**NUTS AND BOLTS**

**Question:** *I am the judge in a city of the Second Class. I found someone guilty and assessed a fine. He complained about it to the city attorney who told him the mayor has the ability to pardon any fines assessed for ordinance violations. Is this true?*

**Answer:** Yes. K.S.A. §14-310 states:

*“The mayor shall have power to remit fines and forfeitures, and to grant reprieves and pardons for offenses arising under the ordinances of the city, by and with the consent of the council; but no such fine or forfeiture shall be remitted or pardon granted, except at a legal session of the council, nor unless the reasons therefore, together with the order of remission or pardon, be entered on the journal entry of the clerk.”*

There are similar provisions for cities of the First Class. K.S.A. §13-515 states:

*“The mayor shall have the power to remit fines and forfeitures, to grant reprieves and pardons for all offenses arising under the ordinances of the city, by and with the consent of the council, and not otherwise.”*

Finally, not to be left out, there is a similar provision for cities of the Third Class. K.S.A. §15-309 states:

*“The mayor shall have power to remit fines and forfeitures, to grant reprieves and pardons for offenses arising under the ordinances of the city, by and with the consent of the council. But no such fine or forfeiture shall be remitted or pardon granted except at a legal session of the council, nor unless the reasons therefore, together with the order of remission or pardon, be entered on the journal entry of the clerk.”*

This is a common executive power, although very rarely used. The President of the United States has pardon powers, as does the Governor of the State of Kansas and every other governor in the United States.

*“The pardoning power shall be vested in the governor, under regulations and restrictions prescribed by law.”* K.S.A. Const. Art. 1, § 7 and K.S.A. §22-3701. The power to grant commutations of sentences, to grant pardons and commutations with or without conditions, and to remit fines and forfeitures is included in this constitutional provision. *Jamison v. Flanner*, 116 Kan. 624 (1924).

The “pardon” or “clemency” power has its genesis in the sovereign’s power to grant mercy to those who violate the law. See, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, Kobil, Daniel, 69 Tex.L.Rev. 569 (1991). Kansas cases have held that “[t]he granting of a pardon is an act of grace bestowed by the government through its duly authorized officers or department, and is designated to relieve an individual from the unforeseen injustice, because of extraordinary facts and circumstances peculiar to his case, of applying to him the punishment provided in a general statute, which under ordinary circumstances is just and beneficial.” *Jamison v. Flanner*, 116 Kan. 624 (1924).

Therefore, it is generally contemplated that the power is to be sparingly used and only in the case of extraordinary facts. There are no Kansas cases discussing the application of the mayoral pardon provisions cited.

**Question:** *Recently an argument was raised that a municipal court DUI diversion agreement which is not file-stamped cannot be used as a prior conviction for DUI sentence enhancement purposes based upon K.S.A. 60-2106(d) and City of Dodge City v. Turner, Unpublished Decision, 85 P.3d 228, 2004 WL 421969 (Kan.App. March 5, 2004). Is this correct?*

**Answer:** No.

First, K.S.A. §60-2601(d) lists the duties of the district court clerks. It has no application to municipal court clerks. It states: “It is the duty of the clerk of each of the courts to file together and carefully preserve in the office of the clerk all papers delivered to the clerk for that purpose....Orders and journal entries requiring the signature of the judge shall have the date and time of day stamped on them by the clerk immediately upon receipt of the signed order or journal entry and the clerk or deputy shall initial the stamp.”

The duties of municipal court clerks are governed by K.S.A. §12-4108, which states “The clerk shall issue all process of the court, administer oaths, file and preserve all papers, docket cases and set same for trial and shall perform such further acts as may be necessary to carry out the duties and responsibilities of the court.” The additional language regarding date stamping that appears in K.S.A. §60-2601(d) does not appear in the municipal court clerk statute. Therefore, it would not seem be required in municipal court cases.

*City of Dodge City v. Turner*, unpublished decision, 85 P.3d 228, 2004 WL 421969 (Kan.App. March 5, 2004) involved a DUI diversion agreement that was signed by all parties. However, it was not dated because the parties had not yet agreed upon the timing for its implementation, nor was it filed with the municipal court. The defendant argued that the agreement was enforceable and the Kansas Court of Appeals held that it was not.

(Continued on page 15)

## Nuts and Bolts

(Continued from page 14)

The Court held that one of the statutory requirements of a diversion agreement is that it be filed with the municipal court and a copy sent to the department of revenue. See, K.S.A. §12-4416(d) and (e). Failure to comply with the statute renders the diversion void and unenforceable. Since there was no dispute that Turner's agreement was not filed with the court, it was unenforceable.

Therefore, as long as the diversion agreement is signed and dated by the parties and the municipal court clerk preserves the records of the court and is able to certify that it was filed with the court, a date and time stamp does not seem to be mandatory. It would, however, avoid the argument all together if it was at least date stamped.

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## Court Watch

(Continued from page 10)

But detaining him while he ran the warrant check was the linchpin of the officer's outrageous and clearly unlawful conduct, the taint of which could not be purged.

He ends the dissent as follows:

*"Too often, however, the decisions declining to suppress evidence based on the reasoning of Green do so without considering the constitutional price paid in freedom lost. They do not mention and, thus, seemingly fail to consider the purpose and effect of the exclusionary rule in shaping the behavior of law enforcement agents. In their failure, those rulings prompt the sort of unconstitutional detention visited upon Martin and Moralez here in Kansas. And each of us now has become a potential target. The authors of the Bill of Rights would shudder at that crippling of the Fourth Amendment. All I can do is dissent from it."*

It is a fascinating read for those so inclined.

**Editor's Note:** See, *In the Matter of M.K.W., Slip Copy, 2010 WL 4977141 (Kan. App. November 12, 2010), pg. 33, supra, in which a different panel, in a 3-0 decision, takes similar facts and finds that there was not sufficient attenuation.*

## PRO SE PLEADINGS

Pro se pleadings are to be liberally construed, giving effect to the pleading's content rather than the labels and forms used to articulate the defendant's arguments. A defendant's failure to cite the correct statutory grounds for his or her claim is immaterial. *State v. Kelly*, \_\_\_Kan. \_\_\_ (December 10, 2010).

**MINI-TRUCK ON FAIRGROUNDS = VEHICLE ON HIGHWAY, THEREFORE DUI LAWS AND IMPLIED CONSENT APPLICABLE; NO REQUIREMENT THAT A VEHICLE BE "STREET LEGAL" OR REQUIRE A DRIVER'S LICENSE**



Brian Shirley was driving a mini-truck on the Kansas State Fairgrounds in Hutchinson. A mini-truck is self-propelled by a gasoline powered engine and is not a device moved by human power. It is not used exclusively upon stationary rails or

tracks and is not a motorized bicycle or a motorized wheelchair. It can go about 60 mph.

Shirley was stopped by a KHP trooper for DUI in the mini-truck. He blew .16. His driver's license was suspended. He appealed the suspension. Two issues are at the heart of *Shirley v. Kansas Department of Revenue*, \_\_\_Kan.App.2d\_\_\_ (December 10, 2010): (1) Is a mini-truck a vehicle, requiring its driver to comply with the implied consent law?; and (2) Does operation of a vehicle on the state fairgrounds, as opposed to the streets or highways implicate the implied consent law?

K.S.A. 2006 Supp. §8-1485 defines "vehicle" as "every device in, upon or by which any person or property is or may be transported or drawn upon a highway, except electrical personal assistive mobility devices or devices moved by human power or used exclusively upon stationary rails or tracks." The word "highway" is defined in K.S.A. §8-1424 as "the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel."

Shirley argued that since a mini-truck is not "street legal" and does not require a license to operate, the DUI laws and implied consent laws do not apply.

Let's just say that Judge Green had a heyday with this one. Turning, as he often does, to *Logic for Lawyers* and adding *Drafting Legal Documents: Materials and Problems, Stipulative Definitions* to his repertoire, he goes through a step-by-step analysis of the fallacy in the defendant's position. He concludes that if the legislature had intended for the definition of vehicle to include by implication the requirement that the device be registered or "street legal" and require a driver's license to operate, the excluding language (personal assistive mobility devices, etc.) would have been unneces-

(Continued on page 16)

## Court Watch

(Continued from page 15)

sary. The Court found that a mini-truck was a “vehicle” for purposes of the DUI and implied consent laws. Judge Green also cites with approval cases from other jurisdictions recognizing a golf cart and a farm tractor as vehicles subject to the DUI laws. All that is required is that the vehicle be capable of being operated on a highway, not whether it legally is being operated on a highway.

Golfers and farmers beware! Drunk driving in virtually ANY vehicle, except electrical personal assistive mobility devices or devices moved by human power or used exclusively upon stationary rails or tracks, will allow the state to prosecute you for DUI and suspend your driver’s license under the implied consent law according to this Court of Appeals panel. In addition, according to this panel, as long as it is physically possible for it to be operated on a highway, you do not have to be operating it on a highway to be charged.

### WARRANTS ISSUED IN JUVENILE CASES MUST BE SERVED WITHOUT UNREASONABLE DELAY IN ORDER TO TOLL THE STATUTE OF LIMITATIONS

Statutes of limitation require that cases be commenced within a statutory period of time. If not commenced within that time frame, prosecution is barred. Issuance of a warrant for the defendant’s arrest generally tolls or stops the statute of limitations from continuing to tick away. In adult cases, K.S.A. §21-3106(7) instructs that if the matter is commenced by the issuance of a warrant, that warrant must be served without unreasonable delay. Otherwise, the Court will not deem the case to have been “commenced” by the issuance of the warrant and the statute of limitations will continue to run.

As an example, let’s assume that the statute of limitations for the crime of theft is three years, and 30 days after the theft is committed, the prosecution files the charges and the Court issues an arrest warrant for the defendant’s arrest. The defendant lives in Viola, Kansas and has always lived in Viola, Kansas and does not appear to be doing anything to hide his residence in Viola, Kansas. However, the warrant is not served on him until 4 years after the theft. The law is clear that the defendant’s prosecution for theft would be barred because there was an unreasonable delay in the service of the warrant.

However, there is no similar statutory provision regarding “unreasonable delay” in the case of a juvenile offense.

In *In re: P.R.G.*, \_\_\_Kan.App.2d\_\_\_(December 10, 2010), the defendant was charged as a juvenile with being a minor in possession of alcohol (MIP). The statute of limitations for a juvenile MIP is two years. *See*, K.S.A. 2009 Supp. §38-2303 (e). A warrant was issued for his arrest after he failed to ap-

pear in court, but his address was listed as North Main instead of South Main in Viola, Kansas. He lived in Viola, Kansas and always lived in Viola, Kansas. He was not arrested on the warrant until 3 years later. He moved to dismiss the MIP charge on the grounds that the warrant did not toll the statute of limitations because it was not served without unreasonable delay. The prosecution countered by pointing out that there was not an “unreasonable delay” exception in juvenile cases like there was in adult cases, therefore the statute was tolled.

The Court of Appeals found that although there is no statutory “unreasonable delay” provision in the juvenile code, there is still a common law “unreasonable delay” exception as indicated in *In re Clyne*, 52 Kan. 441 (1893). The Court cited with approval the following language from *Clyne* :

*“We think the better rule is, that the complaint must be filed and the warrant issued within the period limited by the statute; that it must be issued in good faith, and with the intention that it be presently served, and that the officer must proceed to execute it according to its command; that he must make the arrest within a reasonable time and at the first reasonable opportunity offered him. Neither the county attorney nor the sheriff, nor both together, can, by any voluntary act or by any neglect of official duty, extend the limit of the law.”*

Other decisions over the years have supported this common law “unreasonable delay” exception to a warrant tolling the statute of limitations. There has been no clear legislative intent expressed to abolish this common law rule, therefore *Clyne* still stands. The MIP charge against P.R.G. was ordered dismissed for not being commenced within the 2 year statute of limitations.

### PENALTY PARAMETERS FOR AN OFFENSE FIXED AS OF THE DATE OF THE COMMISSION OF THE OFFENSE

Tina Williams had five identity theft convictions in Washington state in 2001 and 2002. In 2001 and 2002, Kansas classified identity theft as a “person felony.” By the time she committed two identity thefts in Kansas in 2006, Kansas had changed the classification of identity theft to a nonperson felony. In calculating her criminal history it made a difference whether the Washington convictions were classified as person felonies or nonperson felonies (designation as a person felony resulted in a higher aggregate).

In *State v. Williams*, \_\_\_Kan.\_\_(December 10, 2010), the Kansas Supreme Court held that whatever the Kansas statute said when Williams committed the Washington offenses governed the classification. Since identity theft was a person felony in 2001 and 2002, those priors must be classified as person felonies (even though Kansas law no longer so classified them).

(Continued on page 17)

## Court Watch

(Continued from page 16)

“...[D]etermining the criminal history of a defendant is an important factor in the present sentencing calculus...Accordingly, using the date of the commission of the prior out-of-state crime to calculate the criminal history would be consistent with our fundamental rule of sentencing for a current in-state crime: sentencing in accordance with the penalty provisions in effect at the time the crime was committed. We additionally observe that having the penalty parameters for an offense ‘fixed as of the date of the commission of the offense is fair, logical and easy to apply.’”

### OFFICER’S OBLIGATION WHEN VEHICLE IS INADVERTENTLY OR UNINTENTIONALLY STOPPED

Rex Reiss was driving his truck behind a blue pickup truck that had no lights on at 1:00 a.m.. An officer was behind the pickup, Reiss and another vehicle. The officer turned on his lights to stop the pickup. There was no room between Reiss and the pickup. All three vehicles pulled over and Reiss jumped out of his car to ask the officer why he had stopped him. The officer ordered Reiss to get back in his truck. After several orders, Reiss finally complied. The officer approached Reiss and asked for his license and registration and developed suspicion and eventually probable cause to arrest Reiss for DUI.

Reiss claimed that when the officer ordered him to get back in his truck, he had effectively seized him without any reasonable suspicion of criminal activity. He moved to suppress all evidence of DUI.

In *State v. Reiss*, \_\_\_ Kan.App. \_\_\_ (December 17, 2010), the Court of Appeals pointed out that it could find no cases discussing whether a person inadvertently stopped by police has been seized, except a Ninth Circuit case that found the driver was not seized in such a situation.

The Court found that although he was not seized when he pulled over, Reiss was seized for Fourth Amendment purposes when the officer ordered him to get back in his truck. However, the officer’s actions were justified based on a concern for his own safety. It was late at night, his back-up had not yet arrived and he was faced with someone who had jumped out of his truck, seemingly very angry. He could not approach the pickup he intended to stop without turning his back on Reiss. He was outnumbered, with three cars pulled over. Officer safety concerns were sufficient to justify the officer’s order. He was not required to tell Reiss he was free to leave and he was entitled to do some preliminary investigation to determine if Reiss was a threat.

The Court cited the U.S. Supreme Court which has noted that a significant number of police murders occur during traffic

stops. Balanced against the officer’s safety concerns, the intrusion on Reiss’ liberty was minimal. This is analogous to situations in which officers order passengers to remain in the car for officer safety. The officer’s actions were reasonable and he immediately developed probable cause for a DUI arrest after engaging in brief conversation with Reiss. The motion to suppress was properly denied and Reiss’s conviction stands.

### PARENTAL DISCIPLINE IS AN AFFIRMATIVE DEFENSE TO BATTERY

Samuel Wade was convicted of misdemeanor battery for striking his 15-year old son. The prosecution and the defense both agreed and argued that Wade had a right to use force to discipline his child, the issue was simply how much was too much. However, at the end of the trial when defense counsel suggested a “parental discipline” instruction, the Court denied the request. Wade was convicted.

In *State v. Wade*, \_\_\_ Kan. App.2d \_\_\_ (December 30, 2010), the Kansas Court of Appeals held that a defendant is entitled to instructions on the law applicable to his theory of the defense if there is evidence to support the theory. While there is not a statutorily established affirmative defense of “parental discipline” it is a common-law defense.

The following instruction (PIK Crim.3d 52.08) should have been given:

*“The defendant raises parental discipline as a defense. Evidence in support of this defense should be considered by you in determining whether the State has met its burden of proving that the defendant is guilty. The State’s burden of proof does not shift to the defendant.”*

The Court went on to state that the defense is based on an objective standard. It is a defense to the charge of battery if a parent’s use of physical force upon a child was reasonable and appropriate and with the purpose of safeguarding the child’s welfare or maintaining discipline.

The trial judge had a duty to so instruct the jury and failure to do so necessitates a new trial.

*“Whether we consider daycare providers or parents, this essential aspect of the crime of child endangerment must not be lessened. At some time in a child’s life, just about every parent does something that—in hindsight—the parent realizes wasn’t reasonably prudent in terms of the child’s safety. Perhaps you let your child ride a bike without a helmet, or gave up on the argument with your 17-year-old son about putting on his seatbelt. Or you let your young child play with a sharp stick or even play in a normally calm creek. Most of the time, no one is injured. But the potential risks can be serious.”*

Judge Leben’s dissent in *State v. Cummings*, \_\_\_ Kan.App2d. \_\_\_ (December 10, 2010) a case involving the unintentional death of an unattended child at a daycare home.

## 2010 ABA Traffic Court Program

By James Campbell, Ottawa

The American Bar Association Judicial Division Traffic Court Program was held in Little Rock, Arkansas from October 12 - 15. Five KMJA members were in attendance this year, Dennis Reilling of Oskaloosa, Jon Willard of Olathe, Steve Ebberts of Topeka, Katherine McElhinney of Lenexa 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 seminar was opened by remarks from the Governor of Arkansas, Mike Beebe, as well as a representative of the Arkansas Court of Appeals. Thomas Robinson is chairman of the ABA Judicial Division, Special Courts Section this year and served as master of ceremonies for the seminar. Judge Robinson is from Tempe Arizona, and younger brother of Kansas Federal District Court Judge Julie Robinson.

The seminar opened with a stirring presentation of the judicial aspects concerning the segregation of Little Rock's Central High School in 1957. The presentation, titled "Marbury to Cooper" described the important role in an independent judiciary in maintaining balance in life and in the courts. The session opened with a video tape presentation from United States Supreme Court Justice Stephen Breyer. Justice Breyer spoke about the importance of the rule of law and how vital the independent judiciary becomes in time of turbulence.

Recent Supreme Court Cases impacting traffic courts were discussed among the judges, primarily those having a more direct impact on traffic, be it the stop of a vehicle, or the proceedings in court to ensure due process to all parties. This was followed by an update on state court of last resorts and traffic cases that may impact other areas.

The afternoon session was a presentation by local members of the bar of Constitutional Issues in Traffic Court. This was presented in a trail format where each side made arguments in favor of each position and allowed the judges to provide reasons to the ruling they might make in similar circumstances.

Wednesday's session began with Judge Karl Grube, a frequent speaker at our KMJA conference. Judge Grube dis-

cussed the paperless court and the trend to more use of computers and less use of printed documents. We are all working more and more with computers to some degree and this presentation was particularly insightful.

Judge Grube was then joined by Judge Robert Pirraglia. Judge Pirraglia is from Rhode Island and was the host judge for the 2009 conference. Judge Grube and Judge Pirraglia went though specific ethical dilemmas we face as judges in traffic court. The primary focus was on insuring a factual basis for guilty and no contest pleas in agreed cases. It is the ethical responsibility of the court to insure that there is a factual basis for an agreed plea in a case. If an individual is charge with speeding, it is often difficult to accept a plea to an amended charge of defective equipment or illegal parking when no such incident actually occurred. The presentation provided various cases where a judge can be subject to an ethics complaint if the court accepts such a plea, not having a factual basis to do so.

The afternoon sessions were devoted to addiction treatment and the general effects of alcohol on the brain. This was a very detailed presentation devoted to developing alternatives to traditional sentences that may not have been effective in reducing the rate of recidivism in DUI cases.

Friday morning's session showed one possible sentencing alternative, DUI Courts. Judge Michael Kwan from Utah spoke about the DUI Courts and how they developed. A DUI Court is based upon the Drug Courts used throughout much of the country to monitor treatment and punishment requirements. In DUI Court, an offender is required to report on a more frequent basis to show progress on their treatment program and also to present to other offenders experiences and keys to continuing sobriety. DUI Court maintains a longer relationship with the offender. Some research has show that if an offender stays in the treatment environment for an extended time the odds of relapse are reduced. Kansas presently does not have any DUI Courts, but in the states where DUI Courts have been incorporated there has been success in reduction of repeat offenders.

Judge Douglas Saloom provided a session on Judicial Outreach as well. This was the presentation given to the KMJA in April, with updates for some of the newer programs. Judge Saloom was as entertaining and informative as ever as he talked about the importance of a strong judicial presence in the community.

In addition to the training, we were given the opportunity to attend a welcome reception at the Arkansas Governor's Mansion one evening and private tour of the William J. Clinton Presidential Library the following night.

The ABA Judicial Section has not scheduled a conference for next year. Several alternatives are being discussed on how to best provide education and training. Information relative to future opportunities for training will be presented in the Verdict when such information is available.

## A World Away— Bogotá, Colombia

By Hon. Karen Arnold-Burger, Overland Park

Ximena Poveda came to Overland Park, Kansas in the spring of 2010, as part of the National League of Women Voters\* Program “*Connecting Future Legislators with Civil Society-Colombia and Brazil.*” The program was funded by a grant from the Bureau of Educational and Cultural Affairs of the U.S. Department of State. It was designed “*to provide young professionals with direct exposure to the U.S. political process and promote intercultural exchange and dialogue at the local political level, while strengthening the bonds between citizens of the Americas.*”

The program falls under the League’s Global Democracy Program, a program for activists and nongovernmental organizations worldwide. Working with groups abroad to increase their voice in stressing transparency, accountability, and good governance in their societies, the League assists in expanding community influence in public policy-making processes while helping citizens build leadership skills through interactive, hands-on training and citizen exchange programs.

Ximena (pronounced “he-mana”) is a young economist who works for the Corporación Excelencia en la Justicia (CEJ) in Bogotá. This non-profit organization has as its mission the improvement of the justice system in Colombia. It seeks to lead the way in cultural and institutional changes for the betterment of the system as a whole. It has become a national “think tank” for judicial improvement. It conducts on-going dialogues with the judiciary, supports a “best practices” bank, partners with law schools and businesses on projects, speaks in the community, and spearheads many more amazing projects that have resulted in significant improvements since the organization was founded in 1996. *See*, <http://www.cej.org.co>

Ximena specifically asked if she could spend time viewing the court system, particularly the criminal system. I knew several women locally who were involved with the League on both a local and a national level and they contacted me to see if Ximena could spend at least one day of her trip observing the Overland Park Municipal Court. We were excited to participate.

Ximena was impressed and amazed by the efficiency of the court system and the fact that defendants could have a direct audience with the judge to discuss the case and their rights. She was impressed with the concern shown to participants and the time given to each, even though the dockets were large and the courtroom was crowded with people. This direct access to justice is not part of the Colombian process. It was

not that long ago in Colombia when, due to the prevalence of violence and drug cartels, judges were known as “jueces sin rostros” or “judges without faces” because they were forced to hide behind masks to avoid reprisal. We shared information about our different systems.

When Ximena returned to Colombia she asked the League if it would be possible for her to invite me to attend CEJ’s bi-annual award program in Bogotá in an effort to continue the exchange of ideas. The League consented, as did I, and preparations began for me to fly to Bogotá. The executive director of CEJ, Gloria María Borrero Restrepo, sent a formal invitation and asked if I would also do the honor of presenting one of the awards.

A few hours before my flight was to leave Atlanta for Bogotá, I was informed by Christina Atencio (bi-lingual staff person at the League in Washington, D.C. who had planned to accompany me, since my Spanish is a bit rusty), that her flight was not going to be able to leave Washington due to storms in Atlanta and she would miss the connection to Bogotá. Translation: You are on your own. She had, however, called ahead and had the hotel send a taxi to the airport to await my arrival. In addition, she had called Ximena and told her of the problem.

After two hours on the tarmac in Atlanta and six hours in the air to Bogotá, I arrived in Bogotá at about 11:00 p.m. to find the cab driver, as well as Ximena, and her parents there to greet me with homemade signs bearing my name. My adventure began.

Ximena and her parents, German and Miriam, were incredible hosts. The following morning, after a wonderful breakfast at the hotel, while Ximena went to work to prepare for the awards ceremony that evening, her parents picked me up and took me to el Museo del Oro (Gold Museum). Their English was broken, as was my Spanish, but we managed to communicate very well.

The Gold Museum is a fascinating trip through time and contains the largest pre-Hispanic gold collection in the world. The Spaniards arrived in the 17th century looking for the fabled El Dorado, or City of Gold. Lake Guatavita in Colombia seems to be the most credible source of the legend. Muisca Indian kings would float on a boat in the Lake and throw pieces of gold overboard as offerings to the Gods. The region had huge quantities of gold, a sacred metal to the locals, which was used by the native population for daily and ceremonial use. A vast quantity of gold has been recovered from the Lake as well as surrounding caves and was on display in the museum.

We had a traditional Colombian lunch of juice and ajiaco (a potato and chicken-based soup with avocado and rice on the side). All meals are served with arepas (the Colombian equivalent of bread or tortillas). Again, I could not have asked for more gracious hosts than the Povedas.

(Continued on page 20)

## A World Away-Bogotá

(Continued from page 19)

Bogotá, Colombia's mountain capital—located in the very center of the country, is a city of 8 million people. In the Northern Hemisphere, only New York City and Mexico City are larger. There is no public transportation, other than cabs and buses. Amazingly, I never witnessed a collision, but the constant movement of traffic in and out of lanes, with no signals used except a toot of the horn, was enough to impress upon me the importance of the U.N. program urging global traffic safety. See, pg. 23 *supra*. There were many near-misses. In an attempt to control traffic, driving is limited based upon your license plate number. License plates that end in even numbers can driver on certain days of the week, and cars with odd-number license plates on the other days.

Certainly, based on the sheer volume of traffic, traffic enforcement in Bogotá would have been difficult at best. Although I saw many police officers patrolling the streets on foot, I did not see any traffic stops.

That evening it was time for the reason for my visit, the Third Awards Ceremony for CEJ. It was a very impressive event. Although the newly-elected President of Colombia, Juan Manuel Santos, had planned to attend, the unexpected and sudden death of the ex-president of Argentina caused him to leave the country for the funeral. The Vice-President, Angelino Garzón, was in attendance. Also present was Rafael Santos Calderón, President of the Board of Trustees of CEJ and Chairman/CEO of Casa Editorial El Tiempo, a media conglomerate in Columbia that owns most of the newspapers, publishing and television outlets. He is the cousin of Presidente Juan Manuel Santos Calderón and the President's brother, former Vice-President, Francisco Santos Calderón

Imagine my surprise when I was introduced to Sr. Santos and he immediately gave me a hug and said he had visited Overland Park many times when he was attending KU! He said, in perfect English, "I am a Jayhawk." It was only then that I learned that Rafael, as well as his cousins, the president and former vice-president, are all graduates of the University of



Hon. Karen Arnold Burger and Rafael Santos Calderón, fellow Jayhawk

Kansas, along with several other cousins. When I asked him why so many in his family had attended KU, he responded that he believes a Santos many, many years ago went there and liked it and the whole family has fallen in love with Kansas. During his opening remarks at the ceremony, when he was welcoming me to the event, he said he was pleased to welcome Judge Karen Arnold-Burger, from Kansas, a place near and dear to his heart and he placed his hand on his heart. I felt so honored and touched.

I also had the honor of sitting next to Dr. José Alejandro Cortés Osorio, a leader of finance in Columbia, serving as President of Sociudades Bolivar, S.A. (a banking and insurance company), a founding member of the Board of CEJ and founder of the Instituto de Ciencia Política (Political Science Institute) (the mission of which is to study, advance and disseminate the principles of democratic pluralism and free market values). Dr. Cortés graduated from Pomona College and the University of Michigan before returning to Colombia. He was a gracious "seat" neighbor who spoke highly of the United States and his continuing trips to visit his children. He was also surprised by a special honor bestowed upon him for his tireless leadership and commitment to the CEJ. Ximena shared with me that at one time the CEJ, (a non-profit entity which struggles financially, like most do) was unable to make payroll, and Dr. Cortés took money from his own pocket to pay them so that the CEJ could continue its important work.

After an explanation of the award process and the record 33 nominations, top honors went to the National Police of Colombia for its Criminal Investigation Division and Interpol unit. It has made huge improvements in the investigation of criminal cases. In fact, Major General Oscar Naranjo Trujillo could not attend because he was in the United States receiving an award as the "Best Police Chief in the World," an honor discussed with great pride among Colombians.

Finally, the time came to present the "honorable mention" award, which had been assigned to me. The award was given to the University of Caldes Law School which developed a property reconciliation program involving 17 different towns in the region. When the drug traffickers and armed conflict ruled Colombia, many citizens were displaced as the drug lords and their paramilitary organizations took their land. With the removal of these groups, the Law School embarked on a program to help the displaced persons to return to their homes and reclaim their land. Between 1997 and 2008 almost 3 million Colombians, primarily in the rural areas, were "internally displaced." Needless to say, the townspeople left with very little proof of their land ownership. The students worked with the people to develop the necessary proof to get the land back to the rightful owners.

A reception followed where I was introduced to many leaders in the Colombian legal system. Among others, I met Sr. Manuel José Cepeda Espinosa, former president of the Constitutional Court (one of four co-equal Supreme Courts in Colombia) and Jene Thomas, Director of the Office of De-

(Continued on page 21)

## A World Away-Bogotá

(Continued from page 20)

mocracy and Human Rights for USAID, Colombia. After hearing I was associated with the League of Women Voters, Mr. Thomas invited me to the U.S. Embassy in Bogotá the following morning to hear about the work his group is doing in Colombia. The League of Women Voters is registered as a Private Voluntary Organization with USAID and personnel from the U.S. Embassy in Colombia described the League as its “hero.”



So bright and early the next morning, my last full day in Colombia, I headed to the Embassy, but not before walking into the lobby of my hotel to find the staff all dressed like characters from the movie Grease. It was Halloween weekend, and it became apparent that the Colombians go all out for the holiday. With the vast majority of the population being Roman Catholic, All Saint’s Day, November 1, is a government holiday and All Hallows Eve is a cause to party.

Upon arriving at the Embassy, one of the largest U.S. embassies in the world, Ximena and I were greeted by our host, Jene Thomas, Director of the Office of Democracy and Human Rights for USAID, Colombia. We were later joined by J. Michele Guttman, Senior Advisor, Human Rights and Justice, and Orlando Muñoz, Senior Policy Advisory in the Democracy and Governance Office. They introduced us to the Justice House Model that has been established in Colombia.

In cooperation with the Ministry of Justice and Law, USAID funded the building of 59 justice houses to facilitate access to justice. It offers people the opportunity to resolve minor,

everyday conflicts, quickly, effectively and free of charge. It is a multi-agency center in which people can be directed to the resources they need all in the same building. Whether it is getting identification papers, handling conflicts between neighbors, resolving cases of unpaid salaries, prosecuting minor criminal matters, assisting victims of domestic violence or safeguarding individual rights in criminal cases, these “Casas de Justicia” have been very successful. Volunteer community consiliatorios (similar to mediators, but they never suggest an outcome and they are not paid) work to encourage peaceful coexistence through informal conciliation. If an agreement is not reached, the problem can be voluntarily brought before a Justice of the Peace for an immediate decision, again, all in the same building. These JP’s are honorary voluntary positions chosen by the electorate in the community they serve. Many law schools also staff clinics at the Justice Houses.

Exit surveys have found that the Casas are used primarily for family law-type disputes and most appreciate the ability to avoid the judicial system. They overwhelmingly rate the assistance provided as “very good.” They also cite the proximity to their homes and the ability to access several agencies in one place as key. Over 90% said they would use the service again if they had a problem.

Since movement from the inquisitorial process to the accusatory process in 2007, USAID has also provided training for prosecutors, investigators, judges and public defenders in the new system. USAID is also actively involved in voting reforms and facilitating the establishment of environmental protection programs. USAID (a division within the Department of State) is an agency I knew nothing about and I left wanting to know more about their tremendous work in Colombia and around the world.

Later that morning, I met in downtown Bogotá with Judge Martha Inés Diaz, Municipal Civil Court Judge. She has worked closely with CEJ on a project funded by Bogotá’s Secretary of Economic Development to redesign the municipal civil courts. A fair and efficient civil system is seen as

(Continued on page 22)

## ‘Dijín, ejemplo para la Justicia en Colombia’



El director de la Dijín, general Ramiro Mena, es felicitado por Rafael Santos (der.), presidente de la Junta Directiva de Excelencia en la Justicia.

Las buenas prácticas para acortar los tiempos de las investigaciones, y evitar así que muchos delincuentes que son capturados regresen a la calle en cuestión de días, fue uno de los aspectos que le merecieron a la Dirección de Investigaciones Judiciales de la Policía (Dijín) el Premio Excelencia en la Justicia 2010. El comité evaluador destacó que los mecanismos desarrollados por la Dijín son un aporte clave para facilitar el acceso de los colombianos a la Justicia.

Otro gran logro se refleja

en las pesquisas criminales. En el 2007, la Dijín tardaba hasta 15 días, por ejemplo, para identificar a qué tipo de arma pertenecía un casquillo encontrado en la escena de un crimen. Hoy, demora uno o dos días a lo sumo.

La eficacia del organismo se refleja también en el hecho de que de cada 100 pruebas aportadas por la Dijín en procesos judiciales, 95 pasan el control de garantías ante los jueces. Los resultados de estas prácticas son la cosecha de nuevas políticas que se aplican hace pocos años.

“En el 2009, comenzamos a implementar 12 software crea-

### Homenaje

“El premio es un reconocimiento a todos los policías que trabajan día a día para combatir la criminalidad”.

General Ramiro Mena Bravo  
DIRECTOR DE LA DIJÍN

dos por la Dijín, los cuales nos permitieron medir y detectar los tipos más frecuentes de delitos y administrar la información criminal, para hacer más eficientes los procesos”, agregó el oficial.

El presidente de la Junta Directiva de Excelencia en la Justicia, Rafael Santos, destacó que “no todo en la Justicia es negro; hay lugar para el optimismo y, sobre todo, para la creatividad. Esta iniciativa, como las otras 32 que se postularon, está llena de vocación de servicio”, agregó Santos.

Por su parte, Gloria María Borrero, directora de Excelencia en la Justicia, dijo que el premio es un reconocimiento a las buenas prácticas que la Policía Nacional ha desarrollado durante 52 años.

Article in El Tiempo, Saturday, October 30, 2010 about the CEJ ceremony in Bogotá on Thursday, October 28, 2010.

## A World Away-Bogotá

(Continued from page 21)

essential to bringing business and development to Colombia.

She explained that the Colombian legal system is a civil system (as opposed to our common law system) grounded in “written law” with the primary source being legislation. All decisions are based on a strict reading of the statute. This is different from our common law system where judges are guided by precedent created by judicial decisions over time.

As best I could tell, her position was the equivalent of a small claims court judge or limited jurisdiction civil judge in the United States. Her maximum jurisdiction was about \$25,000. Her office has about 5,000 cases pending at any given time. The average amount of time to disposition is about 1,200 days. Dissatisfied litigants can appeal her decision, adding even more time to final resolution. One of the issues CEJ is examining is ways to decrease disposition time.

Face-to-face hearings are extremely rare. Each side presents its case in writing, attaches its *pruebas* or proofs and the judge makes a written decision, never meeting the people involved. CEJ is also working toward a goal of making the process more “oral,” again in hopes of speedier dispositions.

As in other civil law countries, judges are specifically trained career judges. They undergo a system much like the civil service system in the U.S. They take a test and depending on how they score on the test their names are placed on a list from which future judicial openings are filled. Judge Inés makes about \$2,000 per month, which is an average professional salary in Colombia. Judge Inés Diaz expressed surprise that some judges stand for election in the United States. She wondered how the system prevented corruption arising from such a system. I explained that this was a topic of much debate in the United States.



Inside the chambers of the Hon. Martha Inés Diaz, Municipal Civil Judge, Bogotá.

As Ximena pointed out, the Court is located in the heart of downtown Bogotá, an area that is extremely congested, not easy to traverse and somewhat dangerous. This concern for “access to justice” was part of the reason behind the Casas de Justicia built with the help of USAID.

I was not able to view the criminal system at work, but Judge Inés was able to tell me a little bit about it. There are many similarities since the accusatory system became fully operational in January 2008 and a new criminal code was adopted very similar to U.S. criminal codes. My understanding is that due to these reforms, cases in which a person is “caught red-handed” (called “casos de flagrancy”) move fairly quickly through the system. But in any case which involves police investigation, the system is slow, although significant improvements are being made.

The day ended with a trip to the Andino Mall in the Zona Rosa area (also called the T-Zone) of northern Bogotá. It was very nice and similar to very chic big city malls in the United States. We ate at Andres Carne de Res, a four story restaurant, bar, “disco” in the mall. The owner, Andres Jaramillo, is a renowned artist in Colombia, making beautiful art from discarded metal. His art adorns every nook and cranny of the restaurant. Ximena and her friend Ingrid went around to the various food stations and according to Ximena, recalling her visit to the U.S., they served me “family style as they say in Kansas” so that I could taste as many local specialties as possible. It was a relaxing end to an amazing trip.

The next morning, the hotel called a cab at 5:30 a.m. to take me to the El Dorado Airport and back to Kansas, a world away. I will not forget this wonderful opportunity to learn about such a beautiful and emerging nation from its amazing citizens.

*\*The League of Women Voters, a nonpartisan political organization which encourages informed and active participation in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy.*

**In a television debate over tort reform with a physician who was slamming lawyers as a drain on society, Joe Jamail, Jr., famous Texas trial attorney, AKA “The King of Torts,” replied:**

***“I would like to remind the doctor that while his professional ancestors were putting leeches on George Washington to bleed him, my ancestors were writing the Declaration of Independence and the United States Constitution.”***

## Traveling Abroad's Top Risk: Roads

By Gary Stoller, reprinted from USA TODAY  
October 21, 2010

Road accidents — not terrorism, plane crashes or crime — are the No. 1 killer of healthy Americans traveling abroad, a USA TODAY analysis of the past 7½ years of State Department data shows.

About 1,820 Americans, almost a third of all Americans who died of non-natural causes while abroad, have been reported killed in road accidents in foreign countries from Jan. 1, 2003, through June 2010. On average, one American traveler dies on a foreign road every 36 hours.

Almost 40% of the deaths occurred in Mexico, the analysis shows. The second-highest number of road fatalities occurred in Thailand, where relatively few Americans visit. The Dominican Republic, a popular resort destination, ranked No. 3 in fatalities, followed by Germany and Spain.

"Road deaths are the No. 1 risk to tourists — ahead of terrorism, plane crashes and infectious disease," says a report released last month by Make Roads Safe, a non-profit group working with the United Nations and World Health Organization (WHO) to promote global road safety.

The report says "a lethal cocktail of killer roads, unsafe vehicles, dangerous driving and disoriented travelers" is killing an estimated 25,000 travelers to foreign countries each year.

With an expected increase in tourists and motor-vehicle use, that number could almost double to 45,000 by 2020 and triple to 75,000 by 2030, Make Roads Safe predicts.

The number of tourist deaths is dwarfed by the total number of road fatalities worldwide. Nearly 1.3 million people die and up to 50 million are injured a year, WHO estimates.

About half of the fatalities are occupants of motor vehicles. Half are bicyclists, motorcyclists and pedestrians, says Etienne Krug, director of WHO's injury-prevention department.

More than 90% of the world's road fatalities occur in low-income and middle-income countries, which have 48% of the world's registered vehicles. The fatality rate on their roads is nearly double that of high-income countries. In Mexico, a

middle-income country, 682 American travelers died from the start of 2003 through June.

State Department statistics include only reported deaths and may not reflect the total number of American fatalities.

More Americans annually visit Mexico than any other country. Canada, the second-most-visited country, registered 31 U.S. road deaths.

## U.N. Program Urges Global Road Safety

By Gary Stoller, reprinted from USA TODAY  
October 21, 2010

Thomas Oliveri says his son, Michael, was a world-class surfer, so he wasn't worried when Michael left Melbourne Beach, Fla., in August to surf the waves off the coast of Nicaragua.

Michael, 23, had a great time in the surf. But he, a friend and a surfing colleague were killed when a truck taking them to the airport in Managua apparently swerved to avoid a motorcycle, overturned and flipped multiple times. Two other friends were seriously injured.

"It was a freak accident about 10 minutes away from the airport," Thomas Oliveri says. "You're at your own peril in some countries."

Roads in many foreign countries are perilous. An American traveler dies on one every 36 hours on average, a USA TODAY analysis of State Department data from Jan. 1, 2003, through June 2010 shows.

"Americans are traveling increasingly for business, pleasure, study and humanitarian purposes to countries where the chance of being killed is 20 to 80 times greater than in the U.S.," says Rochelle Sobel of the Association for Safe International Road Travel, ([www.asirt.org](http://www.asirt.org)).

Disregarding nationality, every six seconds, someone is killed or injured on the world's roads, says the Make Roads Safe campaign ([www.makeroadsaft.org](http://www.makeroadsaft.org)), a global safety initiative.

About 1.3 million people worldwide die annually in road accidents, and, unless "immediate action" is taken to make roads safer, the number will rise to about 2.4 million by 2030, the World Health Organization (WHO) says.

The rapidly increasing number of road deaths caused the United Nations to act. In March, the organization's General Assembly proclaimed 2011-2020 as the Decade of Action

(Continued on page 24)

## U.N. Global Safety Program

(Continued from page 23)

for Road Safety. The WHO, a group within the United Nations, is leading the development of a global plan that's expected to be launched next May.

The plan aims to encourage countries to improve the safety of roads and vehicles and change the behavior of road users by better enforcement of traffic laws. WHO officials hope the plan will lead to increased investment in national and international road-safety projects.

It will particularly focus on improving road safety in low- and middle-income countries, says Etienne Krug, a doctor at WHO who's in charge of developing the plan.

### POOR DESIGNS

More than 90% of deaths on the world's roads are in low- and middle-income countries, where the fatality rate is about double the rate in high-income countries, according to WHO.

Among the problems:

- Many countries have roads that were designed poorly and lack safety features such as barriers.
- Many roads are shared by motorists, pedestrians, cyclists and animal-drawn carts, and lack safe zones for the more vulnerable road users.
- Many countries lack or fail to enforce laws for speeding, drunken driving and other traffic hazards. Many also lack or fail to enforce laws for wearing seat belts and motorcycle helmets, and using child restraints.

Most recent WHO statistics show that two middle-income countries, China and India, have the most road deaths. In one year — 2007 — nearly 221,000 people were killed in China and about 196,000 in India, WHO estimates.

Elena Kiang, a doctor in Sarasota, Fla., says her mother, her aunt and her cousin's husband were killed, and her sister and cousin were severely injured, on a Chinese highway in December 2008.

Her family was traveling by van on the Yong-Tai-Wen Expressway in Ruian when the driver of an overloaded truck in the opposite direction collided with another vehicle and lost control. The truck crossed the highway and struck the Kiang family's van.

There was no effective barrier preventing such a crash, Kiang says

### TAKING ACTION

University of Massachusetts professor Charles Schewe lost his daughter, Sara, in a bus crash that also killed six others in India in 1996.

She was a college junior studying abroad in a program that was to fly 58 students from Varanasi to Agra. She was instead put on a bus for a nighttime ride on a treacherous road, Schewe says.

He has since founded a travel safety group, Sara's Wish Foundation ([www.saraswish.org](http://www.saraswish.org)), which aims to promote safety standards for student travel programs and warn students about the dangers of traveling abroad.

Governments need to put more money and effort into improving the safety of roads worldwide, where *"the equivalent of 12 jumbo jets crash every day with no survivors,"* he says.

Sobel and other road-safety advocates say many countries are fully committed to the plan by the United Nations and World Health Organization, and it could help save lives.

*"It has a far better chance to succeed than previous plans,"* says Sobel, whose 25-year-old son, Aron, and 22 others were killed in a bus crash in Turkey in 1995. *"Road crashes have finally been recognized as a global crisis and an escalating problem."*

### For Safety on Foreign Roads Travelers Should:

- Read foreign country road-travel reports on the State Department's website, <http://travel.state.gov>. The website's Road Safety Overseas page links to many road-safety resources.
- Consider hiring a well-trained driver instead of driving a car in low-income, and some middle-income, countries.
- Don't drive or ride in any vehicle without an accessible seat belt.
- Learn how to use all controls and signals on a rental in the parking lot before getting on a road.
- Practice driving in a less-populated area before driving in heavy traffic, especially if you're in a country where drivers drive on the left side of the road.
- Become familiar with the local road culture and road regulations. Learn about seasonal hazards and local holidays when road crash rates are higher.
- Avoid night road travel in countries with poor safety records or mountainous terrain.
- Avoid lightweight minivan, motorcycle, scooter and moped travel. If you travel on a motorcycle, scooter or moped, wear a helmet that meets safety regulations.
- Pedestrians are at most risk, so be aware of local traffic patterns, cross roads only at crosswalks and wear reflective clothing at night.

Sources: Association for Safe International Road Travel, U.S. State Department.

*U.S. travelers die on foreign roads every 36 hours*

# 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

[www.accesskansas.org](http://www.accesskansas.org).

## AG OPINION 2010-18 NOVEMBER 15, 2010

Attorney General Opinion No. 97-26 concluded that the "Lucky Shamrock Phone Card Dispenser" is not an illegal gaming device. However, the machine described in that opinion does not resemble the type of phone card dispensing machines that are being operated now.



The current Lucky Shamrock machines are set up to accept \$1, \$5, \$10 or \$20 bills. When currency is deposited into the machine, the machine prints out a slip of paper containing an authorization code that entitles the person playing the machine to a given number of minutes of long-distance telephone service.

At the same time, the machine provides the player with a number of "points" in an amount corresponding to the denomination of the bill deposited (e.g. \$1 = 100 points; \$5 = 500 points). The player may then elect to wager with the "points" in a manner that appears identical to the operation of electronic slot machines. The player selects the number of points he or she wishes to "bet." Then, the machine – operating on the basis of chance – flashes images on the screen to show whether the player has "won" or "lost." If the player "wins," the number of points the player has accumulated increases; if the player "loses," the player's points decrease. The player may continue to play the machine so long as there are points remaining. If the player wishes to "cash out" points, he or she notifies an employee who then verifies the number of points and pays the player either in cash or in prizes, merchandise or coupons from the establishment. In some of the locations, portions of the Stovall opinion are taped to the sides of the machine in an attempt to justify their legality.

Because the Stovall opinion is being used to justify the legality of a machine that does not resemble the machine described in the opinion, the opinion is withdrawn.

# MAKING CRIME PAY

Reprinted from June 2008 ABA Journal

Americans have always had a peculiar relationship with crime and criminals. Each generation seems to fret about unprecedented lawlessness, while bestowing on its most outrageous criminals the kind of celebrity reserved for folk heroes and movie stars.

The new National Museum of Crime and Punishment, which opened in 2008, focuses on that national fascination with exhibits that chronicle both our history of bad behaviors and our sometimes cruel and ingenious ways of repressing them.

Visitors can behold pictures of offenders with ears nailed to pillories, lock themselves or their loved ones into an operational model pillory, or take a gander at an actual electric chair.

The privately funded museum is the brainchild of Orlando, Fla., lawyer and entrepreneur John Morgan, who saw it as a way to better educate CSI-loving Americans about the realities of crime and punishment in America.

In addition to a variety of interactive exhibits on activities such as safecracking and crime scene photography, the museum also tries to explore the legal consequences of crime and punishment by devoting part of its exhibition space to constitutional rights and notable U.S. Supreme Court rulings, including *Miranda v. Arizona*, 384 U.S. 436 (1966).

Beyond those lofty intentions, visitors can expect to be horrified/-titillated by some of the museum's offerings, including a full-scale autopsy room, where awaiting examination is a fake body bearing evidence of strangulation, knife and gunshot wounds, and an unlucky host of other indignities.

There is a Wild West shoot-out game, one of John Dillinger's cars, photos of the world's most notorious computer hackers, a model police booking room and holding cell, and a replica gas chamber.

## CRIMINALS VILIFIED

The museum bears an unapologetic pro-law-enforcement bias—in part because Morgan's partner in the venture is John Walsh, host of the TV show *America's Most Wanted*. In fact, future episodes of the show will be taped from studios in the museum.

Walsh insisted that the museum not glorify criminals, rather that it show the consequences of crime. While the particularly unappealing mugshots of the computer hackers seem to fit that bill, there are some large and glamorous photos of

(Continued on page 31)

## Coalition Takes Action to Sustain Prevention Efforts for Youth

By Keri Renner, Fall 2010

Reprinted with permission from the Official Newsletter of the Kansas Family Partnership, Inc.

A small county in southeast Kansas initiated a grassroots effort to raise funds to continue substance abuse prevention education in their communities.

Linn County Children's Coalition is seeing reductions in youth substance abuse and they want to sustain the efforts impacting the reduction. In order to continue the research-based programs they had implemented in their schools, they realized they needed to seek other sources of funding. The two programs involved are Too Good For Drugs, which provides curriculum for fifth through ninth grades, and Class Action, taught to tenth graders.

The three schools currently implementing the programs are Prairie View (LaCygne); Pleasanton (Pleasanton) and Jayhawk Linn (Mound City).

Linn County is also one of the designated fourteen grantees of the Kansas Strategic Prevention Framework - State Incentive Grant whose funding will end in December 2011.

Municipal court Judge Claude Warren serves as a board member of the Linn County Children's Coalition, and is also Linn County coroner. His background consists of over 25

years in law enforcement. Warren suggested the possibility of a three dollar surcharge being added to court costs as a way to earn income for prevention efforts in the community.

*"I thought, if it is possible for the courts to give back, then I wanted to test the waters by asking if raising fine costs was a possibility,"* Warren said.

Melody Berry, who works as a corrections officer with the Bourbon County Sheriff, is also the chairperson of the Linn County Children's Coalition. In December 2009, she sent Judge Warren a letter in his capacity as a judge--not as a member of the coalition's board. She requested that he contact other administrators within Linn County to consider allowing city courts to designate three dollars of court costs to be set aside to help fund prevention efforts.

Warren said the cities in general were receptive to the idea. Currently, four cities in Linn County have already agreed to the plan.

*"The additional three dollars is not really costing anyone. In LaCygne, they had not raised court costs since 1988, so it was time,"* Warren said. *"It took Linn Valley three months to decide to go ahead with it."*

Berry said that raising funding through increasing court costs was a way to get the community involved.

*"By increasing the price of court costs and fines, that makes offenders pay for our community's prevention education,"* she said. *"All the money raised will be set aside just for education and will be administered by the school districts."*

Berry said that they are still awaiting the City of Pleasanton's response to the proposal. Of all the cities in Linn County, two have no police departments (Prescott and Blue Mound) and rely on the Sheriff's Department, so they only have code

*(Continued on page 27)*



A mock DUI presentation involving the Jayhawk Linn High School students is just one of the many events that the Linn County Children's Coalition sponsors for youth.

# Alcohol Prevention Efforts

(Continued from page 26)

violations and do not have court costs.

Currently, the prevention fund is collecting three dollars from every court case heard in Parker, LaCygne, and Mound City. Linn Valley designates one dollar from every court ticket.

*“If we can continue with the funding, then we can continue to work on dropping the rates of underage drinking in our area. Linn County was 5th in the state for underage drinking when we started our grant,” she said.*

Warren’s motivation for getting involved with the coalition comes from the years he has spent in law enforcement and in his capacity as a coroner--sometimes at scenes of underage drinking accidents. Now he hears cases in court that involve substance abuse in some way.



*“Kids don’t realize that if they are out drinking at age 15, they are affecting their brains,” said Warren. “They could have had that extra edge if they hadn’t been killing their brain cells with alcohol.”*

Hon. Claude Warren

Berry said that much has been accomplished from the funding of the coalition. They have helped local soccer; baseball and football programs secure equipment and helped start sport programs as safe, drug-free alternatives for youth. They have coordinated mock DUI events at the schools. In one instance, they took 144 youth to a rented-out theater in Olathe to view the film, “To Save a Life.” They then purchased videos of that film for the schools in their area. The coalition believes that youth are the future of their community and want to provide them the opportunities to make the right choices.

The Coalition hosts town hall meetings annually as well as family-friendly events. They recently partnered with Crime Stoppers and the schools this year to host pool parties in August in each community before school began. The events were well-attended.

*“When the kids come to us asking for more events, we know we’re doing something right,” Berry said.*

Berry said the members of the coalition have been dedicated and involve many people in the planning stages. Local statistics show that the community’s dedication is paying off. Berry said in the first year, they saw an 11% reduction in 30-day use of alcohol and a 5% reduction in binge



Melody Berry

drinking.

*“We are seeing a reduction in substance abuse and we don’t want to end the programs that are affecting that,” said Berry.*

Warren said if he can convince one youth to not drink until they are legal, then it’s been worth his effort.

*“Living in a small community,” Berry said, “Everybody here knows everybody, and when there is a death of a young person in the community, it stays with a community. Kids may forget, but parents don’t.”*



## A MESSAGE TO THE KMJA FROM THE HONORABLE RANDY MCGRATH, LAWRENCE

To members of KMJA:

**I will be retiring as Lawrence Municipal Court Judge next March. I want to say that I have appreciated the KMJA immensely over the past 12 years and will miss it. Specifically, I have benefited from annual conferences and found them educational, enjoyed the people I’ve met and the exchanging of ideas, enjoyed reading the Verdict and learning from it, enjoyed my time on the board of directors and the meetings in Abilene, and finally was very pleased and proud to have served a term as president of the KMJA in 2006-2007.**

**Best regards, Randy McGrath**



# Unpublished Opinions

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

## **ERRONEOUS DATE ON DC-27 NOT A BAR TO DRIVER'S LICENSE SUSPENSION** *Unpublished Decision*

Dale Schmidt was arrested for DUI and taken to the station for an intoxilyzer test, which he refused. He was arrested on September 28 at 3:51 a.m. In the first paragraph of the DC-27 form, the officer filled in the date of the incident as September 29, instead of September 28. Schmidt argued that this was a fatal defect in the DC-27, preventing the state from suspending his license for the test refusal. He argued that listing the correct date is mandatory.

The Kansas Court of Appeals disagreed. In *Schmidt v. Kansas Dept. of Revenue*, Slip Copy, 2010 WL 4157022 (Kan. App. October 8, 2010), the Court found that K.S.A. §8-1002 (a) lists four pieces of information that must be included on the officer's certification form: reasonable grounds to believe the person was operating the vehicle, person was under arrest or in an accident, officer gave oral and written notice of implied consent, and the person refused the test as requested by a law enforcement officer. The date of the incident is not on the list. Likewise, K.S.A. §8-1002(d) sets out additional information that must be included on the officer's certification (person's name, dl number, current address, reason and statutory grounds for suspension, the date notice is being served and notice of the effective date of the suspension, notice of the right to an administrative hearing; and the procedure to request a hearing). Again, date of the incident is not on the list. The Court declined to read the statute to add the requirement of the date of the offense. Since date is not a mandatory requirement, the error cannot be fatal.

The testimony was clear the incident took place on September 28. Everyone was aware of that during the hearing. This minor error did not mislead anyone, including Schmidt. Therefore, the mistake was not fatal.

## The Verdict

### **COURT CAN'T SPECULATE THAT BLOOD WAS IN DEFENDANT'S MOUTH FROM RECENT TONGUE PIERCING** *Unpublished Decision*

Heidi Schmidt was arrested for DUI and taken to the station for a intoxilyzer test. Pursuant to the KDHE protocol, the officer testified that prior to the test he checked Schmidt's mouth and saw that she had a tongue ring. She told him that she had just had her tongue pierced the day before. He asked her to remove it. She did and he rechecked her mouth. He testified that he did not see any blood. She blew a .097.

At trial Schmidt argued that the test results should be suppressed because she had her tongue pierced the previous day "there was a substantial likelihood the test would be contaminated" due to blood in her mouth. In denying the motion to suppress, the district court judge held that the only evidence before the court was that there was no blood in Schmidt's mouth, therefore the KDHE protocol had been satisfied.

The Kansas Court of Appeals agreed in *State v. Schmidt*, Slip Copy, 2010 WL 4156762 (Kan. App. October 8, 2010).

*"Schmidt's suggestion that she may have had blood in her mouth because her tongue piercing had not completely healed is speculation. Moreover, this conjecture does not controvert the undisputed evidence that Officer Burkholder fully complied with the KDHE protocol by inspecting Schmidt's mouth and finding no blood."*

### **SUFFICIENCY OF MUNICIPAL COURT WAIVER OF COUNSEL FORM** *Unpublished Decision*

Jason Myers was convicted of DUI-third offense. He argued that the district court erred in considering a prior 2004 Lawrence Municipal Court conviction because of an inadequate waiver of counsel form. He claimed that since the form was not verbatim to the form approved in *In re Habeas Corpus Application of Gilchrist*, 238 Kan. 202 (1985), it was inadequate. There were a few differences in the two forms. For example:

Gilchrist Waiver	Lawrence Waiver
"The undersigned now states to the Court that he or she does not desire to have counsel, either retained or appointed, to represent him or her before the Court and wishes to proceed without counsel"	"I am prepared to proceed in my own defense."

*(Continued on page 29)*

# Unpublished Opinions

(Continued from page 28)

In *State v. Myers*, Slip Copy, 2010 WL 4393944 (Kan. App. October 29, 2010), the Court of Appeals cited *State v. Hughes*, 290 Kan. 159 (2010) which found that the *Gilchrist* form did not need to be followed verbatim, other forms may also be acceptable. Substance prevails over form and the two critical questions in evaluating a waiver of counsel are (1) whether the defendant was fully advised of his or her right to counsel and (2) after having been fully advised, did the defendant make a clear determination not to have counsel represent him or her.

In this case, the defendant argued that the Lawrence judge never gave any cautionary admonishments. However, the written waiver did have a judicial certification, identical to the one in *Gilchrist*, in which the judge certified that Myers had been fully informed of his right to either retained or appointed counsel and the “*meaning and effect [of that waiver] has been fully explained*” to him. This judicial certification provided a valuable function—to verify and validate that Myers knowingly and voluntarily waived his right to counsel because it is the judge who is burdened with assuring that these rights have been adequately protected.

In addition, Myers testified that the municipal judge asked him if he wanted an attorney although he couldn’t recall if the judge told him why he might want an attorney. He said he did not believe at the time he had a good defense and he just wanted to get it over with. He said he knew he had the right to an attorney. Myers had experience in other criminal cases in which he had hired an attorney.

Therefore, even though the language in the Lawrence waiver form was not identical to *Gilchrist*, it along with the judge’s certification and Myer’s own testimony was sufficient to establish that Myers had knowingly and voluntarily waived his right to counsel in the 2004 Lawrence case. It was properly counted as a prior conviction for sentencing purposes.

## SETTING ASIDE A PLEA FOR FAILURE TO ADVISE DEFENDANT OF IMMIGRATION CONSEQUENCES OF PLEA *Unpublished Decision*

Juan Francisco Adame-Orozco was a **legal resident** of the United States for over 20 years. He pled guilty to two counts of selling cocaine in return for the prosecution dismissing some other charges. The district judge advised Adame-Orozco of his right to appeal, that the court was not bound by the sentencing recommendations, etc. He was sentenced to 18 months incarceration, but released on probation for 18 months.

When immigration officials learned of the convictions, they initiated deportation proceedings. The Immigration Judge advised Adame-Orozco that “*his best hope of staying in the*

## The Verdict

*country was if he could convince a state court to undo his guilty plea to the cocaine charges.*” The judge gave him a 1 month continuance to see what he could accomplish. Adame-Orozco set out on his quest.

Adame-Orozco filed a motion with the district court to set aside his plea. He claimed in the motion that his attorney never informed him about the possibility of deportation for his convictions. In fact, Orozco believed that if he was given probation, he would not be deported. He testified that he would not have entered the plea if he knew he would be deported.

At the hearing on the motion, Adame-Orozco testified as set out in his motion. His attorney testified that he told Adame-Orozco that he was not an immigration specialist and did not practice immigration law, but that a conviction of this nature could have an impact upon his immigration status. He testified that he told him the charges to which he pled were deportable charges. He further stated that he referred Adame-Orozco to an immigration attorney, but told him that he was not aware that Kansas was deporting individuals for this conviction.

The district court found Adame-Orozco had competent counsel, he entered his plea knowingly and voluntarily, and there was no indication he had been misled, coerced, or mistreated. The judge verified that Adame-Orozco had been advised of the maximum and minimum penalties if he were convicted, but did not advise him, nor was the judge required to advise him, of the immigration or any collateral consequences of his plea. Finally as to his equitable argument of manifest injustice, given that he had legally lived in the U.S. for 20 years, the district judge said, “[I]t is not shocking or obviously unfair that a resident alien who has been convicted of drug trafficking should be sent back to his home country.”

Within 6 months of his first appearance before the immigration judge, Adame-Orozco was deported. He filed a late appeal of the district court decision denying his motion to withdraw his plea, which sat dormant for 3 years. His attorney attributed the delay to many different things, including no direct instructions from the client and an inability to contact the client due to his deportation. In the meantime, a couple years later, Adame-Orozco returned to Kansas and was convicted in federal court of illegally re-entering the country. He went to prison for 15 months and was again deported.

In *State v. Adame-Orozco*, Slip Copy, 2010 WL 4393952 (Kan. App. October 29, 2010), the Court of Appeals found that due to the late filing of his notice to appeal, it had no jurisdiction over his case. It is outlined here simply to show the tangled web these cases can weave and the importance of fully advising clients of immigration consequences.

(Continued on page 30)

# Unpublished Opinions

(Continued from page 29)

## SUFFICIENCY OF EVIDENCE FOR DRUG DUI; URINE TESTS IN DUI CASES *Unpublished Decision*

Police are dispatched to the scene of an injury accident. Brian Harred's car was upside down and up against a tree. It was clear the driver had lost control of the vehicle. Harred was standing nearby and had injuries to his head and arm. He was confused and disoriented. He was unsteady and frequently stumbled. His pupils were constricted in a manner which seemed abnormal given the time of day and the amount of light. The officers had Harred write out a statement about what happened. His handwriting and grammar were poor and didn't seem to make much sense.

Harred told the officer he took a heart medication. He took a PBT which showed no alcohol. No field sobriety tests were performed. The officer read Harred the implied consent advisory and then asked him to give a urine sample at the scene, and he did. He did not request Harred submit to a breath or blood test prior to the request for a urine test. Harred refused medical treatment and the officer took him home. The urine test showed morphine, alpha-hydroxyalprozolam, nordiazepam, temazepam, and oxazepam.

Harred was charged with operating under the influence of drugs. At trial, the State had an expert testify that the officer's observations of the defendant were consistent with drug impairment. The expert also testified as to the effects of the various drugs on one's system.

In *State v. Harred*, Slip Copy, 2010 WL 4668327 (Kan. App. November 5, 2010), Harred challenged the denial of his motion to suppress the urine test as illegally requested and challenged the sufficiency of the evidence for his conviction for DUI.

First, the Court found that even though urine tests are not determinative as to when or in what quantities the drugs may have been ingested, the officer's testimony that he believed Harred was incapable of safely operating a vehicle, the fact that drugs were present in his system and the doctor's testimony regarding their general effects were sufficient to support the district court's guilty finding. The Court pointed out that K.S.A. 8-1567(a)(4) does not require a certain quantity or timeframe of ingestion with respect to drugs.

As to the urine test, K.S.A. §8-1001(d) provided, at the time of this offense (April 2005), that "*If there are reasonable grounds to believe that there is impairment by a drug which is not subject to detection by the blood or breath test used, a urine test may be required.*" The Court of Appeals found that a plain reading of the statute compels the conclusion that a urine test could only be taken after a blood or breath test was attempted or completed. The Court noted that K.S.A.

## The Verdict

§8-1001 has been amended several times and this interpretation solely relates to how the statute read in April 2005. The Court further found that the PBT was not a "breath test" for purposes of compliance with K.S.A. §8-1001(d).

*Editor's Note: The urine test provision in question in this case was removed effective July 1, 2008 and currently K.S.A. §8-1001 does not contain such a restriction. It seems to leave the type of test at the officer's discretion, however if there is an accident involving personal injury and the operator could be cited with a traffic offense, a urine test is required. See, K.S.A. 2009 Supp. §8-1001(h).*

## FALSE NAME AFTER ARREST IS OBSTRUCTING OFFICIAL DUTY *Unpublished Decision*

Querretterion Payne was arrested for possession of cocaine following a police pursuit. He was given his *Miranda* rights and was asked his name. He responded "Albert Brown." He did not have any state-issued identification. Payne was taken to the station under the name Albert Brown and all reports were completed using that name. When jail staff processed and fingerprinted him upon arrival at the jail, they discovered his real name was Querretterion Payne. Upon learning this information, the arresting officer returned to the jail, rewrote his arrest reports and charged Payne with obstructing official duty in violation of K.S.A. §21-3808(a) (See also, UPOC §7.2), which defines "obstructing legal process or official duty as:

*"knowingly and intentionally obstructing, resisting or opposing any person authorized by law to serve process in the service or execution or in an attempt to serve or execute any writ, warrant, process or doer of a court, or in the discharge of any official duty."*

In addition, he Kansas Supreme Court has also held that the State must prove that the defendant had reasonable knowledge that the person being opposed was a law enforcement official. *State v. Gasser*, 223 Kan. 24 (1977).

In *State v. Payne*, Slip Copy, 2010 WL 466839 (Kan.App. November 5, 2010), Payne argued that because he was already arrested at the time he gave the false name, the act of giving the false name did not substantially hinder or increase the officer's duty of making the arrest.

The Court of Appeals did not buy it. His arrest was not "completed" as soon as he was taken into physical custody. "*The subsequent paperwork and booking procedures incident to arrest are completed to assure the arrestee is held to answer for the commission of the crime, and these acts are part of the arrest process.*"

(Continued on page 31)

## Unpublished Opinions

(Continued from page 30)

*“Here, when reviewing the evidence in the light most favorable to the State, there was sufficient evidence to prove the elements of obstruction of official duty. Holloway was discharging an official duty by arresting Payne. Payne knew or should have known Holloway was a law enforcement officer. When Holloway asked Payne his name, Payne lied and stated his name was Albert Brown. Payne knew his name was not Albert Brown; therefore, the false name was given intentionally in order to obstruct Holloway. Payne’s giving a false name substantially hindered or increased Holloway’s burden in making the arrest, which was shown by the fact that Holloway had to go to the jail and redo his police reports upon learning Payne’s real name. The evidence establishes that a rational factfinder could have concluded beyond a reasonable doubt that Payne was guilty of obstructing official duty.”*

### PROBATION, PAROLE AND DUI: A TANGLED WEB *Unpublished Decision*

Walter Green pled guilty to two felony DUIs in Sedgwick County District Court. These convictions were found to be at least #5 and #6, lifetime. Therefore, he was required to be sentenced under K.S.A. 2007 Supp. §8-1567(g):

*“On the fourth or subsequent conviction of a violation of this section, a person shall be guilty of a nonperson felony and sentenced to not less than 90 days nor more than one year’s imprisonment and fined \$2,500. The person convicted shall not be eligible for release on probation, suspension or reduction of sentence or parole until the person has served at least 90 days’ imprisonment. The 90 days’ imprisonment mandated by this paragraph may be served in a work release program only after such person has served 72 consecutive hours’ imprisonment, provided such work release program requires such person to return to confinement at the end of each day in the work release program.”*

The district judge gave the defendant 12 months in jail for each conviction to run consecutively, as well as a \$2,500 fine for each. He authorized work release for the second DUI sentence. At sentencing, the district court judge stated that he did not review the presentence ADSAP evaluation. He denied the defendant’s request for probation stating that could not give probation.

On appeal, Green first argued that the district court judge was not prohibited from placing him on probation and therefore erred in not considering his request for probation.

In *State v. Green*, Slip Copy, 2010 WL 4668321 (Kan. App. November 5, 2010), the Court of Appeals embarks on a complicated analysis of the DUI statute, the statutory definitions in K.S.A. §21-4602 of “probation” and “parole.” The panel concludes by finding that probation should have been considered at the time of sentencing. It opined that even though

## Unpublished Opinions

probation is generally granted “before the prison door is closed ... it is possible that probation can include the situation where a court at sentencing imposes the mandatory minimum jail time as well as a probationary period to begin after completion of the jail time. Parole would occur where a court has imposed a term of imprisonment longer than the mandatory minimum but, after the defendant has served the minimum, the court releases the defendant on parole. This understanding of parole seems to correspond with the definition provided in the second sentence of K.S.A. §21-4602 (d).”

It concluded that under the DUI law, probation is a term of supervised release imposed at sentencing along with any term of imprisonment, mandatory or otherwise. Parole is a term of supervised release granted after sentencing and initial incarceration, before the completion of the term of imprisonment. Since the district judge was incorrect in con-

(Continued on page 32)

## Making Crime Pay

(Continued from page 25)

famous criminals from the 1920s. And future plans for the museum call for it to house the world’s largest collection of crime memorabilia, Morgan says

So what’s missing? “My daughter is mad because I don’t have a section on police dogs,” says Morgan. “You can only do so much.”

The National Museum of Crime and Punishment—online at [crimemuseum.org](http://crimemuseum.org)—is at 575 7th Street NW in Washington, D.C. Admission is \$19.95 for adults. It costs \$14.95 for children, those in the military or law enforcement, and retired military and police officers.



Replica of a gas chamber in National Museum of Crime and Punishment

# Unpublished Opinions

(Continued from page 31)

cluding that he could not give probation, the sentence was vacated and the matter remanded for resentencing.

As to the judge's statement that he didn't review the evaluation (basically because he was giving the maximum sentence and a review would not change the result), the Court of Appeals found that the judge is statutorily mandated to review the ADSAP evaluation prior to sentencing. Although the judge does not have to put on the record that she reviewed the evaluation, an affirmative statement that she did **not** review the evaluation also requires a vacating of the sentence and a remand for resentencing.

**Editor's Note:** Defendant also unsuccessfully argued in this case that his four prior municipal court DUI convictions should not count as priors because they are not a violation "of this section" as specified in K.S.A. 2007 Supp. §8-1567 (g). The Court found that K.S.A. 2007 Supp. §8-1567 (n)(2) specifically allows for considering municipal court convictions as priors for enhancement purposes. However, more interesting is that a review of the briefs does not indicate when these four priors occurred and why an argument was not raised pursuant to *State v. Elliott*, 281 Kan. 583 (2006) that the municipal court did not have jurisdiction over more than two priors. Instead, the Court of Appeals panel found that the district court properly considered Green's four prior municipal court convictions.

(Continued on page 33)

**off the mark.com** by Mark Parisi



Cartoon copyrighted by Mark Parisi, printed with permission

## ADVISORY OPINION ADDRESSES SOCIAL NETWORKING BY JUDGES

### SYLLABUS OF ADVISORY OPINION ISSUED BY THE SUPREME COURT OF OHIO'S DISCIPLINARY BOARD REGARDING SOCIAL NETWORKING AND JUDGES

A judge may be a "friend" on a social networking site with a lawyer who appears as counsel in a case before the judge. As with any other action a judge takes, a judge's participation on a social networking site must be done carefully in order to comply with the ethical rules in the Ohio Code of Judicial Conduct. A judge who uses a social networking site should follow these guidelines. To comply with Jud. Cond. Rule 1.2, a judge must maintain dignity in every comment, photograph, and other information shared on the social networking site. To comply with Jud. Cond. Rule 2.4(C), a judge must not foster social networking interactions with individuals or organizations if such communications erode confidence in the independence of judicial decision making. To comply with Jud. Cond. Rule 2.9(A), a judge should not make comments on a social networking site about any matters pending before the judge—not to a party, not to a counsel for a party, not to anyone. To comply with Jud. Cond. Rule 2.9(C), a judge should not view a party's or witnesses' pages on a social networking site and should not use social networking sites to obtain information regarding the matter before the judge. To comply with Jud. Cond. Rule 2.10, a judge should avoid making any comments on a social networking site about a pending or impending matter in any court. To comply with Jud. Cond. Rule 2.11(A)(1), a judge should disqualify himself or herself from a proceeding when the judge's social networking relationship with a lawyer creates bias or prejudice concerning the lawyer for a party. There is no bright-line rule: not all social relationships, online or otherwise, require a judge's disqualification. To comply with Jud. Cond. Rule 3.10, a judge may not give legal advice to others on a social networking site. To ensure compliance with all of these rules, a judge should be aware of the contents of his or her social networking page, be familiar with the social networking site policies and privacy controls, and be prudent in all interactions on a social networking site.

Opinion 2010-7; Issued December 3, 2010.

**But see, Florida Supreme Court, Judicial Ethics Advisory Opinion, 2009-20; November 17, 2009 which concluded that judges may not friend lawyers nor befriend by lawyers on social networking sites. Verdict, Winter 2010, 24.**

# Unpublished Opinions

(Continued from page 32)

## EXTENDING DURATION OF STOP TO CHECK FOR WARRANTS - ATTENUATION DOCTRINE *Unpublished Decision*

Juvenile, M.K.W. was stopped for a defective taillight. After obtaining her driver's license and her two passengers, the officer returned to his patrol vehicle to run warrant checks on all three individuals. He testified that he obtained identification from the passengers "because they were witnesses to the violation." In addition, he testified that he needed to "know who's in that car at that location, because while I'm writing the ticket I'm not going to get shot." While running the warrant checks, he did not write M.K.W. a citation for defective tail light. Approximately 10 minutes after the stop, the officer learned that one of the passengers had an outstanding warrant.



The officer returned to the car and asked the passenger with the warrant to step out of the car. As he did so, the officer could see that he possessed an open alcoholic beverage. He arrested the passenger and asked everyone else to get out of the car, including the driver, M.K.W. He searched the entire

vehicle. He found a large jar of marijuana. He also searched M.K.W.'s purse and found marijuana, a pipe and a small scale. M.K.W. was charged as a juvenile with possession of marijuana and possession of drug paraphernalia.

Prior to trial, the district court judge suppressed the marijuana recovered on the basis that the officer lacked reasonable suspicion to require identification and run warrant checks on the passengers. Without this unreasonable detention, the marijuana would not have been found. The prosecution appealed.

In *In the Matter of M.K.W.*, Slip Copy, 2010 WL 4977141 (Kan. App. November 12, 2010), the Court of Appeals found that the obtaining of identification from passengers and running them for warrants when he never did write a ticket for the tail light charge, did unlawfully extend the duration of the traffic stop. In addition, there was not sufficient attenuation from the unlawful seizure to allow admission of the marijuana. It affirmed the district court's suppression.

**Editor's Note:** See, *State v. Morales*, \_\_\_ Kan.App.2d \_\_\_ (November 24, 2010), pg. 9, *supra*, in which a different panel, in a 2-1 decision with a filed dissent, takes similar facts and finds that there was sufficient attenuation.

## The Verdict

### RECKLESS DRIVING IS A LESSER INCLUDED OFFENSE OF FLEEING AND ELUDING WHILE DRIVING RECKLESSLY *Unpublished Decision*

At 2:23 a.m. Rusty Sievers encountered Officer Dougherty and responded by driving his vehicle backwards up the street at a relatively high rate of speed, then driving forward toward Dougherty's patrol car, and at the last moment swerving over the curb, across a yard, and over a sidewalk, before returning to the street and speeding away. No one followed Sievers as he sped away and over 2 hours later a report was received of an accident on a gravel township road. Officers arrived and found Sievers' empty overturned vehicle in a ditch. The officers opined that Sievers' vehicle slid in the intersection while trying to make the turn, ran into the ditch and turned over. He was charged with "reckless driving" and "fleeing or attempting to elude by driving recklessly." See, K.S.A. §8-1566 and K.S.A. §8-1568(b)(1)(C) (felony eluding) respectively. He was convicted of both.

In *State v. Sievers*, Slip Copy, 2010 WL 4977153 (Kan. App. November 19, 2010), the Court of Appeals held that the charges were multiplicitous. The State relied solely on the incident that occurred at 2:23 a.m. to make its reckless driving case. Reckless driving is a lesser included offense of fleeing and eluding while driving recklessly. Since he was convicted of the fleeing and eluding charge, he could not also be convicted of the lesser included offense. See, K.S.A. §21-3107(2).

### LAW PREVENTING POSSESSION OF FIREARM BY CONVICTED FELON DOES NOT VIOLATE CONSTITUTIONAL RIGHT TO BEAR ARMS *Unpublished Decision*

Darin Curtiss was convicted of being a felon in possession of a firearm in violation of K.S.A. 2009 Supp. §21-4204(a) (3). On appeal, he argued that the statute violates his constitutional right to bear arms as set out in the Second Amendment to the U.S. Constitution as interpreted by the U.S. Supreme Court in *McDonald v. Chicago*, 561 U.S. \_\_\_ (2010) and *District of Columbia v. Heller*, 554 U.S. \_\_\_ (2008).

The Court of Appeals wasn't buying it. In *State v. Curtiss*, Slip Copy, 2010 WL 4977222 (Kan. App. November 24, 2010), the panel quoted from *Heller*:

*"Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and govern-*

(Continued on page 35)

## No Future in Judging?

By Debra Cassens Weiss  
Reprinted from ABA Journal On-Line  
November 29, 2010

If you are intent on landing a judgeship, you may want to think again.

CBS Moneywatch has compiled a list of the top 10 high-paying jobs with no future, and judges are first on the list. Moneywatch compiled the list from the Bureau of Labor Statistics' Occupational Outlook Handbook.

The Bureau predicts budget cuts will help spur a loss of 700 jobs for judges, magistrate judges, and magistrates in the decade that ends in 2018. The agency also notes the turnover is slow, with the average tenure spanning 14 years.

Tamara Dillon, who researches the occupation for the BLS, told Moneywatch why judges are staying longer on the job.

*"Years ago, some left to become general counsel in the private sector, where they could triple their salary, but since the economic downturn, they're staying longer on the bench,"* she said.

Median pay for judges, magistrate judges, and magistrates was \$110,220 in May 2008, according to the BLS report.

Also on the Moneywatch list of no-future, high-paying jobs: fashion designers, insurance underwriters, travel agents, newspaper reporters and broadcast announcers.

Lawyers didn't make the Moneywatch list. According to the BLS report, job growth for lawyers is projected to be 13 percent between 2008 and 2018, about as fast as the average for all occupations. But the report notes that job growth will be in salaried jobs as businesses and governments hire growing numbers of staff attorneys. The report also notes that lawyers are increasingly finding work outside of law firms in areas where legal training is an asset, rather than a requirement.

### Moneywatch's Top 10 Highest Paying Jobs With No Future

- |                          |                        |
|--------------------------|------------------------|
| 1. Judges                | 6. Broadcast Announcer |
| 2. Fashion Designers     | 7. Plant Manager       |
| 3. Insurance Underwriter | 8. Chemist             |
| 4. Travel Agent          | 9. Economist           |
| 5. Newspaper Reporter    | 10. CEO                |

## The Verdict

### HE DID WHAT?

On November 1, 2010 the Illinois Attorney Registration and Disciplinary Commission initiated disciplinary action against D. Michael Rickgauer for falsely reporting information to the CLE Commission. What did he do, you ask?

Illinois requires attorneys to get 20 hours of CLE every 2 years. It seems that Attorney Rickgauer was in a pickle because he had to complete 20 hours (2 years worth) by the end of the compliance period, July 30, 2009. He enrolled in a series of approved online courses through West LegalEdcenter. He enrolled in 15 courses for a total of 19.25 hours of instruction between July 27 and July 30, 2009.

Each online course required the user to respond to prompts during the course, at approximately 10 minute intervals, to insure that the user was actively participating in the course.

Rickgauer, directed a secretary in his office to watch the courses on a laptop computer and respond to the prompts as if he were watching the course. He then reported the hours to the CLE Commission with the standard certification of attendance.

Is there really anyone out there that doesn't realize you can't cheat the CLE Commission?

Municipal judges should be aware that the Municipal Judges' Testing and Education Committee also takes CLE requirements very seriously and reminds judges to accurately report their hours.



A pilot enforcement campaign was initiated by the U.S. Department of Transportation in April in Syracuse, N.Y. and Hartford, Connecticut to address the problem of texting while driving. In six months, hand-held cell phone use has dropped 56 percent in Hartford and 38 percent in Syracuse, and texting while driving has declined 68 percent in Hartford and 42 percent in Syracuse.

# Unpublished Opinions

(Continued from page 33)

ment buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” 128 S.Ct. at 2816-17.

In a footnote following this passage, the Court continued: ‘We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.’ ...”

The Court of Appeals found that the statute was not unconstitutional.

## FEAR OF POLICE AS DEFENSE TO OBSTRUCTION CHARGE? *Unpublished Decision*

Wichita police officers went to Napoleon Gonzalez’s home to execute a felony arrest warrant. Gonzalez was standing outside the house with his brother and sister. As the officers approached Gonzalez, he and his siblings ran inside the house and barricaded themselves. He stayed there for three hours and only stepped out when police threw tear gas inside the house.

Gonzalez was charged with obstruction of official duties in violation of K.S.A. §21-3808. *See also*, UPOC §7.2.

Gonzalez attempted to present evidence that he feared police and believed that his choices were either to run or to be faced with great bodily harm or death. Under K.S.A. §21-3209, a person is not guilty of a crime, except murder or voluntary manslaughter, if the crime is performed under compulsion because “*he reasonably believes that death or great bodily harm will be inflicted upon him.*”

This fear was based on an incident that had occurred several months earlier when he was confronted by the Bel Aire police. During the confrontation, he requested that Wichita officers be called. Officers arrived (not the same ones that appeared in this case), tased him three times and hit him while he was on the ground. They then shot his pit bull dog seven times, killing it. Gonzalez filed a complaint against the officers involved and the department found his complaint to be well-founded and determined that the officers had violated department policy.

The district judge would not allow the evidence of the earlier incident to be introduced, finding it was irrelevant. Gonzalez appealed arguing that he was prevented from presenting his defense to the jury.

In *State v. Gonzalez*, Slip Copy, 2010 WL 4977218 (Kan. App. November 24, 2010), the Court of Appeals held that compulsion is not a defense to obstruction of official duty.

“*Thus even if we assume the truth of Gonzalez’ claim that his fear of the police prompted his actions, that does not alter*

## The Verdict

*the fact that he intentionally and knowingly fled from police, barricaded himself in his home, and refused to come out...While it may have been reasonable for Gonzalez to fear the officers involved in the [earlier] incident, those officers were not involved in this incident several months later.”*

K.S.A. §21-3217 expressly provides that an individual “*is not authorized to use force to resist an arrest which he [or she] knows is being made either by a law enforcement officer or by a private person summoned and directed by a law enforcement officer to make the arrest, even if the person arrested believes that the arrest is unlawful.*” Even if an individual may have the right to resist arrest when acting in self-defense in the face of use of excessive force, excessive force was never alleged in this case.

## CERTIFIED DRIVING RECORD IS NONTESTIMONIAL AND CAN, THEREFORE, BE ADMITTED WITHOUT VIOLATING THE CONFRONTATION CLAUSE *Unpublished Decision*

Nicholas Jacobs objected to his certified driving record being admitted to prove the charge of driving when his license to do so was suspended. He argued that admission of the record violated his Sixth Amendment right to confront the declarant as set out by the U.S. Supreme Court in *Crawford v. Washington*, 541 U.S. 36 (2004).

In *State v. Jacobs*, Slip Copy, 2010 WL 5139977 (Kan. App. December 10, 2010), the Court of Appeals held that the certified driving record is nontestimonial and therefore may be admitted without live testimony from the compiler of said record. Driving records are required by law, making their compilation a ministerial duty having nothing to

(Continued on page 36)

*“Edwards attempts to rectify that fatal omission by enlisting this court to serve as a mental health expert. ... Edwards suggests that we can look at what the record tells us about his behavior before and during the interview and, using the DSM-IV as our guide, make the diagnosis that he was suffering a major depressive episode during the interview. Then, Edwards apparently expects us to use our nonexistent mental health expertise to opine that a person with bipolar disorder who is suffering a major depressive episode cannot freely, voluntarily, and knowingly give a statement to the police. We decline the invitation to step outside our role as an appellate court.”*

Justice Johnson writing for the majority in *State v. Edwards*, \_\_\_ Kan. \_\_\_ (November 24, 2010)

# Unpublished Opinions

(Continued from page 35)

do with prosecuting a particular individual for criminal activity.

## PROSECUTOR CAN COMMENT ON PRE-ARREST SILENCE *Unpublished Decision*

After some pretty bad driving, Jeffery Tackett was arrested in the driveway of his home for DUI. At trial he claimed that **after** pulling into his driveway, he consumed vodka, not before. During trial, the prosecutor asked Tackett why he didn't mention this fact to the police when they initially questioned him at the scene, pre-*Miranda*. The defense objected, claiming that the use of a defendant's silence for impeachment purposes violated his constitutional rights, per *Doyle v. Ohio*, 426 U.S. 610 (1976).

In *State v Tackett*, Slip Copy, 2010 WL 5185678 (Kan.App. December 17, 2010) the Court of Appeals held that using the defendant's pre-arrest silence to impeach his credibility is not a constitutional violation. No governmental action induced the defendant to remain silent prior to arrest. It is the *Miranda* warning that triggers the rule in *Doyle*. Since *Miranda* was not required at the time of the initial approach by police and their initial investigation, the prosecutor was free to inquire about why Tackett had not immediately tell the officers he had not had anything to drink before driving, only after.

## HANDING FALSE IDENTIFICATION DOCUMENTS TO POLICE SUGGESTS THAT THEY WERE POSSESSED FOR DECEPTIVE PURPOSES *Unpublished Decision*

A police officer properly asked for identification from Romelio Juarez. He handed the officer several documents, including a permanent resident card which did not belong to him. He was charged with identity fraud under K.S.A. §21-4018(d) which made it unlawful to "willfully and knowingly" possess, for the purpose of deception, any identification document.

There was no dispute that the permanent resident card was an identification document. However, Juarez argued that the prosecution was unable to prove that he "knowingly possessed it for deceptive purposes."

In *State v. Juarez*, Slip Copy, 2010 WL 5185764 (Kan. App. December 17, 2010), the Court of Appeals found that given the fact that there was no indication or argument that Juarez's possession of the document was accidental, the logical inference that could be drawn from Juarez handing the document to the officer when the officer asked for identifica-

*"Juarez claims in his appellate brief that [the officer] took the identification papers from Juarez but that Juarez "did not furnish it to [the officer]." That might be significant if it were true, but it is not."*

## The Verdict

tion is that (a) he knew he had possession of the document and (2) he intentionally gave the false document to police for purposes of identification. *"Juarez' use of the document for deceptive purposes certainly suggests that he possessed it for deceptive purposes."*

## JUDGE REMINDS PROSECUTORS OF THEIR ETHICAL RESPONSIBILITIES TO SEE THAT THE DEFENDANT IS ACCORDED PROCEDURAL JUSTICE *Unpublished Decision*

When Barbara Smith was stopped for DUI, she handed the officer her DC-27 form (her temporary license from another DUI). During the trial, the officer testified that Smith presented a DC-27 and the prosecutor asked what that was. The officer testified, over a defense objection, that it was a "temporary driver's license." The officer gave no further explanation. In addition, the prosecutor inquired whether the officer asked the defendant to perform any additional tests after the field sobriety tests. The officer responded, over a defense objection, that she was given a PBT test. The prosecutor did not seek to introduce the results of the PBT, but asked what the officer did after the PBT test and the officer testified that the defendant was arrested for DUI.

In *State v. Smith*, Slip Copy, 2010 WL 5279802 (Kan.App. December 17, 2010), the Court of Appeals suggested that asking about the PBT test, even though no results were offered, may have been irrelevant, the objection lodged by the defense was that there was "no proper foundation." On that basis, the Court found there was no error, because there was a proper foundation for the questions asked. Even if it was error, it was harmless based on the overwhelming evidence of Smith's intoxication.

As to the DC-27 form, the defense argued that the officer's testimony was highly prejudicial and should have been excluded as inadmissible evidence of other crimes or civil wrongs in violation of K.S.A. §60-455. The Court of Appeals found that since the jury was not told what a DC-27 was, the testimony did not implicate Smith in the commission of a crime or civil wrong.

However, of more interest in this case was Judge Buser's concurring opinion. It is reprinted here in its entirety.

*"I write separately only to highlight my concerns regarding the prosecutor's conduct in the presentation of evidence at trial.*

*The fact that Smith possessed a DC-27 form was irrelevant and immaterial to any proof of the elements of the*

(Continued on page 37)

# Unpublished Opinions

(Continued from page 36)

crimes charged. On the other hand, mention of this particular document conveyed to the jury that Smith possessed something other than an ordinary driver's license. Of greater concern, one or more members of the jury may have had knowledge that possession of this document also indicated that Smith had previously either failed or refused to take an alcohol or drug test. In short, there was a potential for prejudice.

Similarly, with regard to the prosecutor's question to the officer about Smith taking a PBT test, that inquiry was immediately followed by the question, "And following the administration of that test, what did you do?" The officer responded, "I informed Ms. Smith she was under arrest." Once again, whether or not the PBT test was administered to Smith was irrelevant and immaterial to proof of the charges. More importantly, the fact that the officer promptly arrested Smith after administration of this test clearly raised an inference that Smith had failed the alcohol test—a conclusion that was statutorily inadmissible as evidence at trial.

I am persuaded that in both instances the prosecutor knew or should have known the evidence offered was inadmissible and could lead the jury to impermissible inferences prejudicial to Smith. In this regard, a prosecutor should remember, however, that his or her special ethical responsibilities include, "specific obligations to see that the defendant is accorded procedural justice." Rule 3.8, Comment 1 (2010 Kan. Ct. R. Annot. 565).

## FAREWELL, FRIENDS

It is with mixed feelings that I edit this, my last edition, of *The Verdict*. I have thoroughly enjoyed every minute of my work on this publication. It has forced me to stay up-to-date with changes in the law and I have been excited to share that knowledge with all of you. I know being a municipal judge can be a very thankless job and somewhat isolated. It was always my hope that the newsletter could provide a way for us to all stay connected to each other. I've also tried to share articles I've come across in other publications that may be of interest to municipal judges.

I welcome anyone that wants to take over the newsletter to contact me and I will send them any information and templates they need. It really is very rewarding.

I am very excited about this new opportunity to join a phenomenal group of dedicated and scholarly judges on the Kansas Court of Appeals. I hope I can hold my own and make you all proud. With warmest regards,

*Karen Ann DeBry*

## The Verdict

### WICHITA COURT CLERK SENTENCED FOR ALTERING COURT RECORDS

A former Wichita municipal court employee was sentenced in federal court on December 16 to five years probation and required to repay the city nearly \$470,000 for her role in a bribery scheme that defrauded the city of bond forfeiture money.

Over a period of three years, Kaylene Pottorff accepted bribes or kickbacks from two bonding companies to make false entries in the court's computer system to reduce the bond forfeiture amounts owing and in some cases, delete them altogether.

Assistant U.S. Attorney Brent Anderson objected to the lenient sentence, stating that it does nothing to discourage others from committing crimes. The sentencing guidelines call for 63-78 months. He had recommended a downward departure to 43 months. The judge order probation and no months. The government plans to appeal.

Employees from AAA Bonding Company and B & J Enterprises were also sentenced following guilty pleas. One received probation and the other was required to serve a year and a day in federal prison. They were also required to make restitution.

*...my colleagues have ventured out on a frozen pond, and the ice is cracking beneath them. I prefer to stand on shore rather than with them...If the legislature wanted to pass a statute imposing strict liability for attorney fees on insurance companies making inadequate offers to settle claims, it could have and would have done so in clear, positive terms. The majority would abandon that principle and, with its overly literalistic reading of K.S.A. 40-908, imputes to the legislature an inept approach to achieving a purpose nobody has actually suggested (before now) it intended to accomplish. A much better and sounder analysis gives K.S.A. 40-908 a reasonable construction and recognizes that it applies only to property loss claims. That result is fully consistent with the statutory language and would reasonably promote the sound public purpose attributed to the statute in protecting parties with property loss claims from sharp insurance practices in refusing to fairly and promptly settle those claims. The legislature sensibly passed K.S.A. 40-908 to accomplish that purpose, and we should construe the statute accordingly.*

Judge Atcheson's dissent in *Bussman v. Safeco Ins. Co. of America* 2010 WL 5185785 (Kan.App., December 17, 2010)

# The Verdict

Winter 2011

Issue 54

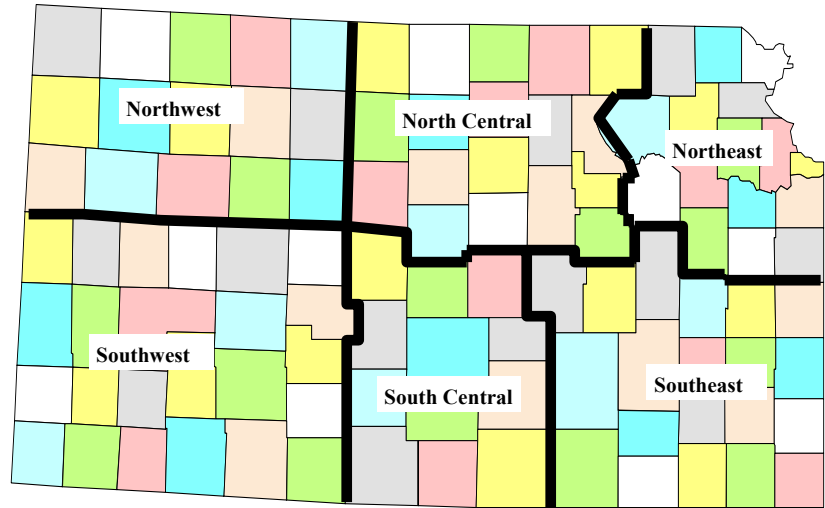
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If you have any questions, you can reach her at (785) 434-2018.

## KMJA MEMBERSHIP REGIONS



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

- President-Elect
- Secretary
- Treasurer
- North Central Director
- Southwest Director

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

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 .....Bryce Abbott (Wichita)  
 .....Pat Caffey (Manhattan)  
 ....Randy McGrath (Lawrence)  
 .....Cathy Lucas (Sublette)

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

### The Verdict

#### KMJA BOARD OF DIRECTORS

President.....Steve Ebberts (Topeka)  
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 Secretary.....Gregory Keith (Haysville)  
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 North Central District.....Scott Condray (Concordia).....2011  
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 Northeast District.....Moe Ryan (KCK).....2013

#### MUNICIPAL JUDGES' TESTING AND EDUCATION COMMITTEE

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

#### MUNICIPAL COURT MANUAL ADVISORY COMMITTEE

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