The Verdict

The Official Publication of the Kansas Municipal Judges Association

Issue 35 Spring 2006

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

LEGISLATIVE UPDATES

Following is summary of bills which have been signed by the Governor this legislative session that you may find interesting. This is not an exhaustive list. If there are any more with implications to municipal courts, they will be summarized in the Summer edition of *The Verdict*.

BEGINNING JULY 1, 2007 COURTS MUST NOTIFY MOTOR VEHICLE DIVISION ELECTRONICALLY OF DISPOSITION INFORMATION

HB 2513 requires that courts notify the division of motor vehicles **immediately and electronically** whenever anyone complies with a citation for which the court has requested suspension for non-compliance. In addition, beginning July 1, 2007, all courts must notify the division **electronically** of all conviction information and must do so **within 10 days** of any conviction or forfeiture of bail. Failure or neglect of a judicial officer to comply shall be considered misconduct in office and subject the judge to removal from office. The bill also firmly places the responsibility of notifying the division in the case of final disposition of municipal court traffic appeals on the

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Court Watch

The following are cases that have been decided since our last issue that may be of interest to municipal judges. Only the portion of the case that may relate to issues that arise in municipal court are discussed. Members are encouraged to read the whole opinion.

IMPERMISSIBLE STACKING OR PYRAMIDING OF INFERENCES

An inference in a criminal case is a conclusion drawn through logic and reasoning after having considered the facts presented. Unlike a legal presumption, an inference does not require that the factfinder come to a particular conclusion as a matter of law. Instead the factfinder has discretion to draw the conclusion based on the compelling nature of a certain factual situation.

Impermissible stacking or pyramiding of inferences occurs where at least two inferences in regard to the

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HAPPY BIRTHDAY TO THE VERDICT IT IS 10 YEARS OLD WITH THIS SUPER-SIZED ISSUE !!!

SPOTLIGHT ON: Mark Westgate

Moran municipal judge Mark Westgate was born in Manhattan and grew up on a farm close to St. George, Kansas. His dad ran a wheel alignment shop in Manhattan. He has four brothers and two sisters. He graduated from Manhattan High School and in 1969 joined the Army. After returning from three years in Germany, he eventually joined the Kansas Highway Patrol in May 1973. Stationed primarily out of Iola, he was a Trooper for 26½ years. While on the force, he became assigned to the Motor Carrier Safety Assistant Program and became an expert on the Federal Motor Carrier Safety Regulations conducting commercial motor vehicle inspections.

Mark became so good at his job that he was often loaned out by KHP to teach others how to conduct inspections. He began teaching in Oklahoma City and by the time he retired he had taught all over the United States, including Hawaii and Alaska. He also helped develop and teach the Federal training class in Arlington, Virginia. When he retired in 1999 from the

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Spotlight on: Mark Westgate

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highway patrol, he took a position as an investigator with the Kansas Corporation Commission. He was soon called away to do what he did best, train others regarding motor carrier safety.

As reported in a November 21, 2002 article in the *Chanute Tribune*:

"With the passing of the North American Free Trade Agreement (NAFTA), it became necessary to open the borders between the U.S. and Mexico for commercial business. The U.S. government was concerned with the safety of the drivers and vehicles that would be traveling over the Mexican border into America. In order to ensure the safety of American citizens, the FMCSA formed a cadre of inspectors and auditors to be stationed at various points along the border. Westgate helped train most of the more than 600 Federal employees and two Mexican nationals to be stationed at the border."

In 2002 Mark was given an award and letter of commendation from the Federal Motor Carrier Safety Administration (FMCSA). In the letter, he was recognized for his contributions to ensure the safety of Mexican-domicile motor carriers and their drivers in America. It also expressed gratitude for Westgate's assistance in the tremendous undertaking to *"fulfill President Bush's commitment to honor our country's NAFTA obligations...to assure the safety of our citizens and at the same time realize the economic promise of NAFTA."*



Mark has been married to his wife Carolyn for 24 years. She owns and operates a counseling and therapy practice in Iola. They have two sons and two daughters. He is currently employed full-time as Safety Director for Consolidated Oil, an oil well servicing company.

In his spare time, he enjoys rebuilding antique tractors and raising horses. He is the judge in Moran, (once per month court) Kincaid (once every other month), Bronson and Uniontown (both as needed). He stated that he enjoys dealing with people in his position as municipal judge. *"It's really just an extension of what I have always done."*

When asked about the benefits of KMJA membership, Mark did not hesitate. *" I have seen over the years through my professional career, that keeping updated can be a monumental task. KMJA has always filled that bill for me. It has been a place to go to get information and I have always appreciated the ability to call other members and their willingness to share their insight on similar concerns."*

Updates from O.J.A.

ANNOUNCING NEW JUDGES!!

Since our Winter 2006 issue, the following new municipal judges have been appointed or elected:

Dena Allen	Moscow
Gerri Wybo-Vopata	Whiting
Mark Blehm	Silvan Grove
Michael Vervaecke	Linn Valley
John Russell	Golf
Jerry Wilson	Mound Valley
John Bullard	Edna
Scott Shocowalter	Kanorado
Amie Bauer	Mound Ridge

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2006-2007 CONFERENCE REMINDERS

Municipal Court Clerks' Fall Conference
September 14-15, 2006
Topeka, KS

District Judges' Annual Conference
October 23-24, 2006
Topeka, KS

Municipal Court Clerks' Spring Conference
March 30, 2007
Manhattan, KS

District Judges' Spring Conference
June 11-12, 2007
Wichita, KS

Municipal Judges' Annual Conference
April 23-24, 2007
Hutchinson, KS

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ANNUAL CASELOAD REPORT

Reminder: Your FY 2006 Annual Caseload report should be filed with our office by July 15, 2006.

MUNICIPAL COURT JUDGES EDUCATION COMMITTEE MEETING

The Education Committee will hold their annual meeting in Abilene on Friday, August 4. The Committee will plan the 2007 Annual Conference. If you have program suggestions, please talk to one of the committee members. The Committee appreciates your input.

Members are:

Tom Buffington
Jay Emler
Karen Arnold-Burger
Jim Wells
Lee Parker



Judicial Ethics Opinions

Opinion JE 136
January 30, 2006

A judge (in a multi-judge district) and the judge's spouse own real estate which is subject to a long-term lease to the Department of Corrections. The property is occupied by the Office of State Parole. This is a local office of the Kansas Parole Board. K.S.A. 2005 Supp. 22-3707.

May the judge accept assignment to the criminal docket?

[Yes] The Kansas Parole Board supervises inmates who have been incarcerated in the penal system and are placed by the Board on parole. Hearings for alleged violation by these former inmates are held by the Kansas Parole Board, not by the courts. See K.S.A. 2005 Supp. 22-3713, *et seq.*

The Department of Corrections, headed by the Secretary of Corrections, is concerned with the management of state correctional facilities, the placement, care and treatment of inmates, and the appointment of parole officers. See K.S.A. 22-3707, *et seq.* as amended. It is unlikely that such officers, or any employees of the Department would appear before the court in criminal matters.

In the event that the Department or any of its employees appear in a proceeding before the court, the judge should consider whether Canon 3E, 2005 Kan. Ct. R. Annot. *566*, requires disqualification. We see no reason why the judge should not accept assignment to the criminal docket.

Opinion JE 137
March 6, 2006

A judge has received a solicitation asking for a cash contribution for Kansans for Simple Justice. The judge inquires whether it is ethically permissible for a judge to contribute to this organization. The judge further inquires whether our opinion in JE132 (2005) is applicable to activities in support of Kansans for Simple Justice.

We are informed that Kansans for Simple Justice is a coalition formed to combat the attacks on the courts and to educate the legislature and the people of Kansas about the advantages of the current merit-based judicial selection system and the disadvantages of a politically-based judicial selection system. Kansans for Simple Justice is not a "political organization." See the definition in 2005 Kan.Ct.R. Annot. 558.

We considered the same question related to a similar organization in JE132 (2005) and conclude that that opinion applies equally to contributions and activities in support of Kansans for Simple Justice. A judge may make contributions to Kansans for Simple Justice.

Opinion JE 138
April 17, 2006

A judge has been invited to attend the Second Annual Judicial Symposium sponsored by the National Foundation for Judicial Excellence. The foundation would pay all costs of the judge's attendance, including tuition, accommodations and travel.

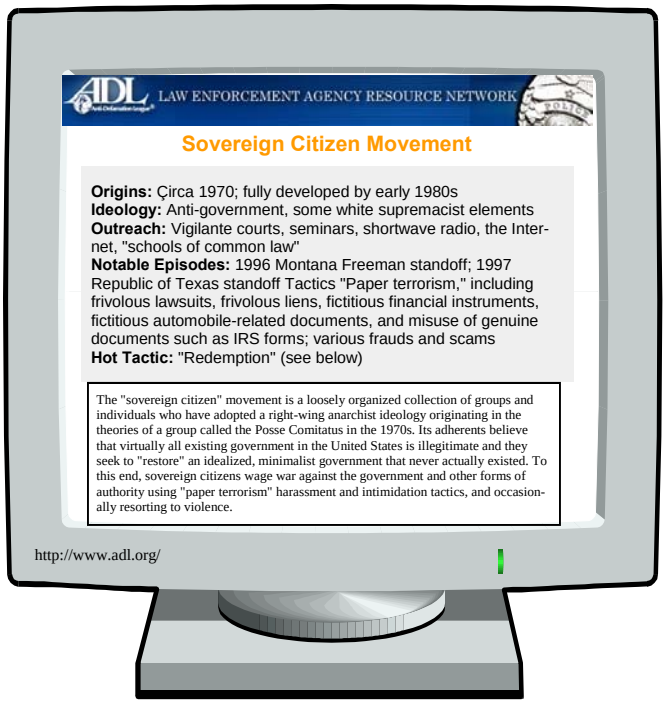
We considered a similar request last year pertaining to a judge's attendance to an earlier program sponsored by the same foundation. Our earlier opinion, JE 127 dated April 8, 2005, held that nothing in the Code of Judicial Conduct would bar the judge from attending the symposium.

That opinion is still valid. The judge may accept the invitation without violating any of the Canons.

Opinion JE 139
April 17, 2006

An announced candidate for district judge asks if he or she may respond to a Kansas Judicial Watch questionnaire. The questionnaire seeks to have the candidate state whether or not in his or her view the Kansas Supreme Court violated the Kansas Constitution in a designated opinion; whether the power to tax and spend the revenues and to define marriage, are the sole prerogative of the Legislature and not the Supreme Court, under the Kansas Constitution; the candidate's

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Court Watch

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existence of a criminal act must be drawn from the evidence and then stacked to prove the crime charged, such that the evidence lacks the conclusive nature to support a conviction. *Graham v. State*, 748 So.2d 1071 (Fla.App. 4 1999); 31A *C.J.S. Evidence* §133 (2005). The rationale behind prohibiting such "stacking" or pyramiding" is that at some point along a rational continuum, inferences may become so attenuated from underlying evidence as to caste doubt on the trier of fact's ultimate conclusion. *U.S. v. Summers*, 414 F.3d 1287 (10th Cir. 2005). Where reliance is placed upon circumstantial evidence circumstances in question must themselves be proved and cannot be inferred or presumed from other circumstances. *State v. Rice*, 261 Kan. 567 (1997).

In *State v. Taylor*, ___Kan.App.2d ___ (January 20, 2006), the Kansas Court of Appeals was faced with an "impermissible stacking" argument. A detailed factual review is necessary to understand the defendant's argument.

Ronnie Taylor was on parole and had an outstanding warrant for a parole violation. Officer Mora knew Ronnie Taylor and saw him driving around Hutchinson. He followed Taylor and started a pursuit with lights and sirens. Taylor refused to stop. The chase lasted 25 minutes. It ended when Taylor and his passenger jumped out of the moving vehicle and it struck a light pole. Taylor and his passenger took off on foot.

Officer Mora called in a K-9 unit, Cyrus. Cyrus picked up the scent from the abandoned car and led the police along a trail of footprints in the snow that ultimately led to the home of Taylor's mother, where they found Taylor. Meanwhile, back at the abandoned car Officer Harcow found a tank in the trunk of the kind used to store anhydrous ammonia, a chemical used in the production of methamphetamine. The contents smelled like anhydrous ammonia. Another officer also searched the car and found drug paraphernalia, methamphetamine and marijuana. A search of the garage apartment in back of Taylor's mother's home uncovered materials consistent with the manufacture of methamphetamine. Taylor was convicted of possession of drug paraphernalia with the intent to manufacture a controlled substance and possession of anhydrous ammonia with the intent to manufacture a controlled substance.

On appeal, Taylor claims the following stacking occurred:

1. The jury had to infer that Cyrus had the ability to track and actually followed his scent from the car to his mother's home. There was no expert testimony.
2. The jury had to infer that the footprints in the snow were his. There was no testimony linking the footprints to his shoe pattern.
3. The jury had to infer that he knew the car contained anhydrous ammonia and drug paraphernalia.
4. The jury had to infer that he was manufacturing methamphetamine in the apartment behind his mother's house even though his mother testified that he had not lived there and she had not seen him for several years.
5. The jury had to infer that the propone tank found in the car contained anhydrous ammonia. No testing was done of the contents.

He argued that this string of inferences necessary to convict him was impermissible stacking.

The appellate court rejected each of these allegations. It found that there is no impermissible stacking of inferences if each element of the crime charged is supported by substantial evidence, either direct or circumstantial. Once a fact is proven through circumstantial evidence, the jury may draw reasonable inferences from a fact so proven.

1. Testimony was presented that Cyrus had been trained by his officer handler since he was 8 weeks old. The officer testified regarding the training and his ability to track a scent and Taylor did not object to any of said testimony at trial. The jurors believed Cyrus's ability to track was established, and there was substantial evidence upon which to base that belief.
2. The Court found that the footprints were not an essential link a chain of evidence needed to convict Taylor. It doesn't matter whether they were his or not given the other evidence to support his conviction. In other words, even if this was an unsupported inference, it was not essential to the case.
3. Although mere presence with another person in a car where drugs are found is not enough to support a conviction for possession of drugs, the Court found that the presence of other factors can supply the link between the defendant and the drugs. In this case, Taylor was driving the car, eluded police on a 25 minute chase, and jumped and ran from a moving car to avoid the police. The jury had ample circumstantial evidence to find that Taylor knew these items were in his car.
4. The jury gets to weigh credibility of witnesses. They didn't have to find that he was in fact manufacturing methamphetamine in the garage in order to find him guilty of the crimes of possession of drug paraphernalia and anhydrous ammonia with intent to manufacturer. So again, like footprints, even if they believed the mother, which it appears they did not, the garage laboratory was not essential in proving the case.
5. There was sufficient circumstantial evidence concerning the fact that anhydrous ammonia was in the tank for the jury to so conclude. Testing was not essential. It smelled like anhydrous ammonia, the brass tube fitting had turned blue, consistent with anhydrous ammonia, the tank contained a freeze line consistent with anhydrous ammonia, and the officer testified that he was 100% sure that is what is was based on his train-

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ing and experience. There was sufficient circumstantial evidence to support this fact.

No stacking. The conviction stands.

MANDATORY DISCLOSURE OF VOLUNTARY SEX OR CONSENSUAL FONDLING OR TOUCHING BETWEEN MINORS

K.S.A. 2004 Supp. §21-3522, adopted in 1999, makes it a crime to engage in unlawful voluntary sexual relations. This is defined as voluntary (1) sexual intercourse; (2) sodomy; or (3) lewd fondling or touching between children of the opposite sex, one of which is 14 or 15 years old, and the other being 18 years old or younger. Therefore, under this law, consensual lewd fondling or touching (known as 'heavy petting" in my day) between a 15 and 16 year old (high school sophomore and junior) is a felony in Kansas. This is commonly referred to as the "Romeo and Juliet" law.

K.S.A. §38-1521 requires that whenever certain specified professionals (doctors, dentists, psychologists, psychotherapists, nurses, teachers, school administrators, employees of a school, counselors, social workers, police officers and juvenile intake workers) have *"reason to suspect that a child has been injured as a result of ...sexual abuse,"* they are required to *"report the matter promptly"* to SRS during business days and to law enforcement on non-regular business days. If it is reported to law enforcement, they must notify SRS the next day it is open for business. K.S.A. §38-1522(c). Willful and knowing failure to make a report is a misdemeanor. K.S.A. §38-1522(f).

"Sexual abuse" is defined at K.S.A. 2004 Supp. §38-1502 (c) as any act committed with a child contained in chapter 21, article 35 of the Kansas statutes. Therefore, by definition, a violation of the "voluntary sexual relations" statute is "sexual abuse." The next question is whether or not that means it has to be reported.

In 1992 then Attorney General Bob Stephan wrote an opinion focusing on the interpretation of the reporting requirement (K.S.A. §38-1521) and opined that the key word was "injured." Before reporting was required there would have to be a determination that the minor had been "injured" by the sexual activity. No definition was contained in the statute for "injured." However, after an analysis of all the statues, he concluded that it could not be assumed, that the pregnancy of a minor equated to an "injury." It may or not be an injury, depending on the circumstances. AG Opinion No. 92-48.

In 2003, Attorney General Phill Kline strongly disagreed with his predecessor and opined that the crimes contained in chapter 21, article 35 are inherently injurious. Any violation of these statutes required reporting. He agreed that it required not only reporting of all pregnancies of unmarried girls under the age of 16; it also required reporting when any boy or girl under the age of 16 seeks treatment for a sexually transmitted disease, or seeks medical attention for a pregnancy, or a girl who seeks birth control and admits to being sexually active. AG Opinion 2003-17.

The stage was set. Four months after the opinion was published, a group of professionals who are subject to the reporting requirements (doctors, nurses, social workers, etc) filed a federal class action lawsuit against all the district attorneys in the state as well as the Attorney General under 42 U.S.C. §1983. They sought an injunction prohibiting enforcement of the mandatory reporting requirements **only as they relate to** the Romeo and Juliet law (the voluntary sexual relations statute), as well as declaratory relief (asking that the reporting statute **as applied to** voluntary sexual relations between minors be declared unconstitutional).

In this type of case, the plaintiff's first seek to stop or enjoin the enforcement of the offending statute while the case is pending. The substantive argument regarding the constitutionality of the reporting requirement is the "declaratory relief" that is sought. If the injunction is granted, the plaintiffs are able to proceed without the fear of prosecution during its pendency. Enforcement would resume if the court finds that the statute as applied is not unconstitutional.

The plaintiffs allege the following:

1. By not requiring that the professional first make a determination that the voluntary sexual relations resulted in "injury" to the child, mandatory reporting violates the rights of those under the age of 16 to maintain the confidentiality of private information about their sexual behavior and medical and psychological health care without serving any legitimate, important or compelling state interest; and
2. The reporting statute fails to give fair notice as to when reporting is required due to a lack of definition for "injured" and thereby encourages arbitrary and discriminatory enforcement; and
3. The reporting statute violates the rights of privacy of adolescents under the age of 16.

On July 26, 2004, federal district judge Marten granted the preliminary injunction. *Aid for Woman v. Foulston*, 327 F.Supp.2d 1273 (D. Kan. 2004). Kline appealed. On January 27, 2006, the 10th Circuit Court of Appeals found that the district court had not properly analyzed the factors that need to be weighed in granting a preliminary injunction. It vacated the preliminary injunction and remanded the case back to the federal district court to make further findings on

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Legislative Updates

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district court clerk. The district court clerk has 10 days from the date of final disposition to forward this information.

DRIVER'S LICENSE EXPIRES ON 21ST BIRTHDAY

In an effort to assist in the battle against underage drinking, SB 554 requires all licenses issued to individuals under the age of 21 to expire on the holder's 21st birthday. In this way only vertical licenses will be held by those Kansans under the age of 21. This will assist businesses that sell alcohol in carding their customers.

BREASTFEEDING MOTHERS EXCUSED FROM JURY DUTY

HB 2284 exempts breastfeeding mothers from jury duty and makes it clear that a mother may breastfeed her baby in any place she has a right to be. The bill states that it is "*the public policy of Kansas that a mother's choice to breastfeed should be supported and encouraged to the greatest extent possible."*

USE OF DEADLY FORCE TO PROTECT NUCLEAR POWER FACILITIES

HB 2703 allows guards to use deadly force to protect the state's nuclear power facilities. The bill also creates a new felony crime of trespassing on a nuclear generating facility.

BUT I LIKE MY CURRENT PLATE

If the director of the division of vehicles decides that the license plates currently being used have deteriorated to the point where replacement is warranted, the director can order that new plates be distributed. However, under HB 2628, which amends K.S.A. 2005 Supp. §8-132, the owner of a vehicle who wants to keep displaying the discontinued license plate can for up to three registration years, and the division will simply furnish a decal for the plate to cover the renewals.

FIREFIGHTER PLATES EXTENDED TO MOTORCYCLES

HB 2631 adds motorcycles to the list of vehicles upon which a firefighter may put his or her distinctive firefighter license plate.

VEHICLE WIDTH AND WEIGHT CHANGES

SB 372 (amending K.S.A. §8-1902); HB 2629 (amending K.SA. §8-1904) and HB 2630 (amending K.S.A. §8-1909a) all make very subtle changes in these statutes. SB 372 allows motor homes or travel trailers to have appurtenances that extend out no further that the rearview mirrors (prior law limited it to no more than 6 inches from the body of the vehicle).

HB 2629 exempts from length limitations "drive-away saddlemount or drive-away saddlemount with fullmount vehicle transporter combinations" with an extreme overall dimension of 97 feet or less. For those city slickers out there, a "saddlemount combination" is a combination of vehicles in which a truck or truck tractor tows one or more trucks or truck tractors, each connected by a saddle to the frame or fifth wheel of the vehicle in front of it. The saddle is a mechanism that connects the front axle of the towed vehicle to the frame or fifth wheel of the vehicle in front and functions like a fifth wheel kingpin connection. When two vehicles are towed in this manner the combination is called a double saddlemount combination. When three vehicles are towed in this manner, the combination is called a triple saddlemount combination.

Finally, HB 2630 makes it clear that truck tractor and dump semitrailers or truck trailer combinations are exempt from the federal gross weight limits.

MAXIMUM NUMBER OF SMALL CLAIMS FILINGS PER YEAR RAISED

HB 2704 raises the maximum number of small claims cases that can be filed by the same plaintiff in one court in one year from 10 to 20.

SMALL CLAIMS COURT FORMS

HB 2609 eliminates the requirement that the office of judicial administration develop the form to be used in submitting information to the court clerk regarding the financial information of the judgment debtor. According to the Governor's Office these forms will still be posted on the Judicial Council web site and will be included in a new Judicial Council Publication, Kansas Legal Forms, in the near future.

WATER ADDED TO UTILITIES FOR PURPOSES OF PROSECUTION FOR THEFT OF SERVICES

HB 2606 defines rural water districts and rural electric cooperatives as public utilities for purposes of the theft of services statute and also adds "water" to the list of utilities protected by the statute.

Editor's Note: *For those cities which have adopted the Uniform Public Offense Code, this may result in the amendment of POC §6.4.*

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Court Watch

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those factors. *Aid for Woman v. Foulston,* 2006 WL 218185 (10th Cir. 2006). It found that the Plaintiffs had not shown, as they are required to show in order to get an injunction, that there was a substantial likelihood they would succeed on the merits.

Therefore, the constitutionality of the reporting statute has still not been decided. Eleven different organizations, including the AMA, the Kansas Medical Society, and the American Academy of Pediatrics, to name a few, filed amicus briefs in the case on behalf of plaintiffs.

Although the appeallate court sent the case back to the trial court, the 10th Circuit did give some hints about what it thought of the claims. First, it held for the first time in this Circuit that the recognized right to "informational privacy" (the right of an individual in avoiding the disclosure of personal information) does extend to minors. The right to "informational privacy" protects individuals from disclosure of information where the individual has a legitimate expectation that it will remain confidential while in the state's possession. In order to inquire into such matters the government must have a legitimate and proper interest. It did however recognize that the state has a somewhat broader authority to regulate the conduct of children than that of adults.

It also noted that Tenth Circuit precedent indicates that minors may not have any privacy rights in their concededly criminal sexual conduct. *"A validly enacted law places citzens on notice that violations thereof do not fall within the realm of privacy...Criminal activity is not protected by the right to privacy... However, if a law making certain activity a crime is challenged as violative of a constitutional privacy right, the government cannot defend the law by arguing that because the activity is illegal, there is no privacy right in that activity."* But alas, the Court points out that the plaintiff's have expressly stated that they are **not** challenging the constitutionality of the criminal statute, just the reporting statute. The Court suggests that this strategy may prove fatal to their privacy claims.

Postscript: *Upon remand, and after seven days of testimony in a bench trial, federal judge Thomas Marten issued his 39 page opinion on April 18, 2006, again granting the plaintiff's relief. He found that the plain reading of the statute vests mandatory reporters, such as health car providers, with discretion to determine when there is "reason to suspect a child had been injured" as a result of consensual sex. Required reporting in accordance with Attorney General Kline's opinion would violate a minor's limited right to imformational privacy. Stay tuned.*

RESTRICTIONS PLACED ON RELEASE OF MEDICAL RECORDS TO ATTORNEY GENERAL

Attorney General Kline initiated an investigation in the Fall of 2004 seeking to uncover violations of two state statutes, K.S.A. §65-6703 which prohibits abortions at or after the 22 week of gestational age unless the physician either finds that the fetus is not viable or if it is viable the physician finds that the abortion is necessary for the health of the mother and K.S.A. 2004 Supp. §38-1522, which governs mandatory reporting of sexual abuse (which as we know from the case discussed above includes voluntary sex or lewd touching between persons 14 or 15 and persons under the age of 18). The General proceeded under K.S.A. §22-3101, which governs the conduct of inquisitions in criminal cases. Under this statute, if the attorney general has knowledge of any alleged violation of Kansas law, he is authorized to apply to a district judge to conduct an inquisition. Once the attorney general's verified application setting forth the alleged violation of the law is filed, the statute states that the judge "shall issue a subpoena for witnesses named in such *praecipe* commanding them to appear and testify concerning the matters under investigation."

Attorney General Kline requested subpoenas for the entire, unredacted patient files of 90 women and girls who obtained abortions at two clinics (one in Wichita and one in Overland Park) in 2003. Pursuant to the inquisition statute, Shawnee District Judge Richard Anderson ordered the files produced to the court for *in camera* review by a judge (appointed by Judge Anderson) and a physician (appointed by the Attorney General). The clinics filed a motion to quash the subpoenas. After a hearing, the motion was denied. Judge Anderson did place several restrictions on the review, disclosure and copying of the files. His order required redaction of identifying information before any record would be allowed to be copied. The clinics then asked for a protective order, asking Judge Anderson to permit them to redact identifying information from the files before production. Judge Anderson had not yet had a chance to rule on this request, when the clinics filed a "writ of mandamus" with the Supreme Court (2 days before production was required under Judge Anderson's prior order). A "writ of mandamus" is a request that a higher court order an official to perform his duty in the way mandated by the higher court. In this case, the clinics want the Supreme Court to order Judge Anderson to 1) require the Attorney General to show that there is a compelling need for the information requested; 2) allow the files be redacted prior to production to protect the Supreme Court's recognized right of privacy in medical records; and 3) enter a protective order to protect the patient's rights before the files are produced. The statute does not allow prosecution of the patient if the abortion was in violation of state law, only the doctor. Therefore, the clinics are objecting to the release of the patients' private information.

The Attorney General countered that mandamus is not an appropriate remedy and can't be used to thwart a criminal

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A STEP BACK IN TIME

The story is a familiar one to many Kansans. While serving time in Lansing, Richard Hickock shared a cell with a person who had worked for Herbert Clutter. Clutter was a highly respected successful farmer in Holcomb who employed about 18 people on his farm. The inmate told Hickock that Clutter kept a safe in his home which always contained at least $10,000. Hickock and Perry Smith had served time together before and were partners in petty crime, usually involving theft and fraud. When Hickock was released, he wrote to Smith and told him about the money at the Clutters' house. Hickock was working in a body shop in Olathe and living in Edgerton when Smith arrived on November 12, 1959. On November 14, the two headed to Holcomb. On the way, they purchased nylon rope, adhesive tape, rubber gloves and a pocket knife. Hickock also brought a twelve gauge shotgun and an 8" hunting knife. They arrived in the middle of the night and went in through an unlocked door, taking the gun and hunting knife with them. They got Mr. Clutter out of bed and took him into the room he used as an office to search for the safe. Clutter told them there was no safe and offered him the money in his billfold. They took him upstairs where his wife and two children were sleeping. They herded them all into a second floor bathroom, and then continued to search the house for a safe. They found nothing. They then took Clutter and his son to the basement and tied them up. They tied Mrs. Clutter and her daughter to their beds. Perry Smith stopped Hickock from raping the daughter (he had admitted in the past to pedophilic desires toward young girls). Desiring to leave no witnesses, it was Perry Smith who snapped and killed Mr. Clutter (cut his throat and then in an act of mercy shot him in the head), and then, in order, the son, mother and daughter, all shot in the head at close range. They picked up the shell casings after each murder. They took $40 cash, a portable transistor radio and pair of binoculars. The whole ordeal took about one hour.



Hickock and Smith went on a cross country driving trip stopping at various sites to clean the blood from the shotgun, bury the hunting knife, shell casings, unused rope and tape, and burn their bloodstained clothing, including the gloves they wore during the murders. They returned to Edgerton and Smith checked into a hotel in Olathe. They then went to Mexico City where they sold Hickock's car, and later sold the radio and binoculars to a traffic policeman. They drove to California, Iowa, Kansas City and finally Las Vegas where they were captured after a tip from the inmate who had initially told Hickock about the Clutter safe, which it turns out never did exist.

The 2006 Academy Award nominated movie *Capote* is a snapshot of 4 years in Truman Capote's life when he wrote the book, *In Cold Blood* about the Clutter murder. After traveling to Holcomb with friend Harper Lee (author of *To Kill a Mockingbird*) to do a story for the *New Yorker* magazine on the effects of the murder on the community, Capote got wrapped up in the story, the community and the killers and ended up writing a book that many deem to be among the best pieces of American literature written. It is cited as being the first example of a non-fiction novel, a common style today.

However, the book was at a great personal cost to Capote. Some writers have speculated that Capote fell in love with defendant, Perry Smith. Capote was very public about his project and after the defendants were convicted, his fans were clamoring for him to publish it. The *New Yorker* published excerpts. It just served to leave the public wanting more. The pressure started to build. But Capote needed an ending, and the best ending could only be written once all the appeals had run their course and the murderers were executed. At first, according to the movie, he helped the killers get attorneys and file appeals, but as the pressure to finish the book started to build, he stopped responding to their letters and told them he could not find an attorney to help them anymore, although it appears he never looked for one. He was ready for it to be over. When it finally ended, he was there to witness the executions and the movie scriptwriters suggest that it was his personal turmoil over the case and his relationship with Perry Smith that led him into alcohol and drug addiction. He never finished another novel.

In the movie, Capote becomes visibly frustrated with what he believes is the snail's pace of the appeal process. So what were those appeals about?

There are three reported cases in Kansas concerning killers Richard Hickock and Perry Smith. The first one was a direct appeal from their trial, which started on March 22, 1960, just 4 months after the murders. The appeal was decided on July 8, 1961 and contains a detailed recitation of the facts of the case. *State v. Hickock and Smith*, 188 Kan. 473 (1961). The defendants were tried together. Before trial their attorneys requested and were granted the appointment of a commission to examine their mental

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A Step Back in Time

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status, if they were competent to stand trial and if they were sane at the time of commission of the crime. The Commission appointed consisted of three practicing physicians in Finney County. The Commission found them both to be competent and sane. The defendants argued on appeal that a psychiatrist should have been part of the appointed Commission or they should have been allowed a separate consult with a psychiatrist. The Supreme Court held that the statute did not require a psychiatrist, regular MD's were just fine. In fact, a psychiatrist that was called at trial by the defense testified that Hickock knew right from wrong at the time of commission of the crime. He was not questioned regarding Smith.

Next, the defendant argued that the Court abused its discretion when it failed to grant a continuance after it was announced that a farm sale of the Clutter's property was to be held the day before jury selection was to commence. In addition, Hickock's father was ill and not able to come testify. The Court found it was not an abuse of discretion and in fact, Hickock's father ended up appearing at trial and testifying, so the issue was moot.

The defendants argued that their counsel did not have adequate time to prepare and as a result they did not receive a fair trial due to the "most expeditious way" in which they were brought to trial. However, the Court noted that their attorneys never requested a continuance for more time to prepare, so they could not claim error. They argued on appeal that there should have been a change of venue due to the intense media coverage of the case, but again the Court noted that the attorneys never made such a motion prior to trial.

After the Kansas Supreme Court denied their appeals, Hickock and Smith started a massive letter writing campaign claiming ineffective assistance of counsel. They requested a rehearing before the Supreme Court. This resulted in the Wichita Bar Association hiring an attorney to look into the situation. The attorney filed a report with the Court that gave some basis for concern about the defendants' representation. The Supreme Court appointed the Wichita attorney to represent Hickock and Smith in a *habeas corpus* proceeding. It then appointed a retired Supreme Court Chief Justice to act as Commissioner and take evidence. The habeas proceeding culminated in the Court's decision on July 7, 1962 in *Hickock and Smith v. Hand*, 190 Kan. 224 (1962). The Commissioner's report is set out in full in the opinion. He reached the conclusion that there was no basis for issuance of a writ of *habeas corpus*. The Supreme Court incorporated his findings and denied relief. It should be noted that shortly before the hearing on the writ in front of the Supreme Court, Perry Smith asked to fire the court-appointed attorney and have a fellow inmate, who was not a lawyer, represent him. This request was also denied.

Finally, after receiving this decision, Hickock and Smith filed separate *habeas* actions in the federal district court, which eventually worked their way up (consolidated) to the 10th Circuit Court of Appeals. Their primary claim was ineffective assistance of counsel. The 10th Circuit released its opinion on July 1, 1964. *Hickock v. Crouse* and *Smith v. Crouse*, 334 F.2d 95 (10th Cir. 1964). When examining whether the attorneys should have waived the preliminary hearing, a constant issue raised in each of the defendants' appeals and highlighted in the movie, the Court pointed out that the defendants' attorneys were faced with clients that had confessed their horrific and senseless crimes and taken detectives to the locations where they had hidden the weapons. It stated that the attorneys would have been justified in advising their clients to plead guilty and throw themselves on the mercy of the court. In fact, their focus quickly changed from defending their guilt to saving their lives. Waiving preliminary hearing was discussed and agreed to by the defendants after a complete explanation of their rights. The waiver had no impact on the fairness of the trial.

With regards to not requesting a change of venue, this was apparently a conscious and much discussed decision with the defendants. It seems there had been numerous rallies in Finney County in opposition to the death penalty. It was a highly religious community. The minister of the Clutters' church had come out publicly opposed to the death penalty in this case. The attorneys were highly respected in the community, one of them being the former mayor of Garden City, the county seat where the trial would be held. The defendants and their attorneys made a well-reasoned decision not to request a change of venue. They felt they were no more likely to get the death penalty in Finney County than in other part of the state.

Although the defendants argued that their attorneys should have strenuously opposed the admission of their confessions, the Court found that it was undisputed that the questioning of the defendants had been courteous and temperate and the confessions were voluntary. KBI agent Nye advised the defendants that they had the right to consult with an attorney prior to questioning and told them that any statements could be used against them. No threats or promises were made. These were long time criminals who had numerous run-ins with police and knew the procedure well. There was no basis to challenge the confessions. *"Attorneys have a duty to demand a fair trial. They have no duty to use devious means to secure an acquittal of a guilty person or to harass a court with unwarranted objections and motions…Neither vigor nor skill can overcome truth. Success is not the test of effective assistance of counsel." Id.*

Hickock and Smith were denied their last request for a writ of *habeas corpus* on July 1, 1964. They were executed by hanging 38 minutes apart on April 14, 1965 at the Kansas State Penitentiary in Lansing. Truman Capote was there to witness the hangings. *In Cold Blood* was released the same year.

Court Watch

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investigation. He argues that there is no privacy argument because investigation of crime trumps any personal privacy argument and the physician/patient privilege is not applicable in this situation.

The Court found that this was an appropriate mandamus action and it had jurisdiction. It found that the clinics did have standing to assert their patients' rights. It further found that three federal constitutional rights to privacy are potentially implicated by the Attorney General's inquisition, the right to maintain the privacy of certain information; the right to obtain confidential health care; and the fundamental right of a pregnant woman to obtain a lawful abortion without the government's imposition of an undue burden on that right. In order to protect these rights, the Court held that Judge Anderson must require that the information be redacted before submission under seal, that both a lawyer and a physician appointed by the Judge Anderson should then review the files and advise if any further redactions are necessary to eliminate information unrelated to the investigation, this review should also determine if any particular file demonstrates nothing more than the existence of reasonable medical debate about the application of the criminal laws at issue which the Attorney General conceded would not constitute a criminal violation; and only the remaining files are to be turned over. With regards to the "reasonable medical debate" the Court made it clear that the law of the land, contrary to what the Attorney General believes the law to be, is that both the mental and physical health of the mother are reviewed in determining the medical necessity of a late-term abortion. Therefore, if there is evidence in the file that, as required by statute, both the treating physician and the physician who performed the abortion agree that the continuation of the pregnancy will harm the mental or physical health of the woman, then there is no evidence of a crime and the General would not be entitled to the records.

Finally, the Court was asked to rule on whether Attorney General Kline was in contempt of court. When the action was filed in the Supreme Court, the Court entered an order that all filings, including the transcript from the district court hearings, be kept under seal. Kline in what the Court described as a "defiant move" disclosed sealed information at a press conference he held concerning the case. *"In essence, Kline has told this court that he did what he did simply because he believed that he knew best how he should behave, regardless of what this court had ordered, and that his priorities should trump whatever priorities this court had set. Furthermore, although there is a conflict between the parties on exactly what was said in the press conference, i.e. whether the actual content of the sealed documents was discussed, Kline's stated reason for holding the conference—to combat what he saw as unflattering earlier press coverage—does not appear to be among the permissible reasons for an attorney in his position to engage in extrajudicial statements under Kansas Rule of Professional Conduct 3.6 (2005 Kan.CtR.Annot. 473). This too is troubling…At oral argument before this court, Kline's lawyer, a former four-term attorney general* [Robert Stephan], *wisely altered the tone of Kline's response"* making a no harm, no foul argument. The Court accepted this approach and concluded that although Kline's conduct was highly improper and defiant, no prejudice resulted from his conduct. The Court did caution all parties to resist the impulse to further publicize their respective legal positions.

After the opinion was issued, both sides publicly declared victory and complemented the Court on a well-reasoned opinion.

FLIGHT EVIDENCE IS ADMISSIBLE IN KANSAS WITHOUT RESTRICTION

On April 14, 2002 Timothy Cooper was shot and killed at the Paradise Club in Wichita. Harvey Ross was identified by several witnesses as the shooter. Ross was seen running from the building following the shooting. Police immediately began looking for Ross. He failed to show up at his job or pick up his paycheck. He failed to meet with his probation officer or contact his probation officer as required. A warrant was issued for his arrest and he was picked up in Federal Way, Washington two months later.

During his murder trial, the State was allowed to admit evidence of Ross's flight from Kansas against him, to show he must have been guilty or he would not have fled. In *State v. Ross*, ___Kan.___(February 3, 2006), he argues that this was error. He argues that admission of flight evidence is improper unless the State is able to establish that he had specific knowledge that he was being sought for the crime charged. Although the Supreme Court recognized that several federal circuit courts have taken such a restrictive approach, it found that there was no reason to vary from its prior holding in *State*

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HAPPY BIRTHDAY TO YOU!

Number of years since the first issue of The Verdict was distributed: 10

Number of total pages published: 612

Number of total issues to date: 35



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v. Walker, 226 Kan. 20 (1979) in which it held:

"Actual knowledge by a defendant that he is being sought for the crime in question is not a prerequisite to the admission of evidence of flight as tending to show consciousness of guilt but merely goes to the weight to be given such evidence. This is especially true when the flight occurs within a reasonable time of the crime. Possibly such a precautionary prerequisite might be justified in situations where the flight occurs months later. However, we deem it the better reasoned authority to admit flight evidence for consideration by the court or jury with such factors as time lapse and accusation knowledge going to the weight to be given the evidence." [citing 226 Kan. at 25.]

EVIDENCE OF GANG AFFILIATION TO SHOW WITNESS BIAS

In the same case, *State v. Ross*, ___Kan.___(February 3, 2006), David Robinson, testified that he was at the scene the night of the shooting and Ross was definitely not the shooter. Robinson and Ross were first cousins and members of the same gang, the Tru Boys. On cross-examination the prosecutor asked Robinson if he and Ross were members of the same organizations or clubs. Robinson said they were not. The prosecutor asked if they were both members of the Tru Boys and Robinson said they were not. The prosecutor then presented rebuttal evidence from a Wichita police officer that Robinson and Ross were both active members of the Tru Boys and that Robinson had "TRU " tattooed on his shoulder. In closing, the prosecutor attacked Robinson's credibility pointing out his denial and the tattoo. Ross argues that this was error. Admitting evidence of the defendant's gang affiliation merely to attack the credibility of another witness was highly prejudicial and irrelevant as to whether or not the defendant committed the murder.

The Kansas Supreme Court disagreed. It held that evidence of gang affiliation is admissible to establish a motive for an otherwise inexplicable act or to show witness bias. Although Ross argues that the evidence should not have been admitted because there was no evidence presented that gang members protect and lie for each other, the Court held that no such prerequisite was required. In fact, it quoted the United States Supreme Court which held in *United States. Abel*, 469 U.S. 45 (1984) that evidence of gang membership created a stronger inference of bias than mere friendship. Although the evidence was highly prejudicial for Ross (the defendant) it was highly probative for evaluating the credibility of Robinson. In addition, the judge gave an instruction to the jury that they were not to draw any conclusions concerning the defendant's guilt based on his gang affiliation. It warned that the evidence of gang affiliation was only relevant in evaluating the existence of bias on the part of the witness. This instruction cured any prejudicial effect of the admission of gang affiliation evidence.

SPEEDY TRIAL TOLLED WHILE DEFENDANT RECEIVES COURT-ORDERED PSYCHIATRIC EVALUATION

When a defendant notifies that court that he or she may use mental disease or defect as a defense, the reasonable delays attributable to the psychiatric evaluation of the defendant by both parties are charged to the defendant for purposes of the speedy trial statute. The time charged to the defendant begins with the filing of the defendant's notice to use mental disease or defect as a defense and ends when the examiners' reports are filed with the court. *State v. McGee*, ___Kan. ___(February 3, 2006).

SERIOUS BODILY HARM OR DEATH CAN BE A REASONABLY FORESEEABLE CONSEQUENCE OF A SIMPLE BAR FIGHT

In the early morning hours of June 29, O.T. bumped into Latrina Green on the dance floor of Harry and Ollie's bar in Wichita. This angered Latrina and she started arguing with O.T. Latrina's boyfriend, Derrick, became involved in the argument. O.T.'s brother, Patrick, stepped between O.T. and Derrick and told Derrick they were not looking for trouble and tried to calm him down. A group of Derrick's friends began crowding around, including Latrina's brother Marshall Green. Derrick was considerably larger than Patrick or O.T. and being concerned about this, Patrick grabbed O.T. and told him it was time to leave. Patrick started pushing his brother toward the door. As the crowd and Patrick and O.T. all pushed toward the door, O.T. shouted to the crowd, "I don't want to fight you all."

Marshall Green responded to this statement by shoving O.T. out the door with both of his fists. O.T. and Patrick started running toward Patrick's car. Derrick went after O.T. and Green went after Patrick. After a few seconds, Patrick stopped and looked back and saw O.T. lying on the ground in the parking lot and several people were kicking and stomping him. He attempted to go to his brother to help him, but Green swung at him and prevented him from helping O.T. The police arrived. Green and his girlfriend ran to Green's car and left. The officer arrested Derrick and both of Green's sisters. O.T. died at the hospital from lack of oxygen to his brain caused by blunt force to the head and chest. Green was arrested in California 5 months later. In the meantime, his sister Latrina and Derrick were convicted of second-degree murder. Another sister and a friend were convicted of voluntary manslaughter as a result of O.T.'s death.

Green was convicted of voluntary manslaughter by a jury. This was based on K.S.A. §21-3205 which provides that a person is criminally responsible for a crime committed by

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another if such person intentionally aids, abets, advises, hires, counsels or procures the other to commit the crime, the aiding and abetting statute. A person is liable for crimes committed by another even if he or she did not intend to commit the crime, if the consequences of the intended crime are reasonably foreseeable. However, the Kansas Court of Appeals, in an unpublished opinion reversed his conviction and held that there was insufficient evidence to support the conviction. It held that since Green was chasing Patrick, he was not personally involved in O.T.'s attack. It further found that O.T.'s death was not a reasonably foreseeable consequence of a "bar fight." The Court found as a matter of law that a bar fight is not per se inherently dangerous if there are no weapons involved or no premeditated planning, therefore O.T.'s death could not have been a reasonably foreseeable consequence.

The Kansas Supreme Court reversed the Court of Appeals and upheld Green's conviction. *"The* Green *court's general conclusion that bar fights are not inherently dangerous accepts Green's assumption that bar fights only involve simple battery. Besides this oversimplification of the nature of bar fights, Green's argument to this court presumes that conclusion without considering the facts of each case. It is important to note that Kansas law does not support that presumption…Any level of harm, ranging from simple battery to death, can result from a bar fight"* Green was an active participant by shoving O.T. out the door. He may not have intended O.T.'s death to result, but is was a reasonably foreseeable consequence of his actions. The Court also noted that an aiding and abetting theory can apply to a person who prevents another from giving aid; in this case Green prevented Patrick from aiding his brother. Finally the Court noted that Green recognized his culpability by fleeing to California while his family members were home being sent to prison for their actions.

WITHDRAWAL OF A GUILTY PLEA

Twelve years after Steve Moses pled guilty to first-degree murder he filed a motion to withdraw his plea. When Moses pled guilty, he signed a written plea of guilty which set out all the constitutional guarantees he was waiving by entering a plea (to wit: right to speedy public trial by a jury; right to counsel; right to confront and cross-examine witnesses; right to compel the production of evidence and witnesses; privilege against self-incrimination; and right to appeal). In accepting the plea in open court, the district court judge asked the defendant if he read the document and if he understood it. He answered in the affirmative. The judge asked if he was freely and voluntarily entering a plea and if he understood all the circumstances that could happen if he entered a plea of guilty. Moses answered that he did. Moses explained how he committed the crime and the prosecutor explained the additional evidence the prosecution would have presented at trial. The Court accepted the plea.

Clearly, the Court did not personally inform the defendant of the constitutional rights he was waiving during the actual plea. Instead it "incorporated" his written waiver as part of the plea. The Kansas courts have long held that the written acknowledgment of rights forms and written entry of plea forms signed by defendants do not cure the trial court's failure to inform a defendant in open court that as a result of his plea he would be waiving his privilege against self-incrimination, his right to a jury trial, and his right of confrontation. Neither do the forms cure the trial court's failure to establish the defendant's understanding of such consequences.

In *State v. Moses*, ___Kan. ___(February 3, 2006) the Kansas Supreme Court held that clearly the plea was not properly taken by the district judge 12 years earlier. However, it takes a "totality of the circumstances" approach in determining whether this is reversible error. It agreed with the district judge that Moses had not presented any factual basis for believing that Moses did not understand the rights he was waiving. He presented no evidence to support a finding that a withdrawal of the plea was necessary to correct a "manifest injustice" as required by the statute.

Next, it found that there had been sufficient evidence presented by the State that Moses had the written petition fully explained to him by his attorney and he told the judge at the plea hearing that he understood it and had no questions. He also stated that he was satisfied with his attorney's representation of him. Finally, Moses could produce no justifiable reason for a 12 year delay in bringing the motion forward. He had brought several legal actions and appeals before the court in the 12 years since his conviction, but had never raised this one although he clearly could have. Finally, to allow a withdrawal of plea at this time would substantially prejudice the State's ability to proceed to trail on the murder charge after witnesses are no longer available or whose memories have faded. It found that prejudice to the State is a valid factor to consider. The Court also factored in the fact that Moses was a 27 year old familiar with the criminal justice system when he entered his plea, and he had heard the State's evidence at preliminary hearing and was well aware of the evidence against him. He entered his plea in exchange for the State dropping its request for a Hard 40 sentence. Therefore, his favorable plea bargain is a factor worthy of consideration. He never asserted his innocence. The plea stands.

RIGHT TO COUNSEL AND
RIGHT TO SELF-REPRESENTATION

Durayl Vann was convicted of attempted first-degree murder. Shortly after he was charged with the crime the district court appointed an attorney to represent him. Within two

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DRUNK DRIVING CASES TURN ON SOURCE CODE

By Curt Anderson, Associated Press Writer
Reprinted from the Topeka Capital-Journal

MIAMI - Timothy Muldowny's lawyers decided on an unconventional approach to fight his drunken driving case: They sought computer programming information for the Intoxilyzer alcohol breath analysis machine to see whether his test was accurate. Their strategy paid off.

The company that makes the Intoxilyzer refused to reveal the computer source code for its machine because it was a trade secret. A county judge tossed out Muldowny's alcohol breath test — a crucial piece of evidence in a DUI case — and the ruling was upheld by an appeals court in 2004.

Since then, DUI suspects in Florida, New York, Nebraska and elsewhere have mounted similar challenges. Many have won or have had their DUI charges reduced to lesser offenses. The strategy could affect thousands of the roughly 1.5 million DUI arrests made each year in the United States, defense lawyers say.

"Any piece of equipment that is used to test something in the criminal justice system, the defense attorney has the ability to know how the thing works and subject its fundamental capabilities to review," said Flem Whited III, a Daytona Beach attorney with expertise on DUI defense.

The Intoxilyzer, manufactured by CMI Inc. of Owensboro, Ky., is the most widely used alcohol breath testing machine in the United States and is involved in the vast majority of these legal challenges. It is used exclusively by law enforcement agencies in 20 states, including Florida, and by at least some police agencies in 20 other states, according to the company. Most states have "implied consent" laws for motorists requiring DUI suspects to blow into a breath analysis machine if asked to do so by a police officer.

"The breath test is an integral part of any prosecution," said Earl Varn, an assistant state attorney in Sarasota.

In Florida, state law currently considers a breath test valid if the machine is approved by the Florida Department of Law Enforcement and the person administering the test is qualified. The law also says that a defendant is entitled to "full information concerning the test taken" if such a request is made. The meaning of that phrase is the key to the DUI challenges in Florida and other states with similar laws.

DUI defense lawyers insist that "full information" means every minute detail about the Intoxilyzer, including the source code used by its computer processor to analyze breath samples, should be subjected to review by expert defense witnesses. Some judges have agreed.

"It seems to us that one should not have privileges and freedom jeopardized by the results of a mystical machine that is immune from discovery," Florida's 5th District Court of Appeal ruled in Muldowny's case, which resulted in his charges being reduced to reckless driving.

Judges in the Florida counties of Manatee, Sarasota, Seminole and Volusia counties are among those who have ruled in recent months that the defense was entitled to the Intoxilyzer's source code to see if the test results are reliable. There also have been successful legal challenges involving the source code of other machines, including a 2005 case in Bellevue, Wash., in which a defense lawyer obtained the code of the BAC Datamaster testing machine, sold by National Patent Analytical Systems Inc.

But many judges in Florida have ruled the opposite way on the Intoxilyzer, including a panel in Palm Beach County that recently denied challenges by 1,500 DUI defendants who sought the source code under state public records laws. The tactic has led lawmakers to introduce a measure in the Florida Legislature to clarify that such source codes don't have to be produced for DUI defendants.

Last November, a similar challenge in Omaha, Neb., was rejected on grounds that Nebraska did not have the source code. In Rochester, N.Y., a DUI suspect whose lawyer was seeking the source code was convicted of a lesser charge when the technician who maintained the machine was unavailable to testify. Because CMI has refused to divulge its source code, Florida officials have argued in court that they cannot produce it for DUI defendants. Although most state judges have upheld that view, others have not.

"The state may not wash its hands of its duty to produce this information by claiming that it does not have it," Volusia County Court Judge Mary Jane Henderson ruled in December. FDLE officials say that even if the state had access to the source code it would not necessary to test the validity of the breath results. Laura Barfield, alcohol testing program manager at FDLE, said each of the 408 Intoxilyzer 5000s used in Florida — soon to be replaced by the 8000 model — are regularly run through painstaking tests at the state and local levels.

"You don't need the source code to know the machine is providing accurate results," Barfield said.

For its part, CMI said there is no evidence that its Intoxilyzer is inaccurate, noting that a review of 80,000 tests in a 2002 Arizona case produced no evidence of mistakes. In

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Intoxilyzer Challenge

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a statement to The Associated Press, the company said also said the source code is not a crucial element in proving the Intoxilyzer's accuracy and is a proprietary trade secret that could create havoc if computer hackers obtained it.

"Exposure of the source code could not only be detrimental to CMI from a commercial standpoint, but it could also be detrimental to customers of CMI," the company said. *"Disclosure of this information could compromise the integrity of test data that is stored in the instrument."*

The conflicting decisions around Florida could land the issue before the state Supreme Court. Florida lawmakers may act before that, however. A bill making several changes to DUI law includes a section clarifying that the "full information" about breath tests does not include the "manual, schematics or software" of the breath machine or any information "in the possession of the manufacturer." The bill is moving through state House committees and could pass later this year. Prosecutors such as Varn say if the defense challenges prevail it would mean each DUI breath test could be subjected to exhaustive analysis.

"We would have to hire an expert to come in and testify in every case to explain the function of the instrument and what the test results mean," Varn said.

But defense lawyers say DUI defendants have the constitutional right to confront their accuser, even if it is a machine.

"If everything is OK and there's nothing to hide, why do they want to change the law?" said Stuart Hyman of Orlando, a leading DUI defense lawyer who represented Muldowny. *"It's ludicrous."*

Editor's Note: The only reported appellate court case on this topic to date is : *State v. Muldowny*, 871 So.2d 911 (Fla. 5th DCA 2004) which held that the exclusion of breath test results was the appropriate remedy for failure to provide the necessary documentation on the Intoxilyzer 5000.



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8000

GEE, I WISH I'D SAID THAT!

United States Bankruptcy Court
Western District of Texas
San Antonio Division

IN RE RICHARD WILLIS KING DEBTOR	BANKR. CASE NO. 05-56485-C CHAPTER 7
FACTAC, INC.. *PLAINTIFF* V. RICHARD WILLIS KING *DEFENDANT*	ADV. NO. 05-5171-C

ORDER DENYING MOTION FOR INCOMPREHENSIBILITY

Before the court is a motion entitled "Defendant's Motion to Discharge Response to Plaintiff's Response to Defendant's Response Opposing Objection to Discharge." Doc. #7. As background, this adversary was commenced on December 14, 2005 with the filing of the plaintiff's complaint objecting to the debtor's discharge. (Doc. #1). Defendant answered the complaint on January 12, 2006. Doc. #3. Plaintiff responded to the Defendant's answer on January 26, 2006. Doc. #6. On February 3, 2006, Defendant filed the above entitled motion. The court cannot determine the substance, if any, of the Defendant's legal argument, nor can the court even ascertain the relief that the Defendant is requesting. The Defendant's motion is accordingly denied for being incomprehensible.[1]

SO ORDERED.
SIGNED this 21 day of February, 2006.

LEIF M. CLARK
UNITED STATES BANKRUPTCY JUDGE

[1] Or, in the words of the competition judge to Adam Sandler's title character in the movie, "Billy Madison," after Billy Madison had responded to a question with an answer that sounded superficially reasonable but lacked any substance,

> *Mr. Madison, what you've just said is one of the most insanely idiotic things I've ever heard. At no point in your rambling, incoherent response was there anything that could even be considered a rational thought. Everyone in this room is now dumber for having listened to it. I award you no points, and may God have mercy on your soul.*

Deciphering motions like the one presented here wastes valuable chamber staff time, and invites this sort of footnote.

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months, the defendant filed a pro se motion with the court asking that the attorney be removed from his case due to a conflict of interest and deterioration of the attorney/client relationship. Although the defendant repeatedly asked about the status of his motion, the district judge told him it was up to his attorney to bring any motions to the court's attention. The court-appointed attorney never did so. At some hearings the defendant asked about it and at some he did not. He raised it both before trial and before sentencing. But each time he did raise it, he was put off by the judge. It was never considered. Testimony was never taken. He also filed a pro se motion to proceed pro se and retain his attorney in a consultant capacity only. This too was never considered by the Court.

In *State v. Vann*, ___Kan. ___ (February 3, 2006) the Kansas Supreme Court held that *"It is the task of the district judge to insure that a defendant's Sixth Amendment right to counsel is honored. Where a trial court becomes aware of a possible conflict of interest between an attorney and a defendant charged with a felony, the court has a duty to inquire further. Likewise, where the trial court is advised of a the possibility of a conflict by either the defendant or the State, the court is required to initiate an inquiry to insure that the defendant's Sixth Amendment right to counsel is not violated. A trial court abuses its discretion if it fails to inquire further after becoming aware of a potential conflict between an attorney and his or her client."*

Likewise, the district court denied the defendant's right to self-representation by not ruling on his motion. Just because he acquiesced in the representation by court-appointed counsel, does not constitute waiver of his right. He may have felt he had no other choice. The right to self-representation is either respected or denied. Therefore, its deprivation cannot be harmless. For the denial of these rights, the Court reversed Vann's conviction and remanded it for a new trial.

WARRANTLESS SEARCH OF STRUCTURE IN AN OPEN FIELD

While hunting two boys discovered a barrel containing bottles beside a shed. One of the bottles was smoking and the other was coated with white residue. The boys also smelled ether. One of the boys told his uncle, who was a detective with the Pratt County Police Department. The uncle called in the Pratt County Sheriff's Department to help. The officers all went to the site.

The officers saw a dilapidated shed near an old chicken house and abandoned cars. The shed had a hole in its roof; its side door was open; and its garage-type door was off its tract. The officers found the barrel and bottles outside as described by the boys. They determined they were gassing generators used in manufacturing methamphetamine. They began to conduct random surveillance. They were not able to catch anyone at the property, but they believed it to be an active operation because items were moved around between visits. One officer visited the site and reported that he had entered the shed and found two pitchers of "meth oil." Surveillance was increased. A red Pontiac approached the shed. Two people exited the car, entered the shed and then returned to the car. The officers emerged from their hiding places and ordered everyone out of the car. One of the passengers yelled, "Drive, drive, go, go, go" but the car did not move. The driver and passenger were apprehended. Each had a pitcher of "meth oil." One also had a container of salt at his feet as well as several bottles, tubing and a backpack that contained a yellow container full of a clear liquid that tested as acid. The property was owned by one of the passengers.

The issue in *State v. Swinney*, ___Kan. ___(February 3, 2006), was whether the evidence should be suppressed because the officers lacked a search warrant and the defendant, who owned the property, had an expectation of privacy in the area searched. The defense argued that the officers should have had a warrant before entering the shed and by allowing the search to stand, the court had made an unwarranted extension of the "open fields" exception to the Fourth Amendment to the shed.

The open fields doctrine was first recognized by United States Supreme Court in *Hester v. United States*, 265 U.S. 57 (1924). The Court held that the special protection accorded by the Fourth Amendment to the people in their persons, houses, papers, and effects, does not extend to open fields. An individual has no legitimate expectation that open fields will remain free from warrantless intrusion. However, the courts have stated that the area immediately surrounding the home (the curtilage) is protected. So was the shed part of the curtilage or part of the open field?

The Supreme Court did not have much trouble finding that the area around the shed in this case was not part of the curtilage. The family rarely went to the area, they ceased storing things there long ago and they had even given up calling police when trespassers damaged the area. However, the officers also entered and searched the shed. The Court conceded that warrantless searches of a structure or outbuilding in an open field presents a much closer question. After citing cases from around the country that go both ways on the issue (for example, barn-no; open trunk of junk car-ok; barn with open side and unlocked doors-ok; unused shed-no) the Court seemed to be leaning toward a ruling that the warrantless entry into the shed was unlawful, but then it avoided the issue by saying that the officers had probable cause to arrest just based on what they had seen outside. Since the arrest was supportable even absent the items in the shed, seizure of property incident to the arrest was also lawful. *"A ruling that the entry and search of the shed were impermissible would have excluded none of this evidence; thus we conclude*

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beyond a reasonable doubt that any error resulting from entering and searching the shed would not have changed the jury's verdicts."

INEVITABLE DISCOVERY RULE REQUIRES THAT INEVITABLE DISCOVERY BE LAWFUL

Word Ackward was being questioned by police for the murder of Joshua Buckman. Ackward asked to speak to his father, who was brought to the interrogation room. The two were left alone, but their conversation was being monitored. They talked about something being located at a woman's house "under the wood." The father asked, "on the other side of the house, lift the wood up?" Then just before leaving the interrogation room, the father said, "I'll go check it out." Shortly after his father left, Ackward requested a lawyer.

Police followed the father as he left the police station. He went to a particular address, spoke to two women and then began looking on the south side of the house. When he went to the north side, he lifted some wood, put on gloves, then picked something up. He walked to his truck and left. When stopped by officer, he had a magazine with ammunition in it. Officers began searching around the house.

Meanwhile, back at the station, the police continued to question Ackward, even though he had asked for a lawyer. During the part of the interrogation that was subsequently suppressed, he agreed to go with the officers to show them where the gun was hidden. While the officers were searching around the house where the father had been, Ackward was brought there. He pointed out the crawl space entrance of the house just south of the one they were searching around, where he pointed out the gun under a wooden cover.

The defendant, of course, argues that the gun should be suppressed on the basis that it was the physical fruit of a *Miranda* violation in that he revealed its location after his request for an attorney was not honored. The State argues that the gun would have been discovered inevitably because the officers were combing that area as a result of the father being there. However, the defendant counters that the inevitable discovery must be lawful. The police had neither a warrant or consent to search the crawl space of the house where the gun was found. Nor did they have probable cause on which to base a warrant application. The State rebuts that argument by saying that the defendant would have no standing to challenge the warrantless search of someone else's crawl space.
In *State v. Ackward*, ___Kan. ___ (February 10, 2006), the Kansas Supreme Court analyzed several federal circuit court cases that have considered the issue and sided with the position taken by the 7th Circuit in *United States v. Johnson*, 380 F.3d 1013 (7th Cir. 2004). It held that the gun was not admissible because the inevitable discovery rule requires that the evidence be discovered in a lawful manner.

WHEN DEFENDANT PROCRASTINATES WITH REGARDS TO RETAINING COUNSEL, COURT MUST APPOINT ONE IF DEFENDANT QUALIFIES

Vincent Young was placed on probation from a seven month jail sentence. After four months on probation, the State filed a motion to revoke his probation alleging that he failed to report to his probation officer as required. The motion first came on for hearing in May 2004. The Court appointed an attorney for Young and continued the matter to June and then to July. In July, Young failed to appear and a warrant was issued. He was picked up in August and stated he was going to hire his own attorney. The matter was continued to September, when the defendant appeared and said he was still trying to get enough money to hire an attorney. The case was continued to October. Young appeared, said he had hired an attorney but the attorney could not be there that day due to another engagement. The Court denied the defendant's continuance motion, finding that he had already had sufficient time to employ an attorney. The judge ordered the matter to proceed with the defendant pro se. Young's probation was revoked and he was remanded to serve his sentence.

In *State v. Young*, ___Kan.App.2d ___ (February 24, 2006), the defendant argued his constitutional right to counsel was denied by the denial of his continuance request. The Kansas Court of Appeals, relying heavily on *State v. Weigand*, 204 Kan. 666 (1970), agreed and found that a trial court can and should protect itself against the irresponsibility of the defendant in hiring counsel. *"The trial court should be aware of the propensities of the accused to procrastinate in the hiring of counsel."* Therefore, after the defendant has had a reasonable time to procure counsel, the trial court must appoint one for the defendant and give the appointed attorney time to prepare. In this case, since Young had qualified for court-appointed counsel in the past, the Court should have appointed one for him at the September hearing when he still didn't have one. The Court does seem to suggest that the result would be different if the defendant did not qualify for court-appointed counsel. The Court also does not address the issue of the defendant's right to counsel of his own choosing, when he has stated he has hired one, as Young did in this case. The district court judge's decision was reversed and the matter remanded for a probation revocation hearing

IF A DEFENDANT IS ARRESTED UPON PROBABLE CAUSE, A "WARRANT" DOES NOT HAVE TO BE ISSUED TO ALLOW THE STATE TO KEEP HIM IN CUSTODY

Jose Palma was stopped for a traffic violation and consented to a search of his car. Officers found 21 pounds of marijuana and arrested him. A probable cause affidavit was filed and the district court judge found, within 48 hours, that there was probable cause to arrest Palma. His bond was set at $25,000.

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The State filed a formal complaint against Palma. A preliminary hearing was eventually held and he was bound over for trial. He plead guilty to the charges and the district judge ordered him released on his own recognizance pending sentencing because he had been held "inappropriately" without a warrant having been issued.

In *State v. Palma*, ___Kan.App.2d ___ (February 24, 2006), the Kansas Court of Appeals found that the district court erred in releasing the defendant. It found that under Kansas law when a person has been arrested upon probable cause and is already in custody, the issuance of warrant is not necessary.

CRIMES MERGE WHEN THEY ARISE FROM A "SINGLE ACT OF VIOLENCE"

Tiffany Bolden discovered her estranged husband riding in a car driven by his mistress. She followed them, flashed her lights, pulled along side their car and rammed her car into theirs, forcing it to the side of the road. When her husband got out of the car, she tried to coax him to come with her, but he refused and got back in the car with his mistress who started driving them toward the police station. Bolden followed and rammed her car into theirs a second time.

Bolden was convicted of two counts of aggravated battery and two counts of aggravated assault, one set for each of the two ramming incidents. In *State v. Bolden*, ___Kan.App.2d ___ (March 3, 2006), the Kansas Court of Appeals held that since the battery and assault charge each arose out of the same act of violence (ramming the car), Bolden can only be convicted of two counts of aggravated battery. In other words, the assault charge merges into its respective battery charge. The Court went on to point out that although battery and assault are not "multiplicious" as has been defined by the Supreme Court since they do contain different elements, Kansas has long recognized the merger of crimes when they arise from a "single act of violence." Where there is only one victim and two acts of violence occurring at approximately the same time and place, the person who inflicts such injuries cannot be charged with two separate crimes. Since they are duplicitous, they merge together. The Court defines "duplicity" as the joining in a single count of a complaint two or more distinct and separate offenses. The theory behind this rule is the same as it is for the standard "multiplicity" argument. To allow both convictions to stand really allows for multiple punishments for the same "act."

ABSENT EVIDENCE TO THE CONTRARY, IT IS REASONABLE TO ASSUME THAT THE REGISTERED OWNER OF THE VEHICLE IS DRIVING IT

Officer Cline observed a Jeep being driven on the streets of Pratt. He knew the vehicle to be registered to Jena Hamic-Deutsch and her husband. In fact, the Pratt police department had stopped Jena twice in the previous two months, one of those times by Officer Cline himself, for driving on a suspended license and having no insurance. Officer Cline also knew that there was an active warrant for Jena's arrest out of the municipal court for a probation violation. Although he could not see who was operating the vehicle, he stopped it to see if it was Jena and to see if it had been insured yet.

It turns out that Jena's mother, Judith, was driving the car, and Jena was just a passenger. Officer Cline was also aware that Judith did not have a valid driver's license and he detected a strong odor of consumed alcohol coming from vehicle. After further investigation, he eventually arrested Judith for possession of marijuana (among other charges). He also arrested Jena on the outstanding warrant and also charged her with possession of marijuana.

Prior to Jena's trial, the district court judge suppressed all the drug evidence obtained on the basis that Officer Cline did not have any basis to stop the car. He did not observe any traffic violations and there were no other safety or public service grounds upon which to base the stop. The fact that the vehicle had not been insured two months earlier, the judge opined, is no indication that it was not insured on the date of the stop. In addition, the vehicle was co-owned by the defendant's husband, and the officer knew the two of them were in the process of a divorce, so he could have just as easily concluded that the husband was driving. The State appealed.

In *State v. Hamic*, ___Kan.App.2d ___(March 3, 2006), the Kansas Court of Appeals found that the stop was reasonable and legal. First, it specifically did not address the issue of whether or not the knowledge that a warrant had been issued for the registered owner was enough in and of itself to stop the car, since the district judge had not addressed the issue at all. It focused solely on the suspended driver's license and no insurance issues. It pointed out that Kansas has no published case dealing directly with the question of whether a law enforcement officer is justified in suspecting the registered owner of a vehicle is the driver, however it cited many other states that have reached that conclusion.

"Perhaps it is more a matter of common experience than a profound legal maxim to declare that a law enforcement officer is reasonable in suspecting that the registered owner of a vehicle is the driver of the owned vehicle, absent evidence to the contrary. One presumes that it is common for a reasonably cautious citizen to honk or wave at a moving vehicle that is owned by a friend without first having identified the vehicles occupants, and in doing so, rationally expect that the

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friend will receive the greeting. Further, the caveat, that the owner-is-the-driver inference may lose its rationality where the officer possesses contrary information, is simply another way of saying that we must look at the whole picture."

In this case, the Court held, based on all the information Officer Cline possessed when he stopped the Jeep, his actions were reasonable. The fact that he knew the defendant and her husband were in the process of divorce was not sufficient "contrary" evidence to prevent him from stopping the vehicle. The district judge's order suppressing the drugs found in the car was reversed.

COLLECTIVE KNOWLEDGE OF OFFICERS CAN JUSTIFY A STOP



An Olathe police officer received a dispatch that a clerk at a convenience store had reported that someone was trying to purchase a large quantity of matchbooks and had been buying matchbooks there for several months. When she refused to sell him more than two boxes, he argued and left. He was also looking at the *Heet* fuel additive, but did not buy any. Based on this, the officer called another convenience store to see if the person had gone there to try to buy matches too. He had. The tag on the car he was driving was registered to someone in Linn County, so the officer called one his fellow officers, gave him a description and told him to watch for the vehicle headed back toward Paola. He told the second officer to stop the vehicle if he saw it. Within a few minutes the second officer saw the vehicle pull into a gas station and the driver go into the restroom. He approached the driver as he exited and discovered that he had a suspended driver's license. He arrested the driver and upon an inventory search found a large quantity of items used to manufacturer methamphetamine (antihistamine tabs, *Heet* fuel additive, 12 boxes of matches, empty boxes of cold and allergy medicine, camp fuel) and a rifle. Upon questioning, he admitted he was driving around getting items for a guy named Steve to make methamphetamine.



During his trial, he moved to suppress all evidence recovered from the car on the basis that the officer had no reasonable suspicion to stop the driver. The district court refused to suppress the evidence relying in part on the nature of the evidence that was found in the car. In *State v. Poage*, ___Kan.App.2d ___(March 10, 2006) the Kansas Court of Appeals found that the district court was wrong to rely at all on contraband found after the stop. However, it found that the officer did have a reasonable suspicion of criminal activity. Even though the officer who actually stopped the defendant had very little information about the defendant's actions, in considering the facts necessary to support reasonable suspicion, the court considers all of the facts known collectively by those involved in the investigation and the stop, not just the officer making the stop. In this case, the totality of the circumstances, including the numerous attempts at more than one location to consummate purchases of large quantities matchbooks (which contain red phosphorus strike plates that are preferred in one method of manufacturing methamphetamine), the information that the defendant had a pattern of this activity, the examination or consideration for purchase of a second material known to be used in manufacturing methamphetamine (*Heet* fuel), the location of the purchases relative to the defendant's apparent county of residence, in the middle of the night, justified the officers' suspicion.

"OBJECTIVE REASONABLE PERSON STANDARD" TO BE USED IN DETERMINING WHETHER A STATEMENT IS TESTIMONIAL

In *Crawford v. Washington*, 541 U.S. 36 (2004) the United State Supreme Court held that out-of-court testimonial statements are not admissible unless the witness making the statements is unavailable and the defendant had a prior opportunity to cross-examine the witness. In *State v. Henderson*, ___Kan.App.2d___(March 10, 2006) the Kansas Court of Appeals was faced with a video taped interview between a 3 year old sexual abuse victim and a Sedgwick County Detective and an S.R.S. employee. The 3 year old was declared an "unavailable witness" after questioning by the judge revealed that the toddler was unable to understand the proceedings, the questions, or her duty to testify truthfully. So the question before the Court was whether or not the video tape of her interview should have been admitted by the trial court in light of the Supreme Court ruling in *Crawford*.

The Court of Appeals first focused on whether the 3 year old's statements were "testimonial" so as to implicate *Crawford*. The Crawford court did not define "testimonial" and in fact stated, *" We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a formal trial; and to police interrogations."* 541 U.S. at 68. The Court suggested the one way to determine if statements are testimonial is whether the "*statements were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."* Since a child would have no way of understanding how his or her statements would be used, aren't they always non-testimonial? Some courts have taken that position. However, the Kansas Court of Appeals states it is going to use the "objective reasonable person" rather than an "objective child of that age" standard. It decides to follow the California, Illinois and Florida courts in finding that in-

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terviews of purported child abuse victims conducted by child protection agencies in conjunction with law enforcement officials, as was done in this case, are testimonial under *Crawford*. In this case, since the witness was declared unavailable to testify, and the defendant had no opportunity to cross-examine her prior to trial, the video tape was inadmissible.

But, the State argued, didn't the defendant forfeit or waive his right to confront the child? When he assaulted a young child, he would have known she would likely be unable to testify against him, so the forfeiture rule should apply. The Court of Appeals found that this was not an appropriate forfeiture situation. To admit the statement under the forfeiture doctrine, the government must show that the defendant (1) caused the potential witness's unavailability (2) by a wrongful act (3)undertaken with the intention of preventing the potential witness from testifying at a future trial. There are no cases that the support use of the doctrine based solely on the witnesses age. In this case, there is no evidence that the defendant did anything to try to silence the victim after the alleged assault.

Because of the admission of the videotape at the jury trial in this case, the Court reversed the defendant's conviction and remanded the case for a new trial.

DEFENDANT MUST BE NOTIFIED IN THE COMPLAINT OF THE SEVERITY LEVEL OF THE DUI OFFENSE CHARGED AND PROSECUTION IS HELD TO THE SEVERITY LEVEL ALLEGED

Michael Moore was charged through the district court with "DUI after having two or more prior DUI convictions, a nonperson felony" He was found guilty. There is no indication that he was ever advised of anything other than the maximum third-time offender penalties. However, he was sentenced as a sixth-time DUI offender using the provisions that apply to "fourth or subsequent offenders." The State argues that they are free to "up the ante" at sentencing because the only requirement for due process is that he be notified of being charged with a "nonperson felony."

In *State v. Moore*, ___Kan.App.2d ___(March 10, 2006) the Kansas Court of Appeals disagreed with the State's argument. It held that although both third and "fourth and subsequent" DUIs are nonperson felonies, the legislature clearly intended them to be treated as separate offenses. This is not a jurisdiction issue, it is a due process issue. Here, once the State committed itself to try Moore as a third-time offender, it was a violation of due process for the State to "up the ante" after Moore was convicted as a third-time offender. The State had access to his driving record. They could have amended the charges prior to trial and the trial court could have advised the defendant accordingly. Therefore, the Court vacated Moore's sentence and ordered the case remanded for re-sentencing as a third-time offender, regardless of what number offender he may actually be.

ANTICIPATORY WARRANTS ARE NOT UNCONSTITUTIONAL

Jeffrey Grubbs purchased a videotape containing child pornography from a Web site operated by an undercover postal inspector. Officers from the Postal Inspection Service arranged a controlled delivery of the package to Grubb's residence. The inspectors received an "anticipatory search warrant" from a federal magistrate.



An "anticipatory warrant" is a warrant based upon an affidavit showing probable cause that at some future time (but not presently) certain evidence of a crime will be located at a specified place. Most anticipatory warrants subject their execution to some condition precedent or "triggering event." In this case, the triggering event was delivery of the video tape and its physical transportation into the house. In other words, the warrant could only be executed once the parcel was received and physically taken into the house.

Grubbs argued that anticipatory warrants are unconstitutional. The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause." At the time of issuance of an anticipatory warrant, he argued, there was no probable cause to search. The probable cause does not develop until later, after the triggering event.

In *United States v. Grubbs*, ___U.S. ___(March 21, 2006), the U.S. Supreme Court held that anticipatory warrants are not unconstitutional. When the warrant is issued, the fact that the contraband is not presently at the place described is immaterial, so long as there is probable cause to believe it will be there when the warrant is executed. The magistrate must find that there is both probable cause to believe that the triggering event will occur and probable cause to believe that contraband will be found in the place to be searched if the triggering event occurs.

Grubbs further argued that even if anticipatory warrants are constitutional, the warrant itself must set out the triggering event. In this case, although the affidavits detailed the trigger, the warrant did not. Even though the officers did not execute the warrant until after the triggering event occurred, Grubbs argued that the warrant violated the Fourth Amendment "particularity" requirement ("the place to be searched" and "the persons or things to be seized") by not specifically setting forth the triggering condition. The U.S.

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Supreme Court again disagreed and found that the Fourth Amendment does not require the detailing of any conditions precedent.

A PHYSICALLY PRESENT CO-OCCUPANT'S REFUSAL TO PERMIT ENTRY RENDERS WARRANTLESS ENTRY AND SEARCH INVALID AS TO HIM

Scott Randolph and his wife, Janet, were having significant marital disputes at their home in Americus, Georgia. After one such dispute, her husband took their son away from the home and she called the police. When officers arrived she told them that Scott was a cocaine user whose habit had caused problems between them. During her conversation with police, Scott arrived back home. He explained that he had taken their son to a neighbor's house out of concern that his wife may leave the country with the child again (she had just returned after taking the boy to her family in Canada for two months). He denied cocaine use and countered that it was in fact his wife who had abused drugs and alcohol. Janet renewed her complaints about her husband and told police that there were items of drug evidence in the house and told them to go inside and look. The officers asked Scott for permission to enter the house, and he flatly refused to consent to their entry into his home. The officers then turned to Janet to ask for consent and she readily gave it.

Scott was eventually convicted of possession of cocaine. He argued unsuccessfully that the officer's entry into his home over his express refusal was unconstitutional. The case made it to the United States Supreme Court and in *Georgia v. Randolph*, ___U.S. ___(March 22, 2006) a 4-3 Court (with Roberts, Scalia and Thomas dissenting and Alito not participating) agreed with Scott Randolph. The search, contrary to his express in-person refusal, was unconstitutional.

The Court distinguished this situation from *United States v. Matlock*, 415 U.S. 164 (1974) in which the Court held that *"the consent of one who possesses common authority over premises or effects is valid as against the absent, nonconsenting person with whom that authority is shared."* In *Matlock*, the officers were not faced with the physical presence of joint occupants. An individual who chooses to live with another assumes the risk that he or she will be unable to control access to the premises during his or her own absence. The key in *Matlock* was that the nonconsenting party was not present to object in person.

The Court acknowledges that a co-tenant may have a desire to consent to the search of their residence and cooperate with police so as not to risk being convicted him or herself of possession of drugs when the co-tenant knows the drugs are present but is unable to to convince the roommate to get rid of them. However, the Court says that the sanctity and privacy of the home is too great an interest to violate in this way. The co-tenant's alternative would be to go to police, explain the situation, and thereby assist in drafting of a warrant to search the premises. Nor, the majority opined, will this interpretation sheild spousal abusers as the dissenters claim. The police can still enter a dwelling to protect a resident from violence, if there is probable cause to believe such an immediate threat exists. The majority specifically stated that an officer could enter over a co-tenants objection to help a consenting tenant victim retreive her personal belongings and get out safely. Anything officers observed in plain view would be fair game. Exigent circumstances of a crime or the threat of crime evidence being concealed or destroyed may justify an entry in spite of a co-tenant/suspect 's refusal.

Finally, the Court expressed its desire to tie up "a loose end" It found that in order for the co-tenant's refusal to override a tenant's consent, the refusing co-tenant must be physically standing at the door, unless purposefully removed by the police to avoid an objection. If the co-tenant is asleep in the apartment, the police are not expected to wake him or her to get consent. If the co-tenant is not far away, but still not at the door, the police are not required to go seek him or her out.

NOT NECESSARY FOR VICTIM TO ACTUALLY SEE THE LEWD ACT FOR A CONVICTION FOR LEWD AND LASCIVIOUS BEHAVIOR

After a lengthy analysis of the definition of the words "presence" and "exposing" the Kansas Supreme Court held in *State v. Bryan*, ___Kan. ___(March 17, 2006) that in order to sustain a conviction for lewd and lascivious behavior it was not necessary to show that the victim actually saw or perceived the offending act. In this case, the defendant exposed himself to his 13 year old daughter while she was sleeping. There was no evidence that she ever saw the defendant's lewd acts while he was naked in her bed.

"Presence," the Court found, means close physical proximity coupled with awareness. However, the awareness does not need to be on the part of the victim, but on the part of the perpetrator. Since K.S.A. 2004 Supp. §21-3508(a)(2) requires that the exposure be *"with the intent to arouse or gratify the sexual desires of the offender or another"* the offender must be aware of what is happening, but not necessarily the victim. In this case, there was sufficient evidence to suggest that Bryan was exposing himself for his own sexual gratification.

The Court distinguished this from the fact pattern in *Burks v. State*, 766 So. 2d 468 (Fla. Dist. App. 2000) where Burks lived on a remote 5 acre tract of land on a gravel road in rural Florida. He was an alcoholic and hearing impaired.

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One day he was naked in his Jacuzzi having a drink, and got out of the tub to check his garden hose. Two teenage girls riding all terrain vehicles on the gravel road observed him naked in the yard as they drove by. The Florida court reversed Burks conviction because there was no evidence that he was aware the girls were ogling him and no evidence to establish that he was walking around his yard naked for a lewd purpose.

Bryan's conviction was upheld.

IMPROPER JUDICIAL BEHAVIOR TOWARD BOTH SIDES IN A DISPUTE MAY BE ENOUGH BY ITSELF TO REQUIRE REVERSAL, REGARDLESS OF WHETHER THE TRIAL OUTCOME WAS PREJUDICED THEREBY

In *State v. Hayden*, ___ Kan. ___(March 17, 2006), which examined a jury trial involving the brutal murder of an elderly couple following a burglary, there was no dispute that the district court judge behaved in an intrusive, rude and sarcastic manner. His misconduct did not consist of an isolated comment or action, but was pervasive during the trial. He was equally obnoxious toward both the defense and the prosecution. Spectators in the courtroom commented on his conduct and seemed embarrassed by it. Even though the Kansas Supreme Court found that here was sufficient evidence presented to support a murder conviction and no other trial errors occurred, it reversed the conviction and remanded the case for a new trial before a different judge because it found that the judge's behavior *"thoroughly polluted the trial, affecting the performance of all concerned."*

RETROSPECTIVE COMPETENCY HEARINGS

In September, 1999, Jeffrey Davis was charged with rape, aggravated kidnapping and battery. In December, his court-appointed attorney filed a motion to determine competency. The prosecution did not object and the judge therefore ordered "that a determination of competency to stand trial should be conducted at Larned State Hospital." No competency determination was made because the order was directed to "Larned State Hospital," when it should have been directed to the "Larned Security Hospital." Although the Court was made aware that the competency hearing had not been accomplished, it took no action. Four months later a preliminary hearing was held and Davis was bound over. In September 2000 he was convicted by a jury of two counts of rape. Davis was sentenced to approximately 50 years in prison.

Two years later, Davis filed a pro se motion to correct an illegal sentence arguing that the trial court lacked jurisdiction when if failed to suspend proceedings back in December 1999 in order to determine if Davis was competent to stand trial. K.SA. 22-3303 provides: *"If upon the request of either party or upon the judge's own knowledge and observation, the judge before whom the case is pending finds that there is reason to believe that the defendant is incompetent to stand trial the proceedings shall be suspended and a hearing conducted to determine the competency of the defendant."* If the defendant is found to be incompetent and the charge is a felony, the statute provides that the defendant *"shall be committed for evaluation and treatment to the state security hospital…"* If the defendant is found to be competent, *"the proceedings which have been suspended shall be resumed."*

In June, 2003, the district court conducted a retrospective determination of competency, since there was no record of one ever taking place when the competency examination was ordered. Davis's court-appointed attorney testified that he assumed he had a good faith basis for filing the motion to determine competency, he would assume a hearing was conducted (although there was no record of one) and he had no concerns about Davis' competency at the time of the preliminary hearing 4 months later or he would have objected to same. He had no explanation concerning what if anything had changed between his December 1999 request and the preliminary hearing 4 months later.

In *State v. Davis*, ___Kan. ___ (March 17, 2006), the Kansas Supreme Court held that proceeding without conducting a hearing was a clear violation of the defendant's due process rights. However, the Court cited *Drope v. Missouri*, 420 U.S. 162 (1975) holding that such a procedural due process violation may be cured retrospectively, although it is inherently difficult to do so. In 2001, the 10th Circuit provided guidance in *McGregor v Gibson*, 248 F.3d 946, 962-63 (10th Cir. 2001):

> *"Retrospective competency hearings are generally 'disfavored' but are 'permissible whenever a court can conduct a meaning-*

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Factors Associated with Erroneous Convictions

Eyewitness errors	74%
Forensic science	
Erroneous	66%
Fraudulent/Misleading	31%
Police misconduct	44%
Prosecutorial misconduct	40%
Bad lawyering	28%
False confessions	19%
Dishonest informants	17%
False witness testimony	17%

Source: M.J.Saks & J.J. Koehler, *The Coming Paradigm Shift in Forensic Identification Science*, 309 SCIENCE 892 (2005)

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> *ful hearing to evaluate retrospectively the competency of the defendant.'… In the context of deciding whether a state court's retrospective determination of a petitioner's competency violated that petitioner's due process rights, we announced factors to be considered in assessing whether a meaningful retrospective determination can be made:*
>
> *(1) [T]he passage of time, (2) the availability of contemporaneous medical evidence, including medical records and prior competency determinations, (3) any statements by the defendant in the trial record, and (4) the availability of individuals and trial witnesses, both experts and non-experts, who were in a position to interact with defendant before and during trial, including the trial judge, counsel for both the government and defendant, and jail officials…"*

The Kansas Supreme Court went on to reject the retrospective competency hearing in this case due to the complete lack of any medical evidence presented. Although the Court pointed out that the statute does not require a psychiatric or psychological examination to determine competency (presumably just a hearing would suffice with lay testimony), in this case by ordering that it be performed at the Larned State Hospital, it is assumed that was what the judge intended. *"When a judge "finds that the competency concern is sufficient to warrant an order for a medical determination on the issue (K.S.A. 22-3302[3]), and the record is silent on why the judge did not pursue the medical determination, a retrospective judicial determination of competency based upon no medial evidence whatsoever cannot stand."* The Court reversed Davis' conviction and sentence. The Court also ordered that before any retrial, Davis' competency must be determined and it strongly encouraged the presentation of medical evidence concerning same.

COMPLAINT CAN BE AMENDED TO ADD CHARGES AFTER THE PRELIMINARY HEARING WITHOUT NECESSITATING A NEW PRELIMINARY HEARING

Mary Frayser was driving her Honda through an 8 mile construction zone on an interstate highway at the posted 60 mph. Travel had been narrowed to one lane for each direction of traffic. Daryl Bischoff was traveling behind her in a semi-trailer. He began flashing his lights and honking his horn. He continually sped up to the rear of her vehicle and then slowed down and backed off. When she reached an exit, she slowed and drove into the exit lane. Bischoff drove his truck around her, nearly hitting it. He pulled in front of her and stopped abruptly, causing Mary to slam on her brakes to avoid hitting him. He got out of the truck and approached her car. She locked her doors. He pulled on her door handles and yelled obscenities and hit her car window. He threatened to kill her. As construction truck entered the shoulder of the exit ramp, Mary started honking her horn to get the driver's attention. Bischoff walked back to his truck, made a u-turn and got back on the interstate. He made an obscene gesture and yelled at Mary as he left. The truck directly behind Bischoff witnessed all the events and corroborated Mary's story.

Bischoff was charged with criminal threat (felony), reckless driving and following too close (both misdemeanors). A preliminary hearing was held on the felony threat charge and he was bound over for formal arraignment. A few days later, the prosecution filed a motion to amend the complaint to add a charge of aggravated assault (another felony), stating that the evidence at the preliminary hearing established probable cause to believe that Bischoff had placed Mary in reasonable apprehension of immediate bodily harm with a deadly weapon, to wit: a semi-truck. The prosecution dropped the two misdemeanor charges.

The defendant argued that this amendment post-preliminary hearing should not have been allowed. He argues he was entitled to a preliminary hearing on the new felony charge. In *State v. Bischoff*, ___Kan. ___ (March 17, 2006), the Kansas Supreme Court stated that courts have consistently given the prosecution considerable latitude in amending a complaint prior to trial. Even the charging of a different crime may be allowed by an amendment to a complaint before trial, provided the substantial rights of the defendant are not prejudiced. In addition, Kansas law has long held that a defendant may be charged with one offense and bound over for another if it shall appear on the preliminary examination that he is guilty of a public offense other than that charged in the warrant. In this case, the Court found that the defendant's rights were not prejudiced by the amendment. The amendment was added based upon testimony provided at the preliminary hearing and his defense counsel had full opportunity to cross-examine the State's witnesses there. The State relied on the same evidence at both the preliminary hearing and the trial. It was added 10 months prior to trial and 8 months prior to the motion to dismiss. The defendant had plenty of time to prepare. Finally, his defense was that he did not intentionally commit any of the acts alleged. That defense was the same regardless of the new charge.

STATUTORY PLEA REQUIREMENTS ARE NOT MANDATORY, IF UPON REVIEW OF RECORD THEIR PURPOSES ARE SERVED

Danny Beauclair entered a plea of no contest to one count of rape of a child under the age of 14 and one count of aggravated sodomy of a child under the age of 14. It is undisputed that during the plea colloquy the defendant was misinformed by the judge concerning the minimum and maximum penalties that could be imposed and the Court did not ask for or consider a factual basis for the plea. However, in *State v. Beuclair*, ___Kan. ___ (March 17, 2006), the Kansas Supreme Court held that the Court did not abuse its discretion in failing to allow the defendant to withdraw his plea.

K.S.A. §22-3210 requires that in accepting a guilty plea the

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plea must be entered in open court; in felony cases, the defendant must be informed of the consequences of the plea, including the specific sentencing guidelines level and the maximum penalty that may be imposed; the plea must be made voluntarily with understanding of the nature of the charges and the consequences; and the court must be satisfied that there is a factual basis for the plea. Although the statute was adopted to ensure compliance with the due process requirements set out by the United States Supreme Court in *Boykin v. Alabama*, 395 U.S. 238 (1969), the Kansas Supreme Court held that strict compliance with the statute is not mandatory, if upon review of the entire record, the purpose of the statute is otherwise served. In this case, the defendant's attorney presented an affidavit that she had correctly gone over the possible minimums and maximums with him. In addition, the defendant was aware through hearings that the applicable version of the sentencing guidelines was being debated by the prosecution and his attorney, yet he never asked to withdraw his plea upon hearing of the dispute, which occurred prior to his actual sentencing. The Court remanded the case to the Court of Appeals for further determination on the failure to establish a factual basis for the plea.

SUFFICIENCY OF COMPLAINT AND VENUE IN VIOLATION OF SEXUAL OFFENDER REGISTRATION PROVISIONS

Wilbur McElroy was charged in Sedgwick County with and convicted of failing *"to inform in writing the law enforcement agency, to-wit: Sedgwick County Sheriff's Department…where said Wilbur McElroy was last registered, of any change of address within ten (10) days of said change of address: contrary to K.S.A. §22-2903(b)(1) and §22-4903."*

K.S.A. §22-2903(b)(1) provides *"If any person required to register as provided in this act changes the address of the person's residence, the offender, within 10 days, shall inform in writing the KBI of the new address. After receipt of the change of address, the KBI shall forward this information to the law enforcement agency having jurisdiction of the new place of residence within 10 days of such receipt of the change of address."*

In *State v. McElroy*, ___Kan.___(March 17, 2006), McElroy argues that the complaint did not allege a crime and that venue was improper in Sedgwick county. The Kansas Supreme Court agreed and reversed his conviction. The statute does not require that McElroy notify the Sedgwick County Sheriff's Department, it requires he notify the KBI. Since it is not a crime to fail to notify local law enforcement, the complaint does not state a crime and his conviction must be reversed. Since notification is to be sent to the KBI in Topeka, venue for the violation is Shawnee County, not Sedgwick County. Venue would also lie in the county of the defendant's new residence (if it is within Kansas), but not in the county where the defendant had previously registered but was no longer living.

It would appear that this will result in a significant caseload increase in Shawnee County.

"PORCH" IS PART OF BUILDING FOR PURPOSES OF AGGRAVATED BURGLARY STATUTE

Aggravated burglary is defined by statute as *"knowingly and without authority entering into or remaining within any building….in which there is a human being, with the intent to commit a felony, theft, or sexual battery therein."* K.S.A. §21-3716. In *State v. Carter*, ___Kan.App.2d ____(March 17, 2006), the Court was faced with whether or not the porch of a house was considered part of "any building," since the defendant broke into the screened porch of the victims house. The Court found that a porch is part of a building. It is an integral part of the house itself, sharing a common foundation, roof, gutter system and siding. The fact that it is not used for dwelling purposes and it is uninhabitable, unused and not very secure is irrelevant.

VALUE OF THE PROPERTY DAMAGED IS IRRELEVANT IN A MISDEMEANOR CRIMINAL DAMAGE TO PROPERTY CASE

Also in *State v. Carter*, ___Kan.App.2d ____(March 17, 2006), the Court found that when it comes to a misdemeanor charge of criminal damage to property, the value of the property damaged is irrelevant. In order to support a felony conviction for criminal damage, there must be evidence of value. Failure to do so will result in the defendant's conviction and maximum sentence being that of misdemeanor criminal damage. The Court took judicial notice of the arithmetic fact that a "value of less than $500" and damage "to the extent of less than $500" includes the value of $0. Although there must be some evidence of injury, damage, mutilation, defacement, destruction, or impaired usage, the value of same is irrelevant in a misdemeanor prosecution.

MERE PRESENCE OF A DECLARANT IN THE COURTHOUSE IS INSUFFICIENT TO OVERCOME HEARSAY OBJECTION; DECLARANT MUST BE CALLED AS A WITNESS EITHER BEFORE OR AFTER THE HEARSAY IS PRESENTED

In *State v. Wilson*, ___Kan.App.2d ___(March 17, 2006), the Kansas Court of Appeals reiterated the rule that a declarant must testify at trial before hearsay evidence of his or her out-of-court statements may be admitted under K.S.A. §60-460 (a). Citing *State v. Davis*, 236 Kan. 538, 541 (1985) for support, it found that the statements are admissible whether admitted before or after the declarant testifies. In this case, the hearsay statement involved conversations the defendant's co-

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conspirator had with police. The Court also found that these statements were not admissible hearsay under K.S.A. 60-460 (i)(2) (exception to hearsay rule for statements among co-conspirators) because the conspiracy had terminated at the time the declarant was talking to police. In order for the co-conspirator exception to apply, the statement must be made while the conspiracy is still in existence.

WHEN EVIDENCE OF GUILT IS OVERWHELMING, THE ERRONEOUS ADMISSION OF EVIDENCE IN VIOLATION OF A CONSTITUTIONAL RIGHT MAY BE HARMLESS

Salina drug task force officers collected the curbside trash outside a house in Salina and found a complete methamphetamine lab and mail addressed to a Charles Grandpre in the trash. Officers started preparing a search warrant. While waiting for the warrant to be issued, Officer Hanus surveilled the house. Charles Grandpre arrived at the house in a pickup registered to him. He went into the house to be searched. He retrieved mail from the mailbox. A few minutes later, he left the house with someone later identified as Robert Hill, who was not listed on the warrant for the residence. Hill was driving Grandpre's truck. By the time the two drove away, Officer Hanus had been advised that the warrant had been issued, but officers were preparing a search plan. Officer Hanus followed Hill and Grandpre. They went to a convenience store. Hill went inside. Grandpre waited in the truck. Officer Hanus followed them as they left the convenience store. Hill stopped the truck and let Grandpre out. Because he was concerned that the two would separate and get away, Officer Hanus exited his vehicle, drew his gun, order Hill out of the truck, and commanded both Hill and Grandpre to lie on the ground. Back-up officers immediately arrived. Officer Hanus told them to handcuff Hill and Grandpre. They searched them for weapons or contraband. None was found.

Grandpre and Hill were separated. Grandpre told police (post-*Miranda*) that Hill was his roommate. Hill (post-*Miranda*) denied this and said he had only slept there on the couch the night before. Officer Hanus arrested Hill and upon searching him incident to the arrest, he found a set of keys. After persistent questioning about the keys, Hill finally pointed out which key opened the door of the Grandpre house. Officers took the key to the house, opened the front door with it and inside found significant evidence of manuafacture of methamphetamine. They found several items that connected Hill to the residence. Hill moves to suppress all the evidence found in the house and all statements he made to police due to his unlawful arrest on the street.

In *State v. Hill*, ___Kan. ___(March 17, 2006) Justice Lockett goes through a lengthy analysis of Hill's arrest. The Court found that clearly when Hill was ordered out of the car, onto the ground and handcuffed, he was arrested. This was more than an "investigatory detention." Since Officer Hanus had no reason to believe that Hill lived at the suspect house and he was not named in the warrant and he had no contraband on him, the officer had no probable cause to arrest Hill. In addition, they had no reasonable suspicion to detain him. However, the Court found that the discussion does not end there. Even when the initial arrest is without probable cause, if the taint of the illegal arrest is sufficiently separate from the statement or evidence obtained, the evidence may be admitted. In this case, the Court found that the taint was not sufficiently separate in time and the officers actions were flagrant. The evidence should have been suppressed. However, the Court found that the error in admitting the evidence was harmless.

Even suppressing the statements made by Hill and the key found in his pocket, there was more than sufficient evidence to convict Hill of manufacturing methamphetamine. His co-defendants testified against him. They testified he was teaching them how to make methamphetamine. In fact at his bench trial, the trial court judge stated *"I don't care who lived at 740 South Tenth. Doesn't make any difference to me. That's just the site of the crime."* The defendant's conviction stands in spite of his unlawful arrest.

APPARENT AUTHORITY RULE WILL SAVE A WARRANTLESS SEARCH ONLY WHERE OFFICERS MADE A MISTAKE OF FACT, NOT WHERE THEY MADE A MISTAKE OF LAW

In *State v. Porting*, ___Kan. ___ (March 24, 2006), the Kansas Supreme Court overruled the previous decision by the Kansas Court of Appeals (34 Kan.App. 211 (2005); see *The Verdict*, Fall 2005, p.1) and found that a parolee who had not been in his mother's house for 18 months had no authority to consent to the search of the house in anticipation of returning to live there while on parole. Citing *United States v. Matlock*, 415 U.S. 164, 171 (1974), the Court pointed out that the authority which justifies a third party consent does not rest in the law of property *"…but rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched."* In this case there was insufficient evidence that Hanson, the parolee who gave consent to search, had any authority to do so. Hanson had no more than a hope or intention of resuming residence at this location after an 18 month absence.

In addition, the Court found that Hanson did not have "apparent authority" to consent. Under the apparent authority rule, a consent to search is valid when the facts available to the officer would warrant a person of reasonable caution to believe that the consenting party had authority over the premises to be searched. The Court found that the apparent

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authority rule will save a warrantless search only where officers made a mistake of fact, not where the made a mistake of law. In this case, the officers were not mistaken about the facts. They knew Hanson had just been released on parole and was hoping to return to his mother's residence. The officers reached the erroneous legal conclusion that those facts authorized Hanson to give valid consent. The conviction of Hanson's former girlfriend and her friend, who were living in the house, and in whose room the police found methamphetamine, was overturned.

DEFINITION OF "FORTHWITH"

Defendants had their driving privileges suspended by the Kansas Department of Revenue for refusing to submit to breath alcohol tests. K.S.A. §8-1020(d) provides in part that *"Upon receipt of a timely request for a hearing, the division shall forthwith set the matter for hearing…"* One defendant had a hearing set 59 days after his request and heard 78 days later, the other had a hearing set 55 days after his request for hearing, and the hearing was held 35 days later. The defendants appealed their driver's license suspensions on the basis that the division failed to comply with K.S.A. §8-1020(d) in that the hearings were not set "forthwith." "Forthwith" is not defined in the statutes. The district court dismissed their suspensions, finding that the division had not set hearings "forthwith." The Department of Revenue appealed the dismissal.

In *Foster v. Kansas Department of Revenue*, ___Kan. ___ (March 24, 2006), the Supreme Court held that the term "forthwith" dos not mean immediately and is not susceptible to a fixed time definition. It means without unnecessary delay and requires reasonable exertion and due diligence consistent with all the facts and circumstances of the case. As long as KDR can show the delay in setting the hearing was necessary and did not result from a lack of due diligence or reasonable exertion on its part, then the setting is forthwith and complies with the statute. The Court went on to hold that the purpose of the statute is to remove dangerous drivers from the highways and protect the public, not the defendant. Therefore, even if the court finds that a hearing was not set "forthwith" the appropriate remedy is not dismissal unless it can be shown that the driver was prejudiced by the delay. The Court would be required to make specific findings of prejudice in order to support a dismissal. The dismissals were reversed and the matters were returned to the district court to make further findings.

KANSAS LAWYERS ARE HELD TO AN UNDERSTANDING OF KANSAS LAW, NOT THE LAW OF OTHER JURISDICTIONS

In *Tomlin v. State*, ___Kan.App.2d ___ (March 31, 2006), the Kansas Court of Appeals held that while the growth of the law is dependent upon creative lawyers advancing new theories, failure to do so does not render a lawyer's performance constitutionally defective. Lawyers representing a criminal defendant charged under Kansas law are held to an understanding of Kansas law, not the law of foreign jurisdictions.

KLINE WAS WRONG TO SEIZE INDIAN CASINO ASSETS IN KCK

The 10th Circuit Court of Appeals has found that Phill Kline exceeded his authority and jurisdiction when he and armed officials from KCK and the KBI stormed the casino located at the old Shriner Tract in downtown Kansas City, Kansas and seized gambling proceeds, machines, and files in April 2004. In *Wyandotte Nation v. Sebelius*, ___F.3d ___, (10th Cir.), decided April 7, 2006, the Court outlines *"a procedural history as complex as a random maze"* which began when the Wyandotte bought the Shriner Tract with proceeds from a prior lawsuit in which the Indian Claims Commission found that the federal government had illegally taken tribal lands belonging to the Wyandotte. Since it was purchased with money held in trust for the tribe by Secretary of Interior, it turned the Shriner Tract into Indian land upon which the Wyandotte plan to operate a casino. The moment that became the tribe's intent became clear, a fight with the state of Kansas went into full throttle. While the case was winding its way through the courts and after the Wyandotte filed an action in the District of Columbia seeking a declaratory judgment that it could lawfully conduct gaming on the tract, Kansas decided, according to the Court, to take the matter into its own hands.

> *"Determined to shut down the tribe's gaming facility and unwilling to wait for the case to travel through proper legal channels, Kansas officials decided to simply bypass the federal court system. They sought and obtained a search warrant in Kansas state court based on suspected violations of state gaming law….[and] stormed the casino, seized gambling proceeds and files and confiscated gaming machines. The law enforcement officers arrested Ellis Enyart, the casino's general manager, for violating state gaming laws…the officers seized more than $1.25 million in cash and equipment. Criminal charges were filed against Enyart but a state court rightly dismissed them because Kansas has no authority to enforce its gaming laws on the Shriner Tract."*

The Court lifted all injunctions against the tribe operating a casino on the tract while the various underlying legal issues are pending. The State was ordered to return the money and equipment seized in the raid. "*There was no legal basis for*

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the state's action and very little likelihood that the state will ever have a legal justification for enforcing its gaming laws on the Shriner Tract." The State was enjoined from taking any enforcement action in the future. Looks like Indian gaming in downtown KCK will resurface again soon.

TEMPORAL LIMITATION ON INVOCATION OF RIGHT TO REMAIN SILENT

When a suspect states, after being advised of his *Miranda* rights, that he does not want to talk to police "right now," he has placed a time-frame or "temporal" limitation on the invocation of his right to remain silent. It is not an unequivocal invocation of the right to remain silent, but is limited to that particular moment in time. An officer can lawfully begin interrogation at a later time by simply asking the suspect whether he is ready to speak now. The officer may clarify the statement further, but is not constitutionally required to do so. The officer has not violated the suspect's right to remain silent by initiating questioning at a later time and the officer is not required to re-read the *Miranda* warning. *State v. Bicker*, ___Kan.App.2d ___ (April 7, 2006).

TELEPHONE HARASSMENT OR CRIMINAL THREAT CAN BE CHARGED IN KANSAS IF EITHER THE CALL OR THREAT WAS MADE IN KANSAS OR THE CALL OR THREAT WAS RECEIVED IN KANSAS

Ian Woolverton and Cathy Rotski were divorced. Wolverton had visitation rights with their daughter. The parties had a very difficult relationship and in 2001 Woolverton was convicted of criminal threat against Rotski. In 2003, as the result of an ongoing dispute about hours of visitation, Woolverton called Rotski from Missouri. He threatened to kill her and take their daughter away so that Rotski would never see her again. Rotski received the call at her home in Johnson County. Rotski was charged and convicted by a jury of criminal threat and telephone harassment in Johnson County District Court. He appealed arguing, among other things, that there was no jurisdiction over this case in Johnson County. He argued that jurisdiction would lie only in Missouri where the words were actually spoken and the call made.

The Kansas Court of Appeals disagreed. In *State v. Wolverton*, ___Kan.App.2d ___ (April 14, 2006), the Court found that a person can be prosecuted in Kansas if a crime is commited wholly or partially in Kansas. If any act which constitutes an element of the offense occurs in Kansas, then Kansas has jurisdiction. Even though the defendant was in another state when he uttered the threat, the defendant communicated the threat to the victim in Kansas and the result of the crime of criminal threat occurred in Kansas.

Editor's note: *This is based on the language of K.S.A. §21-3104(1)(a) of the Kansas Code of Criminal Procedure, which is made applicable to municipal court cases through §12-4408.*

DISCORDANT RELATIONSHIP EVIDENCE IS ADMISSIBLE INDEPENDENT OF THE RESTRICTIONS OF K.S.A. §60-455

In the same case discussed above, *State v. Woolverton*, ___Kan.App.2d ___ (April 14, 2006), Woolverton testified on direct examination that this was a one-time incident in which he just *"sunk to his ex-wife's level"* and he had not done it before, nor would he do it again. The Court allowed the prosecution to ask the defendant on cross-examination if he had in fact been convicted once before of threatening his ex-wife.

The defense argued that this was improper because it was irrelevant and it was inadmissible under K.S.A. §60-455. The Court of Appeals found that Woolverton's prior conviction was relevant to show a continuing course of conduct between Woolverton and Rotski.

K.S.A. §60-455 is commonly referred to as the "other crimes or civil wrongs" provision of the rules of evidence. It states that that fact that a person committed a crime on a specified prior occasion, is inadmissible to prove his or her disposition to commit a crime on this occasion. However, it goes on, such prior crimes can be introduced when it is relevant to proves a material fact in the case, including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. The caselaw states that the trial court must find that (1) the evidence is relevant to prove one of the facts specified in the statute (i.e. motive, opportunity, etc.); (2) the fact is a disputed material fact; and (3) the probative value of the evidence outweighs its potential prejudice.

The Court found that it did not even have to reach an analysis of whether this evidence was admissible under K.S.A. §60-455, because it was relevant to show the discordant relationship between the parties and Woolverton's intent. The evidence is admissible independent of K.S.A. §60-455. In fact the evidence should have been presented in the State's case in chief or in rebuttal evidence and was not properly made a part of cross-examination, but since the defendant didn't object to that fact, the Court did not disallow it on that basis.

Editor's note: *K.S.A. §60-455 of the Kansas Code of Civil Procedure, Rules of Evidence is made applicable to municipal court cases through §12-4504.*

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STATUTORY RIGHT TO JURY TRIAL V. CONSTITUTIONAL RIGHT TO JURY TRIAL

Kansas statutes create a statutory right to jury trial in misdemeanor cases. K.S.A. 2005 Supp. §22-3404(1) states that misdemeanor cases (at the district court level) shall be to the court unless a jury trial is requested in writing by the defendant not later than seven days after the first notice of trial assignment. If the defendant doesn't request a jury trial as provided in the statute, the statutory right is deemed waived.

However, there is also a constitutional right to a jury trial whenever **more** than 6 months imprisonment is authorized. *See* the Sixth and Fourteenth Amendments to the United States Constitution and §5 of the Kansas Constitution Bill of Rights. In cases in which more than 6 months in jail is possible, the defendant does not have to give notice within seven days. In fact, in order to waive a jury trial on a case in which the defendant could be sentenced to more than 6 months in jail, the defendant must be fully advised by the court of his right to jury trial and he must personally waive this right in writing or in open court for the record. *State v. Sykes*, ___Kan.App.2d _____ (April 21, 2006).

Judicial Ethics Opinions

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views on unisex marriage; the candidate's views on who should define pornography; whether the death penalty should be determined, established or denied by the Kansas Supreme Court; the candidate's views of the rights of an unborn child; and whether any portion of the Kansas Constitution is intended to protect a right to assisted suicide.

The candidate inquires whether he or she may respond to the questionnaire without violating the various provisions of the Canons of Judicial Ethics, and in particular Canons 5A(3)(d)(i) and (ii), 5C(2), AND 3e(1). See 2005 Kan. Ct.R. Annot. 555 et seq. The candidate then cites a number of federal cases, including one from the United States Supreme Court, Republican Party of Minnesota v. White, 536 U.S. 765 (2002); and a number from the Circuit Courts of Appeal and the District Courts; all of which hold various provisions of state canons unconstitutional.

In effect, the candidate seeks to have us hold that the various provisions of the Code of Judicial Conduct, as promulgated by the Kansas Supreme Court, are unconstitutional. This we decline to do. Questions regarding the constitutionality of the Code of Judicial Conduct should be addressed to the courts, not to this panel. Such action is not within our limited power. Rule 650(d), 2005 Kan.Ct.R.Annot. 603, which establishes this Panel, states: "Advisory opinions...shall not address issues of law…"

As the Code of Judicial Conduct now stands, it is our opinion that the candidate may not answer the questionnaire. See Canon 5A(3)(d)(i) and (ii).

Opinion JE 140
April 17, 2006

A judge inquires whether it would be in violation of the Canons if the judge were recognized by the naming of two volunteer awards in her honor. The designation of the awards by the judge's name will be by volunteer organizations CASA and Citizen Review Board (CRB). There is no monetary benefit to the judge.

CRB members never appear in court. CASA volunteers regularly attend court hearings pertaining to the child. They rarely testify, but they do submit reports and recommendations to the court. See Rule 110(a)(2), 2005 Kan.Ct.R.Annot. 178.

The Legislature recognized the need for special advocates for children and directed the Supreme Court to adopt rules governing court appointed special advocate programs. K.S.A. 38-1505a. The Supreme Court then adopted Rule 110, 2005 Kan.Ct.R.Annot. 178. Citizen Review Boards are also created by statute, K.S.A. 38-1808, 1812, et seq., and are required to make recommendations to the judge.

The judge is not receiving an award; the judge is not receiving a gift of money or anything else. The question the designation of the award raises is: Will the title given this award convey the impression that member of CASA or CRB or the recipient of the awards are in special positions to influence the judge? See Canon 2B, 2005 Kan.Ct.R.Annot. 560.

The granting of an award bearing the judge's name does not, in our opinion, place the recipient in a special position to influence the judge, nor does it convey that impression.



Legislative Updates

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NOTARY PUBLICS WHO ADVERTISE IN A LANGUAGE OTHER THAN ENGLISH

HB 2485 requires that notary publics who are not licensed to practice law in Kansas and who advertise in a language other than English, must prominently include on the advertisement or letterhead in the language of the advertisement, the following: *"I am not authorized to practice law and have no authority to give advice on immigration law or other legal matters."* Failure to provide this information is a class B misdemeanor. In addition, the same bill states that if a person's notary appointment has been removed due to violation of this provision, he or she may not receive another notary appointment in such person's lifetime. All other violations of the notary rules that result in removal of the appointment are for 4 years.

Editor's Note: *Since this is a new misdemeanor crime, your city may want to adopt a similar provision...or the League may include it in the next edition of the POC.*

VIOLATION OF A PROTECTIVE ORDER EXPANDED TO INCLUDE VIOLATION OF ANY NO CONTACT ORDER ENTERED DURING THE COURSE OF A CRIMINAL CASE

HB 2617 expands the definition of the crime of violation of a protective order to include violation of a no-contact order entered at any time in a criminal case. "Order" includes issuance of an order by a district court or a municipal court.

Editor's Note: *For those cities which have adopted the Uniform Public Offense Code, this will result in the amendment of POC §3.8.1.*

DEPARTMENT OF REVENUE CAN REVOKE OR SUSPEND THE VEHICLE REGISTRATION OF COMMERCIAL VEHICLES WHEN NOTIFIED OF VIOLATIONS BY THE FEDS



SB 373 gives the Kansas Department of Revenue the power to revoke or suspend the vehicle registration of commercial motor vehicles when the federal Performance and Registration Information Systems Management project (PRISM) notifies the state that the motor carrier responsible for a vehicle has been prohibited from operating in interstate commerce. *(See text box, this page for more information on PRISM).*

MISSING PERSON SYSTEM EXPANDED TO INCLUDE ALL MISSING AND ALL UNIDENTIFIED PERSONS

HB 2626 expands the KBI data base to include information regarding all missing persons and all unidentified persons or human remains. This bill expands the requirements to all missing persons. The prior law referred primarily to missing children. It requires information be logged in on unidentified remains in an attempt to identify same and adds coroners to the list of people having responsibility under the law.

It also requires that the person that reported someone missing be notified immediately when the person is located. However, due to concerns from domestic violence groups, an exception was placed in the law prohibiting law enforcement from notifying the reporting party of the miss-

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What is PRISM?

PRISM is a joint project involving state registration and law enforcement agencies, the American Association of Motor Vehicle Administrators (AAMVA), the Federal Motor Carrier Safety Administration (FMCSA), and John Hopkins University Applied Physics Laboratory. It allows state registration and law enforcement personnel to identify motor carriers and their vehicles that were placed in the Motor Carrier Safety Improvement Process (MCSIP) or have had their registrations suspended or revoked.

Using a program called the Safety Status Measurement System (SafeStat), FMCSA evaluates a motor carrier's safety fitness using date from inspections, accident reports, citations and compliance reviews. Motor carriers whose safety fitness falls below a threshold are placed in the MCSIP and their progress is monitored. Sanctions range from a warning letter to vehicle registration suspension or revocation by the state in which the carrier is domiciled.

PRISM provides a way for this carrier safety fitness information to reach state registration and law enforcement (including inspection) personnel. It also provides a way for these individuals to find out, by vehicle, if the carrier to which it is assigned is in the MCSIP or has had its registration suspended or revoked. Registration personnel can then deny vehicle registration to carriers with suspended or revoked registrations and enforcement can more closely scrutinize vehicles assigned to MCSIP carriers, e.g. inspect them more frequently.

Legislative Updates

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ing person's whereabouts if the law enforcement agency has reason to believe that the missing person is an adult or an emancipated minor and is staying at or has made contact with a domestic violence or sexual assault program and does not expressly consent to the release of this information. The bill has very detailed and extensive reporting requirements for local law enforcement.

COACH BILL SNYDER HIGHWAY



Former Kansas State University football coach Bill Snyder was honored through HB 2758 with the designation of part of K-177 and U.S. 24 highways as "Coach Bill Snyder Highway." However, it requires that no signs be erected designating as such until private donations are obtained to pay for the signs at a cost of $1,050 each. Dig deep Wildcats!

CIVIL JURISDICTION LAWS CHANGED

At the behest of KU Law Professor Robert Casad and the Judicial Council Civil Code Advisory Committee, HB 26110 changes the Civil Procedure Code regarding service of process outside the state, known as the long-arm statute, by providing that a person will be considered to have submitted to the jurisdiction of the Kansas courts if substantial, continuous, and systematic contact is established with Kansas that would support jurisdiction consistent with the United States Constitution as well as the Kansas Constitution. In addition to providing personal jurisdiction, the bill would provide *in rem* jurisdiction over specifically identified property that the party may have in the state. The Senate added the Kansas Consumer Protection Act to the list of statutes exempted from the service of process rules established under the long-arm statute.

9/11 MEMORIAL IN ANTHONY, KANSAS



The people of Anthony, Kansas came together to create a memorial to the victims of September 11. The memorial will include steel from the World Trade Center, limestone from the Pentagon and soil from the United Flight 93 crash site in Pennsylvania. HB 2595 designates the Anthony memorial as the official Kansas 9/11 Memorial.

NEW CHILD PASSENGER SEAT RULES FOR THOSE AGES 4-7 AND FINE INCREASE TO $60

HB 2611 amends the Child Passenger Safety Act and requires that children ages 4 –7 who weigh less than 80 pounds or are less than 4'9" in height must be in an approved child safety passenger restraining system. Anyone violating this new provision will just receive a warning until July 1, 2007. In addition, the bill increases the fine from $20 to $60. On cases handled through the district court, $40 of that fine is to go to a special children's advocacy center fund. The bill requires law enforcement officers to notify persons they ticket that the fine will be waived if the person shows proof to the court that they have purchased and acquired an appropriate child restraining system.

Finally, in an interesting exception, the bill states that if the driver is transporting more children in the car than there are "passenger securing locations" and all of the passenger securing locations are being used by children, no ticket can issue.

Editor's Note: *For those cities which have adopted the Standard Traffic Ordinance, this will result in the amendment of STO §182.*

NEW LICENSING PROCEDURE REQUIRED FOR VEHICLE TITLE AGENTS

Vehicle title agents are people/companies that obtain vehicle registration and titles for people for a fee. They usually specialize in securing titles for vehicles and trailers that have been abandoned, impounded, towed and unclaimed, and/or purchased or sold at private or public sale or auction without title. There are approximately 25 of these agents or businesses in Kansas.

HB 2645 requires that these agents now be licensed by the state, pay a fee of $75, and maintain a $25,000 bond with the State Treasurer. They must maintain a log for three years of all of their transactions. The bill was supported by the Kansas Automobile Dealers Association.

INCREASED STANDARDS FOR VETERINARIANS

HB 2835 increases various standards for veterinarians and adds to the circumstances under which a veterinarian's confidentiality privilege of protecting information regarding a client would be waived, including reporting cruel or inhumane treatment of an animal, providing information where necessary to provide emergency care and providing information where the failure to disclose vaccination information may endanger the public health. HB 2833 also deals with the practice of veterinary medicine and en-

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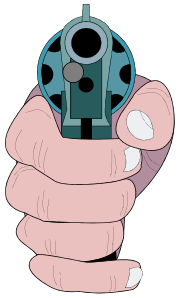
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hances the unlawful practice of veterinary medicine from an unclassified misdemeanor to a B misdemeanor.

TIME TO FILE A SECURITY INTEREST EXTENDED

SB 496 extends from 20 to 30 days the amount of time a dealer or secured party has to file a notice of security interest in a motor vehicle with the Division of Vehicles.

CONCEAL AND CARRY BECOMES LAW IN KANSAS



Overriding a gubernatorial veto, SB 418, titled the *"Personal and Family Protection Act"* added Kansas to the list of states that now allow people to carry concealed weapons.

The bill authorizes the Attorney General to begin issuing four-year licenses to certain persons to carry concealed handguns beginning January 1, 2007. The bill establishes qualifications for licensure and the AG has no discretion regarding licensure if the qualifications are satisfied. The AG has 180 days to issue or deny a license to anyone who applies before July 1, 2007. After July 1, 2007, he only has 90 days to issue or deny.

Concealed carry licenses issued by another state would be valid in Kansas if the standards in that state are equal to or greater than the standards for licensure in Kansas and would only be applicable to non-Kansas residents.

To qualify for a license to carry a concealed weapon, a person must:

1. Be a US citizen;
2. Be a Kansas resident in the county of application for at least 6 months;
3. Be at least 21 years of age;
4. Be free from any physical infirmity that prevents safe handling of a weapon;
5. Desire a legal means to carry a concealed weapon for lawful self-defense; and
6. Present evidence of completion of a 'weapons safety and training course" approved by the AG, a law enforcement agency, or the NRA.

Applications are to be made to the county sheriff in the county of the applicant's residence. A fee of $150 would be collected for new licenses and $100 for a renewal. Forty dollars on a new license and $50 on a renewal can be kept by the sheriff to reimburse for administrative costs and fingerprints. The balance must be forwarded to the AG. The money collected by the AG will go first to cover the cost of administering the act. Any balance will go in to two separate funds, a law enforcement equipment fund (20%) and a forensic laboratory and materials fee fund (80%).

The bill would disqualify from licensure anyone:

1. Who has ever been convicted, placed on diversion, or adjudicated for a felony (adult or juvenile) in any jurisdiction;
2. Who has been determined to be disabled und the Act for obtaining a guardian or conservator unless the person was ordered restored to capacity three or more years before applying for a license;
3. Who is subject to a restraining order under the Protection from Abuse Act or the Protection from Stalking Act;
4. Who is in contempt of court in a child support proceeding;
5. Who has been dishonorably discharged from military service; and
6. Who, during the five years immediately preceding the date of application, has been:

- A mentally ill person or involuntary patient, as defined in K.S.A. 59-2946;
- Committed for abuse of a controlled substance;
- Convicted, placed on diversion, or adjudicated (adult or juvenile) in any jurisdiction for a misdemeanor under the Uniform Controlled Substances Act;
- Committed for abuse of alcohol;
- Placed on diversion or convicted two or more times for driving under the influence of alcohol or drugs; or
- Convicted, placed on diversion, or adjudicated (adult or juvenile) of a misdemeanor under any municipal ordinance or under Articles 34 (crimes against persons) or 35 (sex offenses) of Chapter 21 of Kansas law or a similar law in any jurisdiction.

The AG would have access to expunged records for purposes of determining a person's disqualification.

Licensees could not carry concealed weapons into: police sheriff or Highway Patrol station; detention facility, prison or jail; courthouse; polling place on the day of an election; city council meetings; county commission meetings, political subdivision meetings; city hall; courtroom (except judge or someone authorized by the judge); school, com-

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munity college, university, or professional or school athletic event not related to firearms; any portion of a drinking establishment (except this does not apply to a restaurant); State Fairgrounds; any state office building; public library; church or temple; daycare, group home, childcare centers or preschools; child exchange or visitation centers; community mental health center or state hospital (apparently private hospitals are OK); or any place where the carrying or firearms is prohibited by state or federal law.

Carrying concealed weapons in prohibited places would be a class A misdemeanor.

Any other public or private employer could prohibit weapons in their facilities by posting the property. Violation of carrying a concealed weapon on one of these restricted properties would be a Class B Misdemeanor.

It is also a Class B misdemeanor to fail to carry the license and a valid driver's license or non-driver identification card when carrying the weapon.

The AG must suspend the license whenever anyone commits any of the acts that would prohibit him or her from getting a license to begin with. It is unclear how the AG will become aware that one of the conditions has been met. However, in the case of issuance of a restraining order, the sheriff of the county in which the restraining order is granted must notify the AG "immediately upon receipt of the order." The AG must then immediately revoke the license and give notice to the licensee within 24 hours. Suspension or revocation of a license is subject to judicial review, but the filling of an appeal does not stay the suspension or revocation.

Carrying a concealed weapon while under the influence of alcohol or drugs is a Class A misdemeanor.

Editor's Note: *Since this bill establishes several new misdemeanor crimes, your city may want to adopt similar criminal provisions...or the League may include it in the next edition of the POC.*

KANSAS UNIFORM COMMERCIAL DRIVERS' ACT AMENDED

SB 371 amends various sections of the Kansas Uniform Commercial Drivers' Act to bring it into compliance with the Federal Motor Carrier Safety Improvement Act (hereinafter the "Act.") It requires that the motor vehicle division notify the licensing state of any nonresident commercial driver of the driver's conviction in Kansas of any motor vehicle law, except parking, within 30 days. On September 30, 2008, that time frame drops to 10 days. The Division has 30 days from the receipt of information from another licensing state concerning a Kansas commercial driver to record it on the driver's Kansas license. Again, after September 30, 2008 that time frame drops down to 10 days.

The bill provides civil penalties for drivers and employers who are convicted of violating the Act and makes it clear that a commercial driver will be disqualified for any DUI conviction (in either a commercial or a noncommercial vehicle) including city DUI ordinance violations. Before this amendment, the conviction would have had to be in state court to merit disqualification.

It creates a new Class B misdemeanor for violation of any of the provisions of the Act.

Editor's Note: *Since this bill makes it a misdemeanor to violate any provision of the Uniform Commercial Driver's License Act, cities may want to consider adopting some of the acts provisions as city ordinances. The STO currently only includes the "Commercial DUI" provision. Other provisions that may warrant consideration would be: K.S.A. §8-2,129 (2001); §8-2,130 (2001); §8-2,131 (SB 371); §8-2,132 (2001); and 8-2,141 (SB 371).*

STATE HAS RIGHT TO REQUEST PRELIMINARY HEARING

HB 2616 gives the State the right to request a preliminary hearing in any felony case, except those issued by grand jury indictment.

RELEASE OF LIENS BY LIENHOLDERS

SB 558 requires lien holders of motor vehicles to release fully the lien or encumbrance on a motor vehicle within 3 business days after final payment has been received if payment is made electronically and within 10 business days of payment if the final payment is received in some other form. The bill also provides penalties for non-compliance.

PAY HIKE FOR JURORS

SB 407 allows the board of county commissioners to set juror compensation at an amount of not less than $10 but no more than $50 per day. Currently compensation is set by statute at $10, an amount that was first established in 1972.

COLLISION DAMAGE WAIVER ON RENTAL CARS

HB 2159 creates a definition of "authorized driver" for the purposes of rental insurance coverage. "Authorized

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driver" is defined as the lessee; the lessee's spouse, if such spouse is a licensed driver and satisfies the lessor's minimum age requirement; any person who operates the vehicle during an emergency situation; or any person listed by the lessor on such lessee's contract as an authorized driver.

In addition, several additional provisions were added to include additional exclusions from coverage.

OPEN RECORDS ACT EXEMPTIONS CONTINUED

SB 499 extends the exceptions from the Open Records Act for another 5 years. They were scheduled to expire July 1, 2006.

SAFE BOATING

SB417 amends 11 different statutes and creates 7 new statutes that concern the registration and operation of boats. It creates a new Class A misdemeanor for intentionally defacing, destroying, removing or altering any hull identification number or placing anything on the boat other than the number assigned to it. It also has various provisions dealing with abandonment of a vessel and seizure of the vessel when an officer has probable cause to believe a crime has been committed on it. Notice requirements are also set out in detail.

Editor's Note: *Since this bill establishes several new misdemeanor crimes, your city may want to adopt similar criminal provisions...or the League may include it in the next edition of the POC.*

CRIME VICTIMS COMPENSATION

HB 2761 concerns compensation for the victims of crimes. Current law requires that a claim for compensation be filed within 2 years of the injury or death upon which it is based and lists a few exceptions to the 2 year requirement. This bill eliminates the exceptions. It also adds a provision that would allow compensation otherwise payable to a claimant to be reduced or denied if the victim was likely engaging in or attempting to engage in an illegal act at the time the crime for which the claim is being made occurred. The new provisions shall not be construed to reduce or deny compensation to a victim of domestic abuse or sexual assault.

RESTRICTIVE COVENANTS REQUIRING WOOD ROOFS VOID

In an effort to increase fire safety, HB 2676 declares any restrictive covenant that requires wood shingles or wood shakes as roof covering material for a residential dwelling unenforceable.

FAILURE TO PAY YOUR CITY UTILITY BILL, WILL RESULT IN LIEN AGAINST YOUR PROPERTY

HB 2592 creates a lien on a property receiving services from a municipally-owned or operated utility, if the municipality fails to receive payment for services provided. This only applies to municipally-owned utilities.

SCHOOL BUSES MUST HAVE WHITE FLASHING STROBE LIGHT ON ROOF

HB 2513 requires that any school bus put into initial service after July 1, 2007 be equipped with a white flashing strobe light mounted on the roof of such bus to afford optimum visibility. Many other states have adopted similar laws. The purpose is to increase the visibility of the buses, particularly at night and in foggy conditions.

ALL COLLEGE STUDENTS MUST HAVE MENINGITIS VACCINATIONS

Beginning with the first academic term after July 1, 2007, all incoming college students residing in student housing must be vaccinated for meningitis. If a person refuses such vaccination, the school must have appropriate waiver policies in place. *See,* HB 2752.

QUALIFICATIONS OF WORKERS COMPENSATION ADMINISTRATIVE LAW JUDGES

HB 2696 further defines the qualifications to be a workers compensation administrative law judge. Judges must be lawyers with at least 5 years experience and one year of experience practicing in the area of workers compensation. It also establishes an Administrative Law Judge Nominating and Review Committee. Judges will serve 4 year terms. The attorney must be nominated by the Director of Workers Compensation and the nominee must garner a unanimous vote of the Review Committee in order to be reviewed by the Secretary of Labor for appointment.

CLASSIFYING AN EMPLOYEE AS AN INDEPENDENT CONTRACTOR TO AVOID TAXES

HB 2772 makes it unlawful to knowingly and intentionally misclassify an employee as an independent contractor in order to avoid paying state income tax withholding or employment insurance contributions. It appears that violation of this new statute would result in hefty tax penalties as well as a felony for filing a fraudulent return under K.S.A. §79-3228. The bill also declares that an independent contractor relationship between an owner-operator and a licensed motor carrier may exist during the use of leased vehicles in the transportation of property, so long as the

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licensed motor carrier complies with all statutory and regulatory requirements.

GIFT CARDS AND GIFT CERTIFICATES CANNOT EXPIRE IN LESS THAN 5 YEARS

HB 2658 makes it a violation of the Kansas Consumer Protection Act from and after January 1, 2007 to sell a gift card or gift certificated containing an expiration date which is less than 5 years from the date of purchase. This restriction does not apply to gift cards or certificates which are given away, sold below face value, or sold at a volume discount to employers or non-profit and charitable organizations for fund raising. Merchants however will not be required to redeem a gift card or certificate for cash. Gift cards or certificates do not include prepaid bank cards. Finally, no fees can be charged against the balance of a gift card or certificate within 12 months of date of issuance.

FERAL SWINE



HB 2899 makes it unlawful to import, posses, or transport live feral swine in Kansas and to knowingly release any such animal to live in a wild or feral state upon any land. If feral swine are damaging your property, you must get a permit from the Livestock Commissioner to kill them. It is also unlawful to engage in, sponsor, instigate, assist or profit from the release, killing, wounding of feral swine for the purpose of sport, pleasure, amusement, or production of a trophy. Violations result in a civil penalty.

SCRUFFY'S LAW

SB 408 bifurcates the crime of cruelty to animals, making the intentional and malicious killing, injuring, maiming, torturing, burning or mutilating of any animal a felony with a mandatory 30 days in jail and psychological evaluation. All other acts falling under the cruelty to animals statute would be A misdemeanors for a first offense and felony for subsequent offenses. The bill also upgrades the crime of injuring a police dog, arson dog, assistance dog, game warden dog, or search and rescue dog to a felony. It also prevents any person convicted of cruelty to animals or dog fighting from owning **any** animals, not just dogs.

Editor's Note: *For those cities which have adopted the Uniform Public Offense Code, this will result in the amendment of POC §11.11.*

DANGEROUS ANIMALS

In response to the death of Haley R. Hilderbrand, 17, of Altamont, Kansas, who was killed by a tiger last year while posing with it for senior high school pictures, the legislature adopted several new provisions regarding dangerous animals. SB 578 prohibits a dangerous regulated animal from coming into physical contact with any person other than the person possessing the animal, the registered designated handler or a veterinarian administering medical examinations, treatment or care. It also sets out detailed provisions regarding care and maintenance of such animals, required liability insurance, and seizure provisions.

FOSTER CHILD EDUCATIONAL ASSISTANCE ACT

SB 85 creates the Kansas Foster Child Educational Assistance Act which grants free tuition to Kansas universities, colleges or vo-tech schools for any youth in SRS custody. Some restrictions apply.

MOTORISTS MUST AVOID HIGHWAY WORKERS

SB 411 requires drivers on four lane divided highways to move over to the far lane when passing a stationary vehicle involved in highway work. It also prohibits passing a vehicle when within 100 feet of a highway work vehicle. It also makes numerous violations of the commercial motor vehicle safety regulations, misdemeanors.

Editor's Note: *For those cities which have adopted the Standard Traffic Code, this will result in the amendment of STO §61 and §62.*

NO MORE SEXUALLY-ORIENTED BILLBOARDS

SB 35 bans signs and outdoor advertising for adult cabarets and sexually oriented businesses within one mile of any state highway. It also severely limits the size and content of signs that may be displayed at the business itself.

WORK-SITE UTILITY VEHICLE EXEMPT FROM SALES TAX

SB 76 defines work-site utility vehicles as any motor vehicle which is not less than 48 inches in width, has an overall length, including the bumper, of not more than 135 inches, has an unladen weight, including fuel and fluids, of more than 800 pounds and is equipped with four or more low pressure tires, a steering wheel and bench or bucket-type seating allowing at least two people to sit side-by-side, and may be equipped with a bed or cargo box for hauling materials. These vehicles are deemed exempt from sales tax if used only in farming or ranching operations. Owners are not required to file an application for a nonhighway certificate of title under the provisions of this bill for such work-site utility vehicle, unless they transfer an interest in the vehicle.

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LIFTING RESTRICTIONS ON MOTORCYCLE HANDLEBARS

SB 278 removes language from existing law that prohibits a person from operating a motorcycle with handlebars so positioned that the hands of the operator, when on the grips, are at or above shoulder height.

Editor's Note: *For those cities which have adopted the Standard Traffic Code, this will result in the amendment of STO §141.*

DISOBEYING A SCHOOL CROSSING GUARD

SB 344 makes a new traffic infraction of willfully failing or refusing to comply with a lawful order or direction of any uniformed school crossing guard. It also requires distinctive garb for said guards. However, it specifically provides that school crossing guards shall not have the power to issue citations or make arrests.

UPDATING THE HIGHWAY ADVERTISING CONTROL ACT

SB 253 updates the Highway Advertising Control Act, restructuring fees for signs along highways and authorizing the Secretary of Transportation to adopt rules and regulations to regulate the use of new technology in outdoor advertising.

KPERS GUIDELINES

SB 270 raises the working after retirement salary limitation from $15,000 to $20,000 for retired KPERS members who return to work after retirement for the same employer from which they retired. It also requires any KPERS participating employer who hires a KPERS retired member to pay the KPERS actuarially-determined employer and employee contributions on behalf of the retired member.

ELECTRONIC REMOTE ACCESS TO COURT RECORDS

After a battle between Johnson County and the Supreme Court, SB 505 was adopted which prevents the Supreme Court from requiring that Johnson County or any county collect a fee for electronic access to court records. A county may charge a reasonable access fee, but it is not required to do so. If a fee is charged, it must be waived for indigency and the state board of indigents' defense services and court-appointed attorneys must be exempted from any fees. Only the county can access a fee. In addition, the bill expands the permitted uses for the Judiciary Technology Fund to include establishing, operating, and maintaining a state-wide system of electronic remote access, ***at no cost to users***, to court records that are otherwise public records. In a related action, SB 480 transfers the money in the Supreme Court's Emergency Surcharge Fund into the Judicial Technology Fund and eliminates the Emergency Surcharge Fund.

UNIFORM REAL PROPERTY ELECTRONIC RECORDING ACT

SB 336 states that if a law requires, as a condition for recording, that a document be an original, paper document or other tangible medium, or be in writing, the requirement would be satisfied by an electronic document. Further, an electronic signature would satisfy any law requiring, as a condition for recording, that a document be signed. A 15-member Electronic Recording Commission would be created to develop electronic recording standards.

IT IS A FELONY TO BE A TERRORIST

SB 25 creates several new felonies involving terroristic acts. "Terrorism" is defined as the commission of, the attempt to commit or the conspiracy to commit any felony with the intent to intimidate or coerce the civilian population, influence government policy by intimidation or coercion or to affect the operation of any unit of government. Also made felonious, is the illegal use of weapons of mass destruction. The penalty for either of these offenses is life in prison. It also makes it unlawful to acquire property, conduct financial transaction involving property, or invest in property, among other things, for the purpose of facilitating a terrorist act. There is no statute of limitations for prosecution of these offenses. The bill authorizes judicially approved, *ex parte*, wiretapping to obtain evidence of terrorism or illegal use of weapons of mass destruction. It also adds these offenses to those that give rise to a forfeiture action.

IDENTITY THEFT LEGISLATION

SB 196 makes it a felony to possess or use scanning devices or re-encoders to obtain information from payment cards. It also prohibits making any document available for public inspection and copying that contains an individual's social security number and personal information. "Personal information" is defined as name, address, phone, e-mail address, driver's license number, social security number, financial account numbers. This does not apply to official records in the recorder of deeds office, court records, professional licenses, bankruptcy filings, conviction or arrest information, liens, eviction records, judgments, and filings in the secretary of state's office or information that is lawfully made available to the general public from federal, state or local government records. It also restricts how businesses can use social security numbers.

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It details a chain of events that must take place whenever any business or governmental entity becomes aware of a breach in its personal information security system.

The bill upgrades the level of felony if the identity theft amounts in a monetary loss in excess of $100,000. It also contains a provision that when the court orders restitution be paid to the victim, the restitution amount may include attorneys fees and costs incurred to repair the victim's credit history or rating, in addition to reimbursement for any debt, lien or other obligation incurred by the victim as a result of the identity theft. Computer systems and networks used in the crime are also subject to forfeiture.

Finally, the bill amends the Fair Credit Reporting Act to allow a consumer who is the victim of identity theft to request a security freeze on his or her consumer credit report. A fee could not be charged for this service. The bill is quite lengthy, but it also requires that those businesses or entities in possession of personal information, take reasonable steps to destroy the personal information in their files when no longer needed. The security freeze provisions do not go into effect until January 1, 2007.

VICTIMS OF IDENTITY THEFT CANNOT BE CHARGED EXPUNGEMENT FEES

SB 196 also amends K.S.A. §12-4516a and prohibits municipal courts from charging an expungement fee to victims of identity theft who are trying to expunge wrongful arrest information. A similar provision was inserted in the district court expungement provisions at K.S.A. §22-2410.

REMOVAL OF DISCRIMINATORY RESTRICTIVE COVENANTS

HB 2582 requires all homes associations, without seeking approval from their members, to remove all restrictive covenants in their governing documents in connection with the sale or rental of real property that violate Kansas laws that forbid discriminations based on race, religion, color, sex, disability, familial status, national origin or ancestry and record this removal with the register of deeds by September 1, 2006. It allows a city to give written notice to a homes association requesting that they delete said restrictive covenants, and if they do not do so within 30 days, the city may seek injunctive relief to force their removal and recover attorneys fees for same. It also requires that all home's association board meetings be open to the public. Finally, it requires home's associations to adopt an annual budget and make a copy of its budget available to any homeowner within 30 days of a request.

FLAVORED MALT BEVERAGE ACT



HB 2955 enacts the Flavored Malt Beverage Act. It clarifies that flavored malt beverage products will no longer be classified as "liquor", but will instead be included in the definition of cereal malt beverage. Examples of "flavored malt beverages" are Skyy Blue, Bicardi Silver, Smirnoff Ice, Mike's Hard Lemonade, Zima, Captain Morgan Gold, and Jack Daniels Hard Cola. Like beer, flavored malt beverages are created in breweries using water, yeast, fermented malted barley and hops. But unlike beer, they are then flavored with citrus, vodka, and other highly concentrated ingredients. Both drinks typically have an alcohol content of about 5% by volume.



Legislation to watch for during the wrap-up session:

- ***A new 12 year decay for DUI convictions or diversions***
- ***An increase in state court costs by $10 to support the Law Enforcement Training Center in Hutchinson***
- ***No proof of insurance added to list of "traffic offenses" so juveniles can be charged with that offense through municipal court***
- ***Third time DWS designated a felony***
- ***Driver's license restriction for anyone owing back child support***

This is legislation currently "on the table" that has a fairly good chance of passing during the wrap up session which begins April 26.

Kansas Launches "Safety Belt" Mobilizations to Boost Safety Belt Use and to Save Lives

By Randy Bolin, Regional Program Manager, NHTSA, Region 7, Kansas City, Missouri

Nearly one in three Kansans' still fail to regularly wear their safety belts when driving or riding in a motor vehicle, according to the Kansas 2005 Safety Belt Observational Survey. Among those least likely to buckle up: young males, pickup truck drivers and their passengers, and people who live in rural areas.



In Kansas, the percentage of drivers and passengers observed not wearing their safety belts is 31 percent, well above the national figure of 18%. But failure to regularly wear a safety belt can be deadly. According to NHTSA, 390 passenger car and light truck occupants died in Kansas traffic crashes during 2004 – and 58% percent of those killed were NOT wearing their safety belts at the time of the crash.

That's why the Kansas Department of Transportation in association with the National Highway Traffic Safety Administration is implementing two safety belt mobilizations in May of 2006 to mobilize law enforcement agencies to aggressively write citations. The "Buckle up in Your Truck Campaign" and the "Click It or Ticket" mobilization are being implemented to reduce Kansas fatalities. Both campaigns involve a high visibility enforcement public information component prior to the enforcement period.

Regular safety belt use is the single most effective way to protect people and reduce fatalities in motor vehicle crashes. When worn correctly, safety belts have proven to reduce the risk of fatal injury to front-seat passenger car occupants by 45 percent – and by 60 percent in pickup trucks, SUVs and minivans.



In 2004, 363 of 461 Kansas motor vehicle fatalities were in rural areas. Of those, there were 84 occupants of pickup trucks killed, of which seventy-nine percent were not restrained. Nationally, seventy-four percent of passenger vehicle occupants who were totally ejected from their vehicle were killed. While rollovers can occur in any kind of passenger vehicle, pickup trucks are twice as likely to rollover as cars, because they have a higher center of gravity.

Too many people still take the attitude that it will never happen to them. But fatal crashes can and do happen every day. That's why law enforcement will be out in force writing citations to save lives. Law enforcement officers would much rather write a thousand tickets than have to knock on one family's door with the news that their loved one didn't survive a crash because they weren't wearing their safety belt.

FAMOUS KANSANS TODAY

We often hear about famous Kansans in the past like Dwight Eisenhower, Amelia Earhart, Walter Chrysler, Langston Hughes, but what about famous Kansans of today? Here are just a few who spent many of their formative years and attended high school in Kansas:

Steve Doocy, FOX Anchor, Fox and Friends, Abilene, Kansas

Martina McBride, Country Music Star, Sharon, Kansas

Chely Wright, Country Music Star, Wellsville, Kansas

Jason Sudeikis, Featured Player, Saturday Night Live; Overland Park, Kansas

Gen. Richard Meyer, former Chairman, Joint Chief's of Staff, Overland Park, Kansas

Dr. Phil McGraw, Talk Show Host, Overland Park, Kansas

Rob Riggle, former Featured Player, Saturday Night Live, Overland Park, Kansas

Darren Lynn Bousman, Writer and Director of Saw II, Overland Park, Kansas

Mancow Muller, Disc Jockey, Chicago, regular on Fox and Friends, Prairie Village, Kansas

Danni Boatwright, Winner, Survivor, Guatemala, Tonganoxie, Kansas

Paul Rudd, Actor, (Phoebe's husband on *Friends*) Overland Park, Kansas

Maurice Green, Olympic Gold Medalist, Kansas City, Kansas

AND THE GENERAL SAYS:



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

AG OPINION NO. 2006-7
MARCH 2, 2006

Retail liquor licensees may not give away free alcoholic liquor. The Director of ABC asked whether K.S.A. §41-308 (b) actually gave authority for liquor give-aways:

"The holder of a retailer's license shall not sell, offer for sale, give away or permit to be sold, offered for sale or given away in or from the premises specified in such license any service or thing of value whatsoever except alcoholic liquor in the original package, except that a licensed retailer may…(3) include in the sale of alcoholic liquor any goods included by the manufacturer in packaging with the alcoholic liquor, subject to the approval of the director; and (4) distribute to the public, without charge, consumer advertising specialties bearing advertising matter, subject to rules and regulations of the secretary limiting the form and distribution of such specialties so that they are not conditions on or an inducement to the purchase of alcoholic liquor." K.S.A. §41-308(b).

Given the general tenor of the era in which the liquor laws were enacted and the backdrop of temperance-oriented liquor laws, the General opined that K.S.A. §41-308(b) was not intended to allow retailers to give away free alcoholic liquor, but rather to limit what other items or services they could provide.

AG OPINION NO. 2006-8
MARCH 16, 2006

Because law enforcement officers will often have heightened concerns about privacy due to safety and work considerations, in most instances identifying information such as photographs, home address, home telephone number and identity of family members of an officer may be lawfully closed pursuant to K.S.A. 2005 Supp. 45-221(6)(30). K.S.A. 2005 Supp. 45-221(a)(4) may also allow a public agency to close such identifying information of a public law enforcement officer who is an employee of the agency. The exception to this general rule would arise if a determination is made that the officer in question has somehow consented to the release or waived a claim of privacy, or that the general public interest served by releasing such information somehow outweighs the personal privacy rights of the individual.



Supreme Court Updates Code of Judicial Conduct

Supreme Court Rule 601A, Canon 5C(4) was amended effective January 30, 2006 as follows:

(4) An incumbent judge who is a candidate for retention in office without a competing candidate and whose candidacy has drawn active opposition may campaign in response thereto in the manner provided in Section 5C(1)(b)(i), (ii), and (iii) and may obtain publicly stated support and campaign funds in the manner provided in Section 5C(2). An incumbent judge may, however, establish a committee in a manner and for purposes consistent with Section 5C(2) no earlier than 12 months prior to the election, but funds may not be expended (except for production of campaign materials) nor may statements in support or such materials be disseminated by said committee unless and until such candidate has drawn active opposition. For purposes of K.S.A. 25-4157, a committee formed under this provision shall be deemed terminated 60 days after the election.

By order of the Court, this 30th day of January, 2006.

Kay McFarland, Chief Judge

COURT SECURITY: ANTI-GOVERNMENT EXTREMISTS

By Robin Barnard, Court Administrator, Overland Park

Every judge needs to understand the seriousness of dealing with anti-government extremists. These people are considered "domestic terrorists", and while they are not always well organized or tightly affiliated with one another, they are very dangerous and they are obsessed with courts and judges.

Our mistake is to think of them as relatively harmless kooks. They file frivolous motion after frivolous motion. They file lawsuits against cities and every employee of the government that has played a part in violating their rights. They take up an incredible amount of time in clerk's offices and courtrooms. In fact, "paper terriorism" is their stock and trade. The more paper they can file, the more they can bog down the system in hopes that government will simply give up and leave them alone.

However, if we don't remember ANYTHING else about these people, we should remember this sentence:

EXTREME IDEOLOGY LEADS TO EXTREME ACTION.

The other criminal types that we deal with every day do not subscribe to extreme ideologies. For the most part, they just didn't think they would get caught. Most would not tell you that they think stealing is okay…they even think it is WRONG…but they had an excellent excuse the day they did it, and who is it really going to hurt anyway? But anti-government extremists believe that the laws have no application to them. Courts have no authority over them.

Experts refer to the extremists we see most often in our Kansas courts as members of the "Sovereign Citizen Movement" an off-shoot of the "Posse Comitatus" movement which reached its peak in the mid-80's. They fall under the category of "single issue patriot groups" and their central uniting theme is that all or part of our government is illegitimate. Of all anti-government groups these people are the most likely to break the law. They frequently come into our courts for having "homemade" license tags, unkept property or property foreclosure actions.

In the courtroom and in written motions you will recognize the statement that they do not have a contract with your city or county or state. You will hear: *"I am my own sovereign entity and do not accept the false authority of this court"*. You will hear: *"I represent myself in court but am ultimately represented by Jesus Christ."* Many of them believe that there is an original, covered-up government that they owe allegiance to and they are obsessed with old, long legal documents and "missing amendments" that reveal our true but hidden history. They create fictitious financial documents, vehicle registration forms and other government issued documents. They certainly don't believe they should have to pay taxes, and yellow fringe on the flag in your courtroom sends them into an absolute frenzy. Conspiracy theories abound.

A statement of doctrine that is commonly included in their case filings is: *"My body and soul and all fruits thereof are solely my property, over which I exercise absolute control. Only through my explicit uncoerced consent can my absolute power over my property be diminished by another man, regardless of how many he may be or under what name or alleged authority he masquerades."*

Judges across the Midwest must begin to see that these people are not that distantly related to David Koresh and the Branch Davidians….Randy and Vickie Weaver in Ruby Ridge….Timothy McVeigh. All of them share the same anti-government ideology. All of them value freedom from all government interference at all costs.

September 11th brought international terrorism into our homes and made us believe that we are vulnerable to hate and the actions that come from it. Domestic terrorism is real and the courts and judges are a prime target. Some groups are more inclined toward white supremacy. Some are more religiously based or nationalist oriented. Some still burn crosses and some still tattoo swastikas or Nazi SS lightning bolts on themselves and their children. Some order race-based murders from prisons. Some build bombs and some amass weapons and supplies in preparation for wars that they hope will happen on their own soil. Some are on the internet all day and some do not know how to read. Some are successful and live and work in your neighborhoods. Some are reclusive and have never really succeeded at anything until they succeeded in finding others who share their hate.

I urge judges and court personnel to become educated about these groups. Resources are easily available to you through the Southern Poverty Law Center's Anti-Defamation League. At www.intelligenceproject.org you will find a huge amount of research and can subscribe for free to their publication called *The Intelligence Report*.

Anti-government extremists hate courts and hate judges. They hate the police and they hate local government. They are very dangerous and have a long history of killing people. Be cautious.

Additional Reference:

Francis X. Sullivan, *"The Usurping Octopus of Jurisdictional Authority": The Legal Theories of the Sovereign Citizen Movement*, 1999 Wis. L. Rev. 785 (1999).

ADSAP PROCEDURES

BY GREG NICKEL ~ NEWTON, KANASAS

In reviewing our ADSAP procedures, we have found them to be needlessly complex and not matching the requirements laid out by statute. We also surveyed courts to see how DUI evaluation fees are handled elsewhere and have found that our current procedures may be fairly common. Below is an overview of our research which may differ from other opinions; we welcome feedback and further interpretations of the statute.

$150 Fee Required: Unless waived on the basis of indigency[(1).] a $150 fee is to be charged by the court to each DUI defendant[(2)]; the defendant may not receive credit for a private payment made directly to the provider[(2),(3).]

$150 per Case: In the event that one defendant has two pending DUI cases that can be served by one evaluation, the $150 fee may/should be applied twice. The statute does not expressly require this, but assessing for each case seems to be an equitable policy as the precedent established by other costs (court costs, judicial training fund, probation fees, KBI lab fees.) is that these costs are assessed per case or per charge, not per person. Additionally, giving a break to person for being a rapidly repeating offender is of questionable merit. In the interest of consistency, and of keeping the ADSAP fund salient, applying a $150 charge to each DUI case may be the best policy.

Administrative Costs: The court may retain a maximum of 10% of the amount collected to cover the administrative fees[(4).]

Payment to Evaluation Facilities: Invoices submitted to the court by evaluation facilities are to be paid from the general ADSAP fund[(5)] Payments from the fund should be applied to the cost of the evaluation, not for subsequent treatment[(6)] Attorney General opinion 95-17 indicates that this fund is to be self-supporting despite the fact that the defendant's obligation may be waived due to indigency[(7).] Under this arrangement, the compensation to evaluation facilities is not linked to payments made by the defendant; rather, payment is made immediately from the general ADSAP fund. Experience with court management teaches that other reasons also exist for which a defendant may not pay his/her evaluation fee (the defendant may leave the state, default on his payments, and etc). If the evaluating facility is to be compensated regardless of the individual defendant's situation, and if the fund is to be self-supporting, it follows that the amount of compensation must account for fees waived due to indigency, collection rates, and the 10% withheld for administrative costs. To administer this, the compensation rate may be by contract agreement between the court and the evaluation facility[(8).] A wise policy may be to contract with evaluation facilities to pay them a specified smaller amount per evaluation ($100/eval, for example). This may be appealing to providers as they would be assured of immediate payment in full without collection headaches. In the event that collection rates are underestimated, the ADSAP account could run a surplus. As statute precludes courts from using excess funds for anything other than ADSAP purposes, one option available is to distribute excess funds to the evaluation facilities on a pro rata basis[(9).] Creating a policy specifying that any such distribution would be made only to the local providers may be an acceptable way to administer these distributions.

Footnotes:

[(1)] KSA 8-1008(e): .The $150 assessment may be waived [.] if the court or prosecuting attorney finds that the defendant is an indigent person.
[(2)] KSA 8-1008(e): .$150 shall be assessed against the person by the sentencing court or under the diversion agreement.
[(3)] AG 95-17: .K.S.A. 8-1008(e) requires the assessment for everyone unless it is waived [due to indigency].. An applicable comment is added stating, .there is no exception for persons who are allowed to have their presentence evaluations done in another county or out of state.
[(4)] KSA 8-1008(e): .not more than 10% of the money credited to the fund may be expended to cover the expenses of the court involved in administering the provisions of this section.
[(5)] AG 95-17: "...the cost of the presentence evaluation is to be paid from the assessment monies placed in the alcohol and drug safety action fund of the sentencing court [.] the alcohol and drug safety fund is the source for payment of presentence evaluations..
[(6)] AG95-17: "...it is our opinion that the individual is responsible for paying the costs of any alcohol and drug education, rehabilitation or treatment but since one of the purposes of the assessment is to pay for the presentence evaluation, the alcohol and drug safety fund is the source for payment of presentence evaluations.
[(7)] AG 95-17: . .If the assessment is waived in situations where the defendant is indigent, who pays for the presentence evaluations?. As previously indicated, the alcohol and drug safety action fund is the source for payment of presentence evaluations [.]. We note that when the state alcohol and drug safety action fund existed, the law authorized SRS to increase the assessment amount so that the program could be financially self-supporting.
[(8)] KSA 8-1008(e) . .In the provision of these services the court shall contract as may be necessary to carry out the provisions of this section..
[(9)] AG 2002-22 ....distribution of those [excess] funds to each certified program on a pro rata basis is permissible.

What is J.A.I.L?

J.A.I.L. stands for Judicial Accountability Initiative Law. This is currently certified as an amendment to the South Dakota constitution (meaning it got enough signatures to be placed on the ballot) and will be voted on by the electorate in November of 2006. Here is an excerpt:

> *" We, the People of South Dakota, find that the doctrine of judicial immunity has the potential of being greatly abused; that when judges do abuse their power, the People are obliged - it is their duty - to correct that injury, for the benefit of themselves and their posterity. In order to insure judicial accountability and domestic tranquility, we hereby amend our Constitution by adding these provisions as §28 to Article VI, which shall be known as "The J.A.I.L. Amendment."*
>
> *1. Definitions. Where appropriate, the singular shall include the plural; and for purposes of this Amendment, the following terms shall mean:*
>
> *a. Blocking: Any act that impedes the lawful conclusion of a case, to include unreasonable delay and willful rendering of an unlawful or void judgment or order.*
>
> *b. Judge: Justice, judge, magistrate judge, judge pro tem, and all other persons claiming to be shielded by judicial immunity. . .*
>
> *2. Immunity. No immunity shall extend to any judge of this State for any deliberate violation of law, fraud or conspiracy, intentional violation of due process of law, deliberate disregard of material facts, judicial acts without jurisdiction, blocking of a lawful conclusion of a case, or any deliberate violation of the Constitutions of South Dakota or the United States, notwithstanding Common Law, or any other contrary statute."*

The Amendment goes on to set up a "special grand jury" that will try the judge for violations, either civilly or criminally. Its decisions are not reviewable by any state court. Judges, lawyers, and law-enforcement personnel, active or retired, are not allowed to serve on the jury.

February 16, 2006 the South Dakota Legislature adopted a resolution urging the voters of South Dakota to vote against the amendment. Here is an excerpt from Resolution HCR 1004:

> *WHEREAS, the author of Amendment E has publicly stated that with the passage of Amendment E, Judicial Accountability Initiated Law members from across the country will "purposely drive to South Dakota...just for the privilege of getting a traffic ticket so you can demand a jury trial. I anticipate traffic courts to be among the first courts to all but totally close…," thus depriving South Dakota citizens of their constitutional right of access to our courts…"*

If this passes, the founder of the J.A.I.L. movement, Ron Branson, has vowed to push forward to every state in the union. Many states already have chapters and have attempted without success to get the initiative on their statewide ballots.

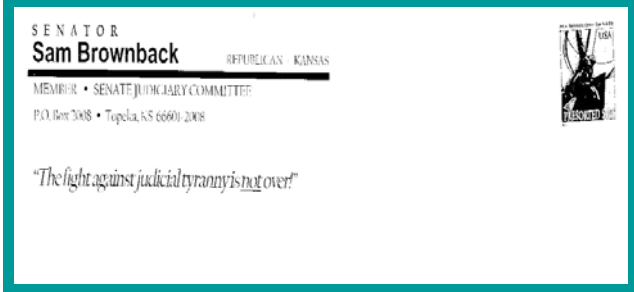
See:

Full text of HCR 1004:
http://legis.state.sd.us/sessions/2006/bills/HCR1004enr.htm

Full text of Amendment E:
http://www.southdakotajudicialaccountability.com/amendment.htm

Home page of Jail 4 Judges movement:
http://www.jail4judges.org

Envelope from a recent fund raising letter sent to constituents:



"The fight against judicial tyranny is <u>not</u> over!"

"In this age of mass communication, harsh rhetoric is truly dangerous. It seems to me that even though we cannot prove a cause-and-effect relationship between rhetorical attacks on judges in general and violent acts of vengeance by a particular litigant, the fostering of disrespect for judges can only encourage those who are on the edge or on the fringe to exact revenge on a judge who displeases them."

Comment made May 18, 2005, by The Hon. Joan Lefkow, (who's mother and husband were murdered in February 2005 in her Chicago home by a disgruntled litigant) in response to Pat Robertson, founder of the Christian Coalition, who had recently appeared on a national talk show and criticized judges with agendas by saying their *"gradual erosion of the consensus that's held our country together is probably more serious than a few bearded terrorists who fly into buildings":*

Unpublished Opinions

(Continued from page 43)

CORNER LOT MAY HAVE TWO "FRONT YARDS" FOR PURPOSE OF ZONING ORDINANCE

Unpublished Decision

Susan Christie lives at 5401 Switzer in Merriam. It is a corner lot. Her front door faces Switzer to the west and the garage and driveway face 54th Street to the north. The City of Merriam has a zoning ordinance which permits outside storage of boats and trailers so long as they are located behind the front building line and more than 7 feet from the side property line.



When Christie parked a boat and two trailers in her driveway, facing 54th Street, the City code officer wrote her a ticket for violating the above mentioned zoning ordinance. The City argued that since she had a corner lot, she has two front yards, one facing Switzer and one facing 54th Street. The yard on the east side of her house is considered the "side yard" It required her to move the boat and trailer to the side yard, behind the front line of the house that faces 54th Street and more than 7 feet from the east property line. She was convicted in municipal court, fined $500 and sentenced to 90 days in jail. She appealed to district court.

Christie's attorney filed several motions before trial, including a motion to dismiss or discharge. The parties entered stipulated facts and presented two legal issues to the Court. First, under the ordinance, does the defendant have two front yards and second, whether the items are prohibited as an impermissible accessory use because they are stored in the front yard, not behind the front lot line. After hearing, the District court, notwithstanding protests from Christie's attorney that the matter was just being heard on the motions, entered a finding of guilty of violating the city ordinance and imposed a $50 fine. Christie appealed to the Kansas Court of Appeals.

In *City of Merriam v. Christie*, 2006 WL 995356 (Kan. App. April 14, 2006), unpublished disposition, the Court held that Christie's property indeed has two front yards, and as such her boat was improperly parked in the front yard in violation of the zoning ordinance.

However, the Court found that Christie was denied a *de novo* trial on her appeal to the district court. The matter was presented to the court only on her pre-trial motions on stipulated facts, the issue of guilt or innocence was not to be resolved on those facts. The defendant argued that she had other arguments to make regarding the constitutionality of the zoning ordinance, whether the complaint was fatally defective, and whether the City was estopped from enforcing the ordinance against her under a "grandfathering" theory.

The Verdict

Therefore, the district court's denial of her motion to discharge was affirmed by the Court of Appeals, but the Court remanded the case for trial, including consideration of her various defenses.

MORE FAMOUS KANSANS TODAY

Here are some more famous Kansans of today:

Kirstie Alley, Actress, *Cheers*
Wichita, Kansas

Mike Jerrick, Newscaster, Fox and Friends
Wichita, Kansas

Melissa Ethridge, Country Music Singer/Songwriter,
Leavenworth, Kansas

Arlen Spector, Pennsylvania Senator
Russell, Kansas

Tim Kaine, Governor of Virginia
Overland Park, Kansas

Steve Hawley, Astronaut
Salina, Kansas

Ed Asner, Actor
Kansas City, Kansas

Barry Sanders, Hall of Fame Football Player
Wichita, Kansas

Lynette Woodard, First Female, Harlem Globetrotters
Wichita, Kansas

Gale Sayers, Hall of Fame Football Player
Wichita, Kansas

Christopher Backus, Model, Husband to Mira Sorvino
Overland Park, Kansas

Julie Meyers, Director, US Immigration & Customs Enforcement, Homeland Security
Overland Park, Kansas

Constance Ramos, Designer, Extreme Home Makeover
Kansas City, Kansas

Janet Murguia, President, CEO, National Council of La Raza
Kansas City, Kansas

Unpublished Opinions

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

RESISTING ARREST

Unpublished Opinion

Officer Poe tried to stop Nathan Atkinson for speeding, 50 mph in a 30 mph zone. Atkinson refused to stop until he pulled into a residential driveway, jumped out of the car and ran to the front door of the residence. The officer yelled at him to stop and return to the car, but the defendant refused. The defendant was knocking on the door as the officer approached. The officer pushed him against the door to prevent him from going inside. He turned around and grabbed the top of the officer's gun and said "I could have shot you." A fight ensued. The officer hit the defendant several times in the back of the legs with his baton and placed him in a "full nelson." His back-up arrived during the fight and sprayed pepper spray at the defendant and kicked him in the groin, all in an attempt to subdue him. He was eventually handcuffed and placed in the patrol vehicle where he tried to kick out the patrol car windows. Officer Poe ended up with a separated shoulder out of the incident. Atkinson was charged through Wichita Municipal Court with two counts of battery on a law enforcement officer (presumably Poe and his back-up) and two counts of resisting arrest (again presumably one count for resisting Poe and one for resisting his back-up officer).

He was convicted of all four counts and appealed to the District Court. The defendant claimed self-defense. During his jury trial two neighbors who witnessed the disturbance testified that the defendant was cooperative and did not struggle. They corroborated his story that he was simply trying to protect himself from excessive force. Poe and his back-up testified that the defendant was anything but cooperative and in fact battered and resisted them. At the close of trial, the judge dismissed one of the counts of resisting as duplicative. The jury found the defendant guilty of one count of resisting arrest, and not guilty of the battery charges. He appeals to the Court of Appeals arguing the evidence was insufficient to enter a guilty verdict on the remaining count of resisting arrest. In *City of Wichita v. Atkinson*, 2006 WL 213877 (Kan.App. 2006), the Kansas Court of Appeals held that it was not its role to reweigh the evidence and re-determine the credibility of the witnesses. When viewed in the light most favorable to the City, the City presented sufficient evidence for a jury to conclude that the defendant was guilty of resisting arrest.

OFFICER NOT REQUIRED TO IGNORE EVIDENCE OF INTOXICATION OBTAINED AFTER HANDING DEFENDANT TRAFFIC CITATION

Unpublished Decision

Hays Police Officer Schmidt stopped Brandon Green for making an improper turn. When she first approached she noticed he had bloodshot eyes. When she returned to his vehicle to give him the citation and explain it to him, she smelled the odor of alcohol coming from him. At that point she had him step out of the car and do field dexterity tests. She ended up charging him with DUI. Green challenged his driver's license suspension. He argued that once the purpose of the traffic stop had been accomplished, to wit: the writing and delivery of the ticket, he should have been allowed to go. Since it is not illegal to have a drink before driving, the mere odor of alcohol is not sufficient to support a claim of reasonable suspicion.

The Kansas Court of Appeals disagreed. In *Green v. Kansas Department of Revenue*, 2006 WL 265238 (Kan.App. February 3, 2006), the Court held even though the odor of alcohol alone does not support reasonable suspicion to justify a stop (citing *City of Hutchinson v. Davenport*, 30 Kan.App.2d 1097(2002)), Green was lawfully stopped for a traffic offense. Once lawfully stopped, an officer is not required to turn a blind eye to indicia of criminal activity unrelated to the traffic offense. The officer was entitled and obligated to investigate further once she noticed the bloodshot eyes and odor of alcohol. She had a reasonable suspicion that Green had committed, was committing, or was about to commit the crime of DUI. The brief continued detention was justified under the circumstances.

ODOR OF A KNOWN MASKING AGENT MAY PROVIDE REASONABLE SUSPICION NECESSARY TO JUSTIFY AN INVESTIGATORY DETENTION

Unpublished opinion

Officer noticed defendant's car weave within its own lane, crossing over the fog line, and going left of center. After following the car for approximately 5 miles, he stopped the vehicle and the defendant properly produced his driver's license. Although the officer did not notice any odor of alcohol, he did notice a strong odor of mint in the car. He

(Continued on page 43)

Unpublished Opinions

(Continued from page 42)



testified that his training taught him that mint could be used to mask the smell of alcohol. He decided to have the defendant step from the car so he could conduct some more tests to determine if the defendant was under the influence of alcohol. His performance on the tests lead the officer to arrest the defendant for DUI.

The defendant's driver's license was suspended and he appeals the suspension on the basis that the officer did not have reasonable grounds to get the defendant out of the car to conduct further tests. He argued that the officer had no reasonable basis to suspect DUI and that he must not have been too concerned about his operation of the vehicle because he followed him for 5 miles.

In *Francis v. Kansas Dept. of Revenue*, 2006 WL 686401 (Kan. App. March 17, 2006), the Court of Appeals conceded that an officer must have a reasonable suspicion of criminal activity to continue an investigation. However, it also recognized cases that support the proposition that the strong odor of a known masking agent may be probative of illegal activity. In this case, the officer detected the strong odor of mint, which he testified is often used to mask the odor of consumed alcohol. In addition, the events occurred at 1:30 a.m., a time he testified when up to 10% of the driver's on the road are impaired. And finally, the defendant had a difficulut time maintaining his lane of traffic. All of these factors combined, support a resonable suspicion that the defendant was impaired. His license suspension stands.

LITIGIOUS PROPERTY MAINTENANCE CODE VIOLATOR

Unpublished Decision

In 1998 Bryan Dahl was building a house in Shawnee. He had the foundation walls completed, when a 24,000 pound boulder dislodged from the hillside above his property and crashed into the foundation. A city plans examiner viewed the property and told him he had 30 days to take steps to repair or remove the foundation and provide structural stability to the foundation and excavation. Dahl did nothing. The City Council passed a resolution setting a hearing to show cause why the structure should not be ordered repaired or demolished. The City Codes Administrator advised the Council that the structure was unsafe, open and attractive nuisance to children in the area.

A hearing was held in which Dahl and his father attended and spoke. The City found the structure to be unsafe. It ordered Dahl to install safety fencing within two weeks and to submit an engineering plan to repair or remove the foundation within 3 weeks. If he failed to do so, the City could cause the foundation to be removed, filled, and the area seeded and mulched. Dahl did nothing. A little over a month after the Council meeting, he filed an action in the district court for a permanent injunction against the city and a temporary restraining order to prevent the removal of the foundation. He did not send a copy of the action to the City , never called to tell them he was going to appeal, nor did he ever serve the City.

The City proceeded with the demolition of the foundation. It hired Midland to do the work. Several months later the City notified Dahl that he was in violation of City ordinance by having several piles of lumber and orange temporary fencing lying on his property. He was given 30 days to correct the violation. He did not and an action was filed in Shawnee Municipal Court. Dahl also had tall grass growing on his property. The City notified him of this violation and gave him time to correct and he did not.

Dahl's violations just kept on coming. A month later, having received complaints regarding his truck parked on the street, a green sticker was placed on it notifying him it was in violation of city ordinance. It remained parked in the same location 48 hours later. Dahl was issued a ticket for parking a commercial vehicle in a residential area. Dahl's truck was towed. He was notified that it was his responsibility to to reclaim the truck from the tow lot and pay all necessary fees. If he did not do so within 30 days the tow company could dispose of the truck. In the meantime, the Shawnee Municipal Judge dismissed the ticket on "procedural grounds."

Dahl racked up $7, 992 in storage fees. Although at one point his father tried to negotiate the payment of the fees, the truck ended up being sold at auction for $1,500. Dahl unleashed a series of lawsuits against Midland, the city of Shawnee, Red Oak Hills Homes Association, Santa Fe Tow, and several individual homeowners for trespass, intentional infliction of emotional distress, intentional or negligent misrepresentations, private nuisance, inverse condemnation, conversion, and conspiracy to deny him his rights. All of his suits were eventually either dismissed or consolidated into *Dahl v. City of Shawnee*, 2006 WL 851232 (March 31, 2006), unpublished. Dahl was unsuccessful in all of his claims, some of which survived summary judgment and made it to the jury for consideration. The opinion is 16 pages long. It was found that the City properly demolished the foundation. Dahl had not exhausted his administrative remedies because he failed to appeal the City's decision and he could not bootstrap collateral constitutional claims to avoid his failure to pursue his administrative remedies. The Court found that he could not use as a defense that he did not get notice of certain actions, when the City had sent notice by certified mail and he failed to pick up the mail.

(Continued on page 41)

The Verdict

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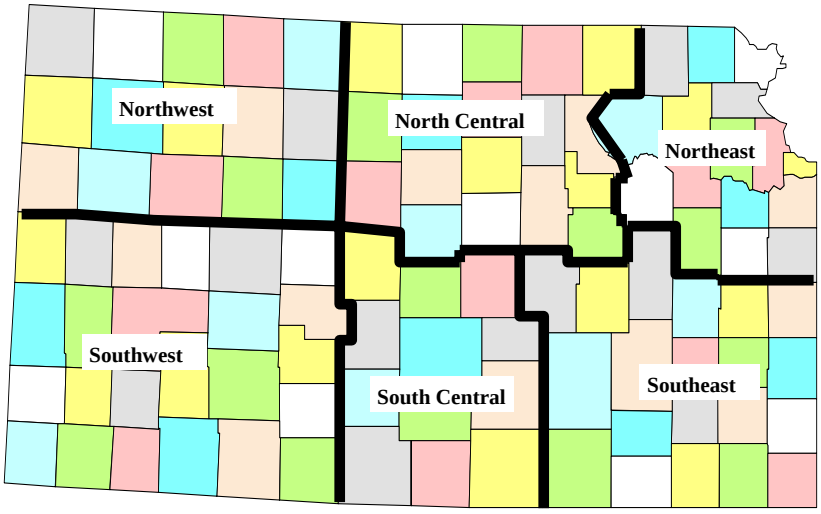
C/O Overland Park Municipal Court
12400 Foster
Overland Park, KS 66213
(913) 327-6852 ► Fax-(913) 327-5701
karen.arnold-burger@opkansas.org

All KMJA dues should be sent to:

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

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

KMJA MEMBERSHIP REGIONS



Interested in serving on the KMJA Board of Directors? At the April 2006 meeting the following positions will be up for election:

President-Elect
Secretary
Treasurer
Northwest Director
Southeast Director

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

President
Phil Durr

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THE VERDICT

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.....Cathy Lucas (Sublette)

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

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