The Verdict

The Official Publication of the Kansas Municipal Judges Association

Issue 51 Spring 2010

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

LEGISLATIVE UPDATES

Following is a **summary** of bills 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*

MUNICIPAL COURT APPEAL FEE AND DRIVER'S LICENSE REINSTATEMENT FEES GO UP

Sen. Sub for HB 2475, Section 2 increases driver's license reinstatement fees to $76.50. Section 7 of the same bill raises the fee for municipal court appeals to $92. This is effective April 20, 2010.

$19 STATE ASSESSMENT ON ALL CASES EXCEPT NONMOVING TRAFFIC VIOLATIONS

SB 373 makes it clear that the $19 state assessment set out in K.S.A. 2009 Supp. §12-4177 is to be assessed on all cases, except nonmoving traffic violations. A "case" means all charges arising against the same person out of the same incident. For example, if a defendant has several traffic charges out of one stop, the $19 is only assessed once, not for each charge. The prior language stated that it was charged for any cases "charging a crime." Based on an AG

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A STEP BACK IN TIME

Eugenics is defined as *"the study of hereditary improvement of the human race by controlled selective breeding."* The term was coined in 1883 by Sir Francis Galton, a scientist and cousin of Charles Darwin. With Darwin's research on natural selection, coupled with a resurgence of interest in Gregor Mendel's studies in genetics, a growing number of physicians and scientists began to speak about the proposition that if we could selectively breed for improved cattle stock and better corn, we could selectively breed humans.

The "eugenics movement" won substantial recognition in the early 20th century in the United States. The biggest American financiers of the day, Andrew Carnegie, John D. Rockefeller, Edward Harriman, Henry Ford, John Kellogg and Clarence Gamble, to name a few, donated substantial sums of money to continue research in this area and were firm believers in it. Several U.S. presidents were on-board, including Theodore Roosevelt, William Taft, Calvin Coolidge, Warren Harding and Herbert Hoover.

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SPOTLIGHT ON: Marshall Christmann and Cheyenne Beisiegel

The newest judges to participate in certification testing are Marshall Christmann, *Lorraine*, and Cheyenne Beisiegel, *Blue Mound*.

Marshall was a Navy brat who grew up all over the United States. His mother was a commander in the Navy and his father worked for the Department of Defense. He graduated from high school in Lyons, Kansas, where he currently resides. He stayed in town after meeting his wife while he was in high school, even though his parents moved on. He currently serves as the President of Local 278C of the Chemical Workers Union. That is where he met the Mayor of Lorraine, who asked him to be the town's judge. The municipal court in Lorraine has not been active for many years. It is currently scheduled to meet once a month.

Marshall has three sons, 15, 13 and 8. He just finished two

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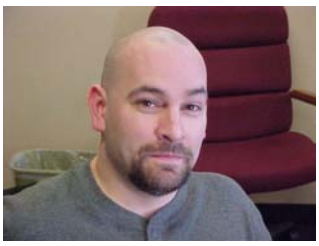
Spotlight On: Christmann and Beisiegel

years at Hutchinson Community College and will be entering Fort Hays State majoring in pre-law.

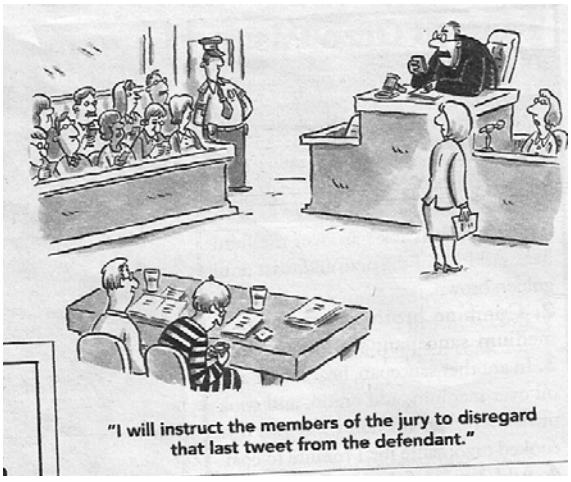


Cheyenne Beisijel was born and attended high school in Springfield, Missouri. He attended Southwest Missouri State University (now Missouri State) and received a degree in Accounting and Economics. He then went on to get a Masters of Public Administration (MPA) degree, also from Missouri State.

Many years ago he started a tax and accounting firm in Mound City, Kansas. His partner was the late Robert Stocking, former municipal judge in Blue Mound. It was after Robert passed away that the city first asked him to serve as its judge. Blue Mound Municipal Court is also scheduled to meet once per month, although that is seldom necessary.

Cheyenne has two sons, one of whom is serving in the Army in Iraq and the other is a high school student in Mound City. His wife is a nurse at St. Luke's South in Overland Park.

Both Marshall and Cheyenne took the municipal court judge certification test in February and hope to attend the April conference.



Updates from O.J.A.

TWO NEW JUDGES CERTIFIED

A certification session was held at the Judicial Center on February 25-26. Two new judges were certified: Cheyenne Beisiegel, *Blue Mound* and Marshall Chrismann, III, *Lorraine*

CASELOAD REPORTS

An Annual Caseload Report will be sent to all courts in the next couple of weeks. Please complete the Report and submit it to the Office of Judicial Administration by July 10. The report will cover the time period of July 1, 2009 to June 30, 2010.

MUNICIPAL COURT MANUALS ON-LINE

Both the Municipal Court Judges' Manual and the Municipal Court Clerks' Manual have been posted on websites. In our continuing effort to conserve funds, these manuals and future supplements will be posted rather than printed and mailed to every court. The posted manuals are current with the most recent updates.

Listed below are the instructions for accessing the manuals:

MUNICIPAL COURT JUDGES MANUAL

Municipal Judges will need to link to the Kansas Judicial Council website to access the Municipal Court Manual. The website address is

http://www.ksjudicialcouncil.org

Judges will need to enter the following user name and password to access the Manual for viewing/printing. (User name and password must be entered exactly as displayed here - use capital letters where shown).

User Name: Municipal.Court
Password: Manual

MUNICIPAL COURT CLERKS MANUAL

To view or print the Clerks' Manual, please access the Supreme Court website at

http://www.kscourts.org/kansas-courts/municipal-courts/Municipal-clerks-manual-2010.pdf

ATTENTION

Effective April 20, 2010 driver's license reinstatement fees increase from $69 to $76.50

The Governor approved an increase in the Court surcharge by $7.50

See, Sen.Sub. HB 2476

Step Back in Time

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The movement gained steam after World War I, when many able-bodied men were killed and the country started to examine who was left to build America. The Great Depression further fanned the fire. Healthy men and women did not have money for food, but the country was spending millions of dollars housing habitual criminals, the disabled and the "feeble-minded."

If unemployment, crime, and expensive institutionalized care resulted from the behavior of genetically inadequate people, the most rational solution was to prevent those "types" from being born in the first place. So, the first manifestation of eugenics came in the form of forced sterilization. The United States was the first country to undertake such action on a nationwide scale led largely by Paul Popenoe, a Stanford-educated Kansan, and leader of the Human Betterment Foundation of California. He spent his career promoting sterilization around the country. In 1918, he co-authored a popular text *Applied Eugenics*. His father, Fred, was the owner and publisher of the *Topeka Daily Capital* newspaper.

Popenoe may have even gotten the idea for forced sterilization from his Kansas roots. The effort to sterlize the unfit began in Kansas in 1894 with F. Hoyt Pilcher, the superintendent of the Kansas State Asylum for Idiotic and Imbecile Youth in Winfield. By 1895 Pilcher had developed a reputation as a trailblazer in the area. According to an article in the Wichita Eagle, *"The unsexing of 150 of these inmates—male and female—was an innovation that received the endorsement of the entire medical profession of the world, and the plaudits of right-thinking people everywhere."* Popenoe's work along with Harry Hamilton Laughlin of the Eugenics Research Office in California resulted in drafting of a "model sterilization law" which spread across the country like wildfire.

The American Eugenics Society began sponsoring "Fitter Family" contests, open to all who chose to participate, using measures of physical appearance, health, behavior, talents, and intelligence to judge which family displayed the greatest potential to produce genetically superior children. State fairs were popular venues because of the clear connection to agricultural breeding. The very first "Fitter Family" contest was held in 1920 at the Kansas State Fair in Topeka and continued to be a mainstay event throughout the 1920's and 1930's. Lighted boards were displayed intending to demonstrate principles of heredity and the menace of unchecked breeding among the unfit. On a panel, four red lights were set to flash at various intervals driving home the point of the text, which had the heading, *"Some people are born to be a burden on the rest."* While a new child is born in America every 16 seconds, it claimed, every 48 seconds a feeble-minded child is born, every 50 seconds comes a criminal *("Very few normal persons ever go to jail"*), but only every seven and a half minutes is a truly creative and capable person born. As for the pocketbook, every 15 seconds, $100 from each taxpayer goes to support the mentally and morally defective. The threat to American society was clear: the dangerous and defective were reproducing too quickly and placing an unmanageable burden on our entire system.

Kansas Fitter Family Winner 1927

In 1927, the United States Supreme Court held in favor of Virginia's forced sterilization of the feeble- minded in *Buck v. Bell*, 274 U.S. 200 (1927). Carrie Buck was feeble-minded, her mother was feeble-minded and she had a feeble-minded daughter, according to the state. They were all housed in the state home for Epileptics and Feeble-Minded. Virginia wanted to sterilize Carrie under the "Racial Integrity Act" and she protested. Oliver Wendell Holmes, writing for a unanimous court, opined:

"We have seen more than once that public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough."

Buck, as of this date, has not been overruled. Even though the Supreme Court did strike down the forced sterilization of prison inmates in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), it distinguished *Buck* and left it in tact. The problem it found with the Oklahoma law was that it was unequal in which crimes resulted in sterilization and which did not (white collar crimes were exempt). The Court did not question Oklahoma's authority to force sterilization, simply the inequality of the method used in Oklahoma. In *dicta*, Justice William Douglas did foreshadow future problems:

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Step Back in Time

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"We are dealing here with legislation that involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far reaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear."

Kansas also had a forced sterilization law, originally adopted in 1913. (R.S. §76-149 et seq.) In fact, at one point in the 1920's Kansas ranked 2nd in the United States in total number of sterilizations performed. Over 3,000 mentally ill patients were sterilized before the Act was repealed.


uvm.edu

In 1928, one year after *Buck*, the Kansas Supreme Court was asked to rule on the law's constitutionality. *Smith v. Schaffer*, 126 Kan. 607 (1928), was a writ of mandamus action brought by the Kansas Attorney General William Smith (who later became a Kansas Supreme Court justice) against a surgeon at the Topeka State Hospital for the Insane to force him to perform a vasectomy on Emil Luthi. The Court granted the writ, found the statute to be constitutional under Kansas law, and wrote:

"Procreation of defective and feeble-minded children with criminal tendencies does not advantage, but permanently disadvantages, the race. Reproduction turns adversary and thwarts the ultimate end and purpose of reproduction. The race may insure its own perpetuation and such progeny may be prevented in the interest of the higher general welfare. ..the court concludes the statue does not violate any provision of the Constitution of the State of Kansas."

In 1965, Kansas was the first state to repeal its forced sterilization laws. When it was all over, it is estimated that 50,000 people in the United States were sterilized under similar laws.

In 2002, on the 75th anniversary of the *Buck* case, the governor of Virginia, publicly apologized for Virginia's participation in forced sterilization. He dedicated a historical marker to Carrie Buck. Other state governors have followed suit and issued apologies for their state's role in forced sterilizations. No Kansas governor has yet issued such an apology.

Another legal manifestation of eugenics was in federal limits on immigration. The Immigration Act of 1924 (also called the Johnson Act) significantly restricted immigration from Eastern European and other "undesirable" countries of origin, while allowing widespread immigration from Western European countries to continue. It prohibited immigration from Asian countries altogether. This exclusionary quota system based on "desirability" of one's country of origin was repealed in 1965.

Finally, miscegenation laws, prohibiting marriages between people of different races, were also an offspring of the eugenics movement. Such laws were not declared unconstitutional until 1967 in *Loving v. Virginia*, 388 U.S. 1 (1967) when the U.S. Supreme Court stated that their sole, unlawful, purpose was to promote white supremacy.

What came of the study of eugenics? Only after eugenics became entrenched in the United States was the campaign transplanted to different parts of the world. The Rockefeller Foundation helped found the German eugenics program and funded the work of a scientist by the name of Josef Mengele. The Carnegie Institution eugenic scientists cultivated deep personal relationships with Germany's eugenicists. Adolph Hitler became a student of American eugenics law. In *Mein Kampf*, published in 1924, Hitler quoted American eugenic ideology. *"There is one state,"* wrote Hitler, *" in which at least weak beginnings toward a better conception [of immigration] are noticeable. Of course, it is not our model German Republic, but the United States."* He often spoke of his great interest in *"the laws of several American states concerning prevention of reproduction by people whose progeny would, in all probability, be of no value or be injurious to the racial stock."*

Hitler started forced sterilization programs, modeled after the United States laws, particularly the California law developed by Popenoe and Laughlin. But after a while, sterilizations were becoming expensive and they did not solve the problem of the expense of caring for the infirm, disabled, and incarcerated. Germany's economy was in shambles. The idea progressed from forced sterilization of these German citizens to mass extermination, to stop their financial drain on Germany.

In the fall of 1939 Hitler signed a secret order initiating the "euthanasia" program, code named T4. Operation T4 targeted for death institutionalized German adults and children with mental and physical disabilities. Homosexuals and prostitutes were deemed mentally ill, and were also often incarcerated for their illegal behavior. Victims were transferred from institutions to centralized killing centers, where they were murdered without their families' knowledge or consent. Six gassing centers were eventually established to murder the victims, and their bodies were burned in crematoria attached to the gassing facility. They had developed the gas chambers (including mobile gas vans) because of the emotional toll that shooting the victims had on the shooters. With gas, the executioner did not have to actually observe the death take place.

The sudden death of thousands of institutionalized patients triggered widespread public suspicion. Fearing popular unrest, Hitler halted the program in August 1941. In 1942 the killings secretly resumed and continued through 1945, including an ever widening range of victims, including asocials, geriatric patients, bombing victims, and foreign

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Step Back in Time

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forced laborers. At the International Military Tribunal in Nuremberg, it was estimated that 275,000 people were murdered under the program. This program was separate and apart from the "Final Solution" manifested in the Holocaust. The first extermination camp for Jews was not built until 1942. However, by the time it was all over, an estimated 6 million Jews were killed. In addition, the program of killing other ethnic groups (gypsies, Slavic people, etc.) as well as homosexuals, inmates, and the mentally and developmentally infirm continued during the same period. At the Nuremburg trials, Nazi doctors cited American eugenics studies to justify their actions.

American Philosophical Society. Noncommercial, educational use only.

Has this issue resurfaced 100 years later?

Some say the "population control" movement which is also tied to environmental sustainability programs is the new-age eugenics. The billionaire philanthropists of today (Gates, Buffett, Rockefeller, Soros, Packard, etc.) are investing large sums of money toward the issue of population control worldwide. Recognized international methods of population control (although not all are widely accepted, nor intentionally initiated) include: contraception, abstinence, abortion, sterilization (voluntary and involuntary), birth credits, birth limits, family planning educational programs, selective implantation, homosexuality, infanticide, emigration, immigration, famine, plague, and war.

Arkansas and Mississippi still have forced sterilization statutes for the mentally ill. Several other states allow "voluntary' sterilization at the request of inmates (particularly for sex offenses), parents or guardians. Many involuntary sterilizations of the mentally ill or infirm occur privately every year in every state, wholly financed by family members. Judges around the country have continued to fashion sentences that involve forced contraception and threats of loss of parental rights, if unfit parents continue to sire children. Some have threatened jail or a vasectomy for deadbeat dads. In California, one quasi-governmental agency offered $200 to any cocaine-addicted woman who could provide medical proof of sterilization. Bills continue to be introduced around the country demanding sterilization of mothers that have delinquent children, or who are on welfare or who are drug addicted. Some parents make the most of scientific advances to select "normal" fetuses prior to implantation or to selectively abort defective fetuses. As recently as 1985, an ordained Baptist minister in Wichita was prosecuted for refusing to perform interracial marriages. See, *State v. Barclay*, 238 Kan. 148 (1985). And many feel the human genome project, the mapping of human DNA to identify the genetic source of disease and other permutations, raises a plethora of legal and ethical questions about the use of such information.

All of these actions are the same song, second verse of the eugenics movement, even though the term is no longer favored. As previously noted, *Buck* and *Schaffer* remain good law. Most constitutional scholars opine that they will remain intact. But, should we continue to be haunted by Justice Douglas's warning about what can happen when such policies are effectuated by "evil or reckless" hands? Only time will tell.

If you want to learn more about this topic, the National Archives facility in Kansas City, Missouri is hosting a traveling exhibit from the U.S. Holocaust Museum entitled *"Deadly Medicine: Creating the Master Race"* It runs through June 10, 2010. Information can be obtained on its website: http://www.archives.gov/central-plains/kansas-city/

Most of the information for this Step Back in Time article was obtained at the exhibit. *Also see*, Lombardo, Paul, *Eugenics, the Supreme Court and Buck v. Bell*, Baltimore: John Hopkins University Press, 2008 and Bruinius, Harry, *Better for All the World: The Secret History of Forced Sterilization and America's Quest for Racial Purity*, New York: Alfred A. Knopf, 2006. Pictures are from the Kansas Historical Society.

"That the warden of the state penitentiary, the superintendent of the Hutchison reformatory, the superintendent of each of the state hospitals for the insane, the state hospital for epileptics, the state home for the feeble minded, or the state industrial school for girls, shall certify in writing to the governing board of the institution of which he or he is warden or superintendent, that he or she believes that the mental or physical condition of any inmate would be improved thereby or that procreation by such inmate would be likely to result in defective or feeble-minded children with criminal tendencies, and that the condition of such inmate is not likely to improve so as to make procreation by such person desirable or beneficial to the state it shall be lawful to perform a surgical operation for the sterilization of such inmate…."

Kansas Statutes: R.S. §79-149 (1913), repealed 1965

Genocide is *"any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life, calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; [and] forcibly transferring children of the group to another group."*

1948 United Nations Convention on the Prevention and Punishment of the Crime of Genocide (CPPCG). Article 2

EVIDENCE-BASED SENTENCING

By Hon. Karen Arnold-Burger, Overland Park

Acting within the constraints of applicable presumptive or mandatory sentencing guidelines….judges typically rely on their instincts and experience to fashion a sentence based upon the information available about the offense and offender. But relying upon gut instinct and experience is no longer sufficient. It may even be unethical—a kind of sentencing malpractice that produces sentencing … decisions that are neither transparent nor entirely rational."

-Prof. Richard E. Redding, Chapman University School of Law

Some say it was Albert Einstein who opined: *"The definition of insanity is doing the same thing over and over and expecting different results."* As we continue to rely on our gut instincts, as Prof. Redding correctly points out, our jails keep filling up and crime continues to rise. If our sentencings are so effective, why does the United States have 5% of the world population, but 25% of its prisoners? What if our instincts are wrong? What if everything we always thought was true about offenders, just ain't so? What if we began to realize that in our sentencing practices we are thinking like non-addicted, law-abiding citizens, who avoid negative ramifications and appreciate consequences, **not** like a criminal defendant? What if we found out some of our sentencing practices actually increased recidivism (the rate at which convicted offenders reoffend), instead of reducing it?

Although "unethical" and "malpractice" are certainly strong words, the trend in criminal justice today is clearly moving toward scientific-based sentencing options, sentencing based not on gut instinct and experience, but on a wealth of scientific studies that show judges what works and what does not work when it comes to the ultimate goal of reducing recidivism.

I know for those of us who have been around awhile, this all seems like "retro: sentencing. Up until the mid- 70's there was a movement toward rehabilitation of criminal offenders. Unfortunately, rehabilitation programs were based on what we believed would work, not any empirical research as to what would work. We knew what would work with us if we were in that situation, so surely that would work with the offenders in our courtrooms. Decisions were made based on "clinical judgment," based solely on experience and intuition. Many of us remember the days, for example, of making all offenders with alcohol charges do 90 AA's in 90 days, without any evidence of the level or extent of their alcohol problem…or even if alcohol was **the** problem.

Then in the late 70's with the advent of sentencing guidelines, the conventional wisdom became fairness in sentencing as it relates to the crime of conviction and the offender's criminal history and a "get tough on crime" approach. There was a belief that little could be done to turn an offender's life around, because the rehabilitation movement had obviously failed. It must have, our jails were still full and recidivism was rising. Many jails and prisons stopped programming in the interest of balancing the budget, "since it doesn't work anyway." But, prison populations grew. Between 1974 and 2005 our federal and state prison population grew from 216,000 to 1,525,924, a sixfold increase. Local jails saw similar increases. Recidivism rates increased. In fact, some studies have now found that longer periods of incarceration for non-violent offenders may have actually made their behavior worse in the long run. If most defendants are reformed solely by punishment, we wouldn't have the highest number of prisoners per capita in the world.

But, harkening back to Bob Dylan, these times they are a changing and we do know more now than we did then. Today there is a growing body of solid research showing that certain "evidence-based" sentencing and corrections practices do work and reduce crime rates as effectively as jail and at much lower cost. Evidence-based sentencing involves the use of scientific research that is now available to improve the quality of decision making and reduce recidivism.

Why do we care about recidivism rates? Ninety-five percent of all state and federal prisoners will be released from prison at some point, the vast majority after only a few years. They usually return to the community from whence they came, the same community in which they were sentenced. If they have a high probability of reoffending, the crime will occur in our community. Therefore, if we reduce recidivism, we reduce the crimes in our community, thereby increasing public safety. As Judge Michael Wolf put it in a recent law review article, *"We must acknowledge that the reason for sentencing is to punish, but if we choose the wrong punishments, we make the crime problem worse, punishing ourselves as well as those who offend. If we are to think rationally about what is in our own best interest—that is public safety—we should try to determine what reduces recidivism."* Many proponents of this position argue that we put too much focus on closing cases, disposition rates and moving offenders through the system. They propose that instead we should be focusing our performance measurements on recidivism rates. In fact, in a Public Safety Policy Brief issued by the PEW Charitable Trust, it recommends that recidivism reduction should be an explicit sentencing goal. So how does this work?

Evidence-based approaches are most commonly used as conditions of release on probation, parole or diversion. They are said to work best by targeting moderate to high-

Evidence-Based Sentencing

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risk offenders. It is assumed that low-risk offenders are not likely to reoffend anyway and therefore should not monopolize resources for alternative programs—as they often do—and extremely high risk offenders are not likely to be responsive to alternative programming. With this in mind, the use of a risk/needs assessment is a key component of this approach. These assessments are validated instruments, supported by credible recidivism research, that actuarially determine the risk that any particular offender will re-offend. They measure the risk factors (age, education, criminal history, lack of high school diploma, etc.), the protective factors (i.e., employed, family support, etc.) and the criminogenic needs (clinical disorders or functional impairments that if ameliorated would substantially reduce the likelihood of continued engagement in crime, like drug addiction, mental illness, etc.). There are several such instruments currently in use around the country.

One such instrument, the LSI-R™ (Level of Services Inventory-Revised), is currently being piloted in Johnson County and is expected to be implemented statewide once funding is secured for the training of court staff and on-going related costs. *See*, http://www.mhs.com/product.aspx?gr=saf&prod=lsi-r&id=overview

Community Corrections personnel throughout Kansas have been using the LSI-R™ for internal purposes, but the pilot in Johnson County has expanded its use into the sentencing arena. Court Services personnel throughout the State have also used the Wisconsin Risk Assessment for internal purposes, but not for sentencing recommendations.

In Johnson County, in the case of felony offenders, the LSI-R™ assessment, which involves both a written assessment and an interview by a trained court officer, is conducted before sentencing, and the actual sentence can be molded accordingly, targeting intervention to the specific risk and criminogenic needs of the offender. In the case of misdemeanants, the process is the same, but it is usually conducted after sentencing as a way to individualize probation requirements.

Risk assessments are also on the "radar" of the DUI Commission. The Commission's Interim Report recommends their use in DUI sentencings in addition to the alcohol and drug evaluation. Wichita Municipal Court uses a risk assessment tool developed in Sedgwick County for its probationers and reports very good results. Its probation office experienced an immediate reduction in caseload as a result of identifying those offenders that needed to be seen weekly, monthly, or rarely.

The application of evidence-based sentencing continues, according to the experts, by requiring that any community programs in which the offender is required to participate, also be evidence-based, meaning completion has been shown to decrease recidivism. It requires that all staff involved in the process be trained on evidence-based practices. And, it does encourage swift and certain responses to probation violations, although not necessarily for the entire term of the sentence. Finally, it encourages police and community collaboration. *See*, *"Effective Alternatives to Incarceration: Police Collaborations with Corrections and Communities,"* by Joanne Katz, J.D. and Dr. Gene Bohham which can be accessed on-line at http://www.jdaihelpdesk.org/Docs/Documents/COPS%20Alternatives_to_Incarceration[1].pdf

Returning to the quote opening this article, although there are no known cases of judges being disciplined or removed from office for utilizing sentencing practices that do not result in a scientifically supported outcome of reducing recidivism, judges do have a responsibility to become educated on this topic. A good place to start is the inaugural issue of Chapman Journal of Criminal Justice, produced by the University of Chapman School of Law in Orange, California. The entire first issue is dedicated to scholarly articles on evidence-based sentencing. It can be read on-line at: http://www.chapman.edu/ . Likewise, the National Center for State Courts has a Center for Sentencing Initiatives. The NCSC website contains links to several publications on the topic of evidence-based sentencing.

2010 TOP LEGAL BLOGS

AS DETERMINED BY THE ABA JOURNAL AND ITS READERS

"LIGHTER FARE" CATEGORY

Bitter Lawyer is a legal humor website, complete with video programming, daily reports from the Bitter Newsroom and frank interviews with lawyers with unusual stories to tell, such as the lawyer-founder of a dating agency for marrieds looking to cheat. http://www.bitterlawyer.com

"NEWS" CATEGORY

Above the Law is routinely credited by the mainstream media for breaking news of law firm layoffs and salary freezes, this self-proclaimed legal tabloid is a must-read for those who want to know the latest industry gossip. ATL star David Lat has rejoined editor Elie Ying Mystal, and they are the primary contributors, aided by anonymous tipsters and forwarded e-mails. In response to industry woes, the blog added a "Notes from the Breadline" column last year. http://www.abovethelaw.com

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.

SERVICE OF THE DC-27

Tyron Byrd's driving privileges were suspended when he blew .28 on the intoxilyzer in association with a DUI arrest. Pursuant to a policy of the Atchison County Sheriff's office, the arresting officer submitted the DC-27 form to an administrative assistant, who then was responsible for mailing it to the driver at the address shown on the form. There was no dispute that the form was mailed to Byrd and he received it.

K.S.A. 2007 Supp. §8-1002(C) states that when the officer directing administration of the test determines that the person has failed the test, *"the officer shall serve upon the person notice of suspension of driving privileges…"*

Byrd argued that since the officer did not actually mail the notice (DC-27 form), service was not proper and therefore the KDR had no jurisdiction to take action on his driver's license. KDR argued that the statute should not be strictly construed to require the officer to actually place the form in the mail box. As long as the officer "caused" the form to be mailed (substantial compliance), service was sufficient.

In *Byrd v. Kansas Department of Revenue*, ___Kan.App.2d ___(January 15, 2009), the Kansas Court of Appeals held that based on recent legislative enactments, K.S.A. 2007 Supp. §8-1002 is a remedial law that should be liberally construed. Therefore, when determining whether service by mail had been achieved in accordance with the statute, technical irregularities can be overlooked as long as the essential purpose of the provision has been fulfilled. The purpose of the statutory provision is to make sure the driver is aware of his right to appeal. That purpose was fulfilled in this case and the driver could not show any prejudice that resulted from the assistant mailing the form instead of the officer. Bryd's privileges remain suspended.

CAN'T EXCLUDE PEOPLE FROM COURTROOM DURING *VOIR DIRE*

Eric Presley was charged with a cocaine trafficking offense. Mr. Presley's uncle stood in the courtroom as an observer prior to the beginning of jury selection. The presiding judge removed him from the court and explained that the 42 prospective jurors would fill the courtroom momentarily and that she did not want an outside observer to mix with members of the jury. She instructed the uncle to leave until jury selection was complete and the trial commenced. The jury ultimately convicted Presley of cocaine trafficking. Presley moved for a new trial on the basis that the public was not allowed in the courtroom during jury selection, violating the 6th and 14th amendments. Presley presented evidence that 14 jurors could have fit in the jury box while the other 28 could have fit on one side of the courtroom, leaving adequate room for the public.

The Georgia Supreme Court affirmed the holding that the trial court could exclude the public from jury selection so that potential jurors are not exposed to prejudicial remarks from the public. Leah Ward Sears, then chief justice of Georgia, dissented, stating, *"A room that is so small that it cannot accommodate the public is a room that is too small to accommodate a constitutional criminal trial."*

In *Presley v. Georgia*, ___ U.S. ___ (January 19, 2010), the U. S. Supreme Court ruled that voir dire must be open to the public because "*there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public." 467 U. S., at 46*. The Supreme Court of Georgia ignored prior United States Supreme Court rulings, according to the U.S. Supremes, most notably the case of *Waller v. Georgia , 467 U. S. 39 (1984)*, in which they held that right to a public trial extends beyond the actual proof at trial. *"[T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure" Waller v. Georgia ,* 467 U. S. 39 (1984)

Presley's conviction was reversed and his case remanded for a new trial.

Editor's Note: *This decision was filed one week after the Kansas Supreme Court granted the Wichita Eagle's request for a writ of mandamus against Wichita Judge Warren Wilbert, reversing his decision to close jury voir dire in the case of State v. Scott Roeder and ordering him to make specific findings balancing the public's right to attend, the defendant's right to an open trial and the right to privacy of the jurors. See, http://www.kscourts.org/Kansas-Courts/Supreme-Court/Orders/Case-Orders/103666.pdf*

Although the Court suggested to Judge Wilbert that he might consider opening the voir dire to the public but giving the venire members an opportunity to request individual in camera voir dire on certain sensitive topics, Judge Wilbert elected to close all but the last hour and a half of voir dire and then opened it only to the four media outlets that had requested access with an audio

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feed to other media outlets in another room.

SPEEDY TRIAL REQUIREMENTS DO NOT APPLY TO SENTENCING DELAYS

Defendant was convicted in November 2005. Prior to sentencing he was arrested on charges in another county causing him to miss his sentencing hearing. He did not end up being sentenced until February 2007. The issue in *State v. Pressley*, ___Kan. ___ (January 22, 2010) was whether the Sixth Amendment right to a speedy trial encompasses sentencing.

The Court pointed out that there was no controlling U.S. Supreme Court authority controlling this issue and courts around the country are divided. However, it decided to stick with its prior holding in *State v. Freeman*, 236 Kan. 274 (1984), and found that the right to a speedy trial is not implicated in the case of sentencing delays.

The issue of whether the statutory right to a speedy sentencing under K.S.A. §22-3424 ("sentence [shall be] pronounced without unreasonable delay") was left for another day because it had not been properly raised by the parties.

US SUPREME COURT JUSTICES HINT AT DIFFERENT STANDARD FOR UNCORROBORATED TIPS REGARDING DRUNK DRIVERS

A Richmond, Virginia police officer pulled Joseph Harris over after receiving an anonymous tip that he was driving while intoxicated. The tipster described Harris, his car, and the direction he was traveling in considerable detail. However, the officer did not personally observe Harris violate any traffic laws or drive unsafely. When he was pulled over, Harris reeked of alcohol, had slurred speech, and almost fell over exiting the car. He failed the field sobriety tests and was arrested for DUI. The Virginia Supreme Court threw out his conviction on the basis that the stop violated the Fourth Amendment prohibition against unreasonable searches and seizures because the officer had failed to independently verify that Harris's driving was dangerous.

The prosecution filed a request with the U.S. Supreme Court to hear the case. The request was denied, but Justices Roberts and Scalia joined in a dissent from the denial. In the dissent, they hinted at their belief that due to the dangers of drunk driving, and the exigent circumstances at play when operation of a vehicle is involved, independent corroboration may not be necessary in the case of a tip regarding a drunk driver.

Here are just a few excerpts from *Virginia v. Harris*, 130 S.Ct. 10 (October 2009) (citations omitted):

"Every year, close to 13,000 people die in alcohol-related car crashes-roughly one death every 40 minutes. Ordinary citizens are well aware of the dangers posed by drunk driving, and they frequently report such conduct to the police. A number of States have adopted programs specifically designed to encourage such tips-programs such as the "Drunkbusters Hotline" in New Mexico and the REDDI program (Report Every Drunk Driver Immediately) in force in several States. By a 4-3 vote, the Virginia Supreme Court...adopted a rule that will undermine such efforts to get drunk drivers off the road. [It's decision] commands that police officers following a driver reported to be drunk ***do nothing*** *until they see the driver actually do something unsafe on the road-by which time it may be too late…*

"I am not sure that the Fourth Amendment requires such independent corroboration before the police can act, at least in the special context of anonymous tips reporting drunk driving. This is an important question that is not answered by our past decisions, and that has deeply divided federal and state courts. The Court should grant the petition for certiorari to answer the question and resolve the conflict."

There might be situation, the Justices opined, where the danger alleged in the anonymous tip was so great as to justify a search even without a showing of reliability.

"There is no question that drunk driving is a serious and potentially deadly crime, as our cases have repeatedly emphasized...This Court has in fact recognized that the dangers posed by drunk drivers are unique, frequently upholding anti-drunk-driving policies that might be constitutionally problematic in other, less exigent circumstances."

The Justices pointed out that the conflict among various jurisdictions is widespread and demands its attention..

"The conflict is clear and the stakes are high. The effect of the [Virginia] rule will be to grant drunk drivers "one free swerve" before they can legally be pulled over by police. It will be difficult for an officer to explain to the family of a motorist killed by that swerve that the police had a tip that the driver of the other car was drunk, but that they were powerless to pull him over, even for a quick check."

Editor's Note: See, State v. Crawford, *275 Kan. 492 (2003) in which the Kansas Supreme Court held that an anonymous tip of reckless driving in which the officer corroborated everything except bad driving, was sufficient to justify the stop of the vehicle for further investigation.*

WRITTEN WAIVER OF COUNSEL FORMS IN MUNICIPAL COURTS

Municipal court judges are advised to adopt a written waiver of counsel form that mirrors or is substantially simi-

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lar to the form contained in the Municipal Judges Manual. As we all know, these written waivers become very important when a person challenges his or her criminal history score and asks that misdemeanor convictions in municipal court not be counted because there is no showing of an adequate waiver of counsel.

In *State v. Hughes*, ___Kan. ___ (February 12, 2010) the Kansas Supreme Court held that failure of the waiver form to contain the signed certification by the judge that the defendant had been fully informed of his right to counsel was a fatal defect in using said conviction to enhance a person's criminal history score, **absent some other affirmative evidence by the prosecution of a valid waiver** (for example, the testimony of the municipal judge at the sentencing hearing in district court or a defendant's acknowledgement that the form correctly stated what he or she had been advised of).

This was an appeal of an unpublished Court of Appeals decision that was discussed in The Verdict, Winter 2009, p. 19. Here are the waivers at issue, side-by-side:

DODGE CITY WAIVER	**WAIVER APPROVED IN *GILCHRIST* AND CONTAINED IN MUNICIPAL JUDGES MANUAL**
I, the undersigned and above name defendant state: (1) That I am appearing upon having been charged with the offense of: battery (2) advised orally of the potential penalties and state that I have been informed of the nature of the charge in open Court and understand the same. (3) After being advised of my rights, I hereby state that I understand my right to counsel and I hereby knowingly and intelligently waive my right to counsel in the above captioned case. Signature of Defendant	The undersigned acknowledges that he or she has been informed by the Municipal Court of the charges against him or her, of the possible penalty, of the nature of the proceedings before the Court, of his or her right to have counsel appointed to represent him or her, if he or she is financially unable to obtain counsel and is determined to be indigent, all of which the undersigned fully understands. The undersigned now states to the Court that he or she does not desire to have counsel, either retained or appointed, to represent him or her before the Court and wishes to proceed without counsel. Signature of Defendant
Acknowledgment and signature by judge that the waiver was subscribed and sworn to in her presence. Signature of Judge	I hereby certify that the above named person has been fully informed of the charges against him or her and the accused's right to have counsel, either retained or appointed, to represent the accused at the proceedings before this Court and that the accused has executed the above waive in my presence, after its meaning and effect have been fully explained to the accused… Signature of Judge

It is the shaded certification language that was at the heart of the *Hughes* case. The Supreme Court held that absent some other evidence of the judge's advisal to the defendant, *"without the certification language, all that can be readily determined is that a defendant acknowledged being informed of his or her rights, but we cannot ascertain whether the proper or full panoply of rights were ever communicated. Thus, the importance of the judge's certification cannot be understated."*

The Court remanded the case for re-sentencing and ordered the Court not to consider the municipal court convictions in which the waiver form did not contain the judge's certification.

JURY INSTRUCTIONS MUST SET OUT THE FIVE MOVING VIOLATIONS THAT TRANSFORM AN ELUDING CHARGE FROM A MISDEMEANOR TO A FELONY; LEAVING AN ELEMENT OUT OF THE INSTRUCTIONS IS SUBJECT TO A HARMLESS ERROR ANALYSIS

Dorian Richardson was charged with felony eluding. Under K.S.A. §8-1568(b), an eluding charge is transformed into felony if the driver commits five or more moving violations in the course of the eluding charge. The jury was instructed on the elements of eluding with one of the listed elements being that the defendant committed five or more moving violations, with no further explanation of what those violations were.

The general rule is that if an element is omitted from the jury instructions the Court will examine whether the omitted element was uncontested and supported by such overwhelming evidence that the jury verdict would have been the same without the omission, a harmless error analysis. However, in *State v. Richardson*, ___Kan. ___(February 19, 2010), the Supreme Court found that the definition of a moving violation is not something intuitive that an ordinary juror would know, but is specifically defined in Kansas regulations. Therefore, the Court could not speculate with legal finality which of a wide range of conduct committed by the defendant (some legal, some illegal) the jury elected to consider as moving violations. Since the five moving violations were not identified or defined to the jury, it is impossible to determine what the jury considered. The defendant's conviction was reversed.

SEARCH BY SCHOOL OFFICIALS WHEN SCHOOL RESOURCE OFFICERS PRESENT

A teacher at Salina High noticed one of his students acting strangely. He believed he was either ill or under the influence of something. The teacher sent the student to the principal's office, after informing the school counselor of his concerns. Two school resource officers were in the room with the principal and the student. The principal asked the student to empty his pockets (after one of the officers asked the prin-

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cipal if that's what he wanted the student to do). The student asked if he was required to empty his pockets and the principal told him he was. The student removed two baggies of marijuana from his pocket and laid them on the table. The officers smelled the baggies and asked the student what was in them. The student replied, "weed." The student was charged with possession of marijuana and argued that there was no probable cause for the search and, therefore, the marijuana should be suppressed.

In *State v. Burdette*, ___Kan.App.2d ____(February 19, 2010), the Kansas Court of Appeals relied heavily on *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) and *In re L.A.*, 270 Kan. 879 (2001), which both made clear that school searches differ from law enforcement searches. The search need only be "reasonable." It need not be supported by a traditional "probable cause" analysis. The Court must consider where the action was justified from its inception and whether the search as conducted was reasonably related in scope to the circumstances which justified the interference in the first place. However, Burdette argued that the law enforcement involvement in this search changed it into a traditional police search, thus requiring that there be probable cause. Since there was no evidence to believe that a crime had been or was being committed, Burdette argued the search was unlawful and must be suppressed. This fact pattern, to wit: the presence of law enforcement in the room when the search took place, represented a case of first impression in Kansas.

The Court conducted a review of cases from other jurisdictions and adopted the position that the "reasonableness" standard will apply where police involvement is minimal or where school officials are acting in conjunction with, but not at the behest of, law enforcement. In this case, the Court found that the school resource officers did not initiate this investigation and had no part in Burdette's search other than being present. It was the principal who asked Burdette to empty his pockets. Based on the observations of Burdette's appearance and behavior by his teacher, school officials had a reasonable basis to be concerned about his condition and suspect drug use. Therefore, the request was justified from its inception and the scope of the search was limited to him emptying his pockets, an action not excessively intrusive. Therefore, the marijuana need not be suppressed.

The Court did warn that a school official's power to search students cannot be used to cloak what is normally a police function performed by or at the behest of law enforcement officers. In such situations, a "probable cause" standard will apply. However, this was not one of those cases.

EXACT WARNINGS AS OUTLINED IN *MIRANDA* NOT REQUIRED IF THE OFFICER'S WORDS CONVEY THE SAME MEANING

Kevin Powell was arrested for being a felon in possession of a gun. At the police station he was given the *Miranda* warnings prior to being interrogated. The oral and written warning advised him that he had the right to remain silent, that anything he said could be used against him; that he had a right to talk to a lawyer prior to questioning and that if he could not afford one, an attorney would be appointed at no cost to him before any questioning. He was further advised that he had the right to invoke any of his rights at any time during the interview. He acknowledged he understood his rights, said he wanted to waive them, and then promptly admitted to the crime.

Powell was not specifically told, using the language proposed in *Miranda*, that he had a right to consult an attorney any time during questioning, only that he could talk to a lawyer before questioning. Because of that, he argued, his confession should be suppressed.

In *Florida v. Powell*, ___U.S. ___ (February 23, 2010), the United States Supreme Court held that even though the officer did not use the exact *Miranda* language, by advising Powell that he could invoke his rights at any time, the warning was sufficient to convey the same meaning. Although the Court pointed out that by using the exact words from *Miranda*, police can significantly reduce the chance of suppression, the precise words aren't necessary as long as they communicate the same essential message.

U.S. SUPREME COURT SETS OUT BRIGHT LINE RULE OF TWO WEEKS BEFORE POLICE MAY INITIATE INTERROGATION OF SUSPECT WHO HAS INVOKED HIS FIFTH AMENDMENT RIGHT TO COUNSEL

In *Edwards v. Arizona*, 451 U.S. 477 (1981), the U.S. Supreme Court held that when an accused invokes his Fifth Amendment right to have counsel present during interrogation, a valid waiver cannot be established by showing only that the accused responded to police-initiated interrogation, even if he has been advised again of his *Miranda* rights. He cannot be subjected to further interrogation until counsel has been provided, unless he initiates the contact with police himself. The Court has said that this is not a constitutionally based rule, but a judicially created "prophylaxis" basically to prevent coercive police badgering. In each case in which the *Edwards* rule was discussed, the accused was held in uninterrupted pretrial custody during both the initial and the subsequent interrogations while the crime was being actively investigated.

In *Maryland v. Shatzer*, ___U.S.____ (February 24, 2010), the U.S. Supreme Court was confronted with a situation where a defendant (Shatzer) invoked his Fifth Amendment

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right to counsel when he was questioned while serving time in prison on another crime. Questioning ceased and the case about which he was being questioned was closed. Two and a half years later, armed with new evidence, police re-opened the case and returned to the prison to interview Shatzer. Police advised Shatzer that they had re-opened the case and read him his *Miranda* rights prior to questioning. He agreed to waive his rights and spoke to the detectives about the incident, eventually agreeing to take a polygraph. Five days later, he was again advised of his *Miranda* rights prior to the polygraph, and waived them. He failed the polygraph and when confronted with the results, he admitted to committing the crime. He then requested an attorney and interviewing stopped.

Prior to trial Shatzer moved to suppress the admission he made based on a violation of *Edwards*, to wit: police had initiated contact after he had invoked his right to counsel, even though that had happened over two years earlier. The case wound its way to the U.S. Supreme Court which decided to modify *Edwards* and develop a bright line rule that requires a minimum of a two week break in custody before police can re-initiate interrogation of a suspect who has invoked his Fifth Amendment right to counsel.

It went on to say that just because a suspect has been continually incarcerated does not mean there can't be a "break in custody." *"Interrogated suspects who have previously been convicted of a crime live in prison. When they are released back into the general population, they return to their accustomed surroundings and daily routine—they regain the degree of control they had over their lives prior to the interrogation.*" Therefore, if the suspect is living in prison for some other crime, the "break in custody" simply means the suspect has been returned to the daily routing of prison life.

Shatzer's interrogation was constitutionally permissible and his confession was admissible.

IN A DUI SENTENCING, THE DISTRICT JUDGE MUST TAKE INTO ACCOUNT FINANCIAL RESOURCES IN DETERMINING WHETHER OR NOT THE DEFENDANT WILL BE REQUIRED TO PAY THE MANDATORY FINE OR DO COMMUNITY SERVICE IN LIEU THEREOF

K.S.A. §21-4607(3) requires that the district court judge "*take into account the financial resources of the defendant*" and "*the nature of the burden that payment will impose when determining the amount and method of payment of a fine.*" The Supreme Court has held that in the case of a mandatory minimum fine provided by statute, the Court does not need to take financial resources into account. However, in *State v. Copes*, ___Kan. ___ (February 26, 2010), the Supreme Court held that in the case of a DUI, the district court judge must take into account the defendant's financial resources as it relates to the **method** of payment, since the alternative method of community service is allowed under the statute. The case was remanded to the district court for the judge to consider Copes' financial resources with respect to the method of payment of her mandatory DUI fine.

Editor's Note: *There is no similar provision to K.S.A. §21-4607(3) in the Code of Procedure for Municipal Courts, so the application of this decision to municipal court DUI fine assessments is yet to be determined.*

LAW ENFORCEMENT OFFICERS DO NOT HAVE THE AUTHORITY TO ENTER IMMUNITY AGREEMENTS

In *State v. Ralston*, ___Kan.App.2d ___(February 26, 2010), the Kansas Court of Appeals held that absent the knowledge, involvement and approval of the District or County Attorney, law enforcement officers have no authority to enter immunity agreements with defendants. If they do so, and the defendant makes incriminating statements or exhibits incriminating behavior in detrimental reliance on said unauthorized grant of immunity, the remedy is suppression, not dismissal or specific performance. The Court also discusses the distinction between immunity agreements, cooperation agreements, charge agreements and plea agreements all of which require prosecution approval to be binding and enforceable.

UNCOUNSELED MUNICIPAL COURT CONVICTION WHERE JAIL TERM IS IMPOSED BUT PROBATED AND NO WAIVER IS IN THE RECORD, CANNOT BE USED FOR SENTENCE ENHANCEMENT PURPOSES

Travis Gunner Long was convicted of possession of methamphetamine. His criminal history revealed three Garden City municipal court battery convictions, which under the sentencing guidelines can be rated as one person felony, and thus cause his sentence in the methamphetamine case to be enhanced. He challenged the convictions as uncounseled and therefore unconstitutional. In *State v. Long*, ___Kan.App.2d ___ (February 26, 2010) the Court of Appeals agreed.

If a defendant is sentenced to a jail term, regardless of whether it is suspended or probated, he or she must either have counsel or have a valid waiver of counsel on file for said conviction to later be used for enhancement purposes. In all three cases the defendant was placed on "probation" for one year. The defendant was clearly not represented in any of the three cases and there was no indication that he had properly waived his constitutional right to counsel.

The issue that makes this case interesting is that the Garden City Municipal Judge never specified a jail term, although he used the term "probation." The Court of Appeals found that this "distinction is insignificant." Had he received only a fine, with no term of probation, the constitutional right to

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counsel would not have been triggered. *"But because Long was placed on probation in each misdemeanor case, he was entitled to counsel at the state of the proceeding where his guilt was adjudicated, even though his incarceration was not immediate or inevitable."*

Editor's Note: *Municipal judges would be well-advised to make it clear in sentencing whether a jail term is being imposed or not and the number of days. The definition of the term "probation" in Black's Law Dictionary is "a court-imposed criminal sentence that, subject to stated conditions, releases a convicted person into the community* ***instead of sending the criminal to jail or prison****." So when the term "probation" is used, a jail term is assumed. See also, Kansas Municipal Judges Manual, pp. 10-7 and 13-5*

STATE'S EFFORTS TO SERVE WARRANT MUST BE REASONABLE, NOT PERFECT

Brent Alexander was on probation, violated his probation and a warrant was issued for his arrest. The warrant was served on him almost 2 years later, even though he had been living in Kansas and had had contact with police in his town of residence, although they had not checked him for warrants. He argued that the State waived its right to send him to jail for a probation violation by failing to serve the warrant within a reasonable time.

In *State v. Alexander*, ___Kan. App.2d ____ (February 26, 2010), the Court of Appeals held that the State's efforts to serve the warrant must be reasonable, but not perfect. In this case, it was able to show that sheriff's deputies had called his mother, called his friends, published his photo in the local newspaper, tried to execute the warrant at his last known address, sent a copy of the warrant and his photo to the police in Ulysses, where his wife lived (although they did not contact his ex-wife), and sent his information to Arkansas, where they thought he might attempt to flee. It was in Ulysses that the police had contact with Alexander as a witness in a case, but failed to act on the warrant. He was subsequently arrested in Arkansas.

Although the prosecution waives its right to proceed on a probation violation if it unreasonably delays executing a warrant for the arrest of the probationer whose whereabouts are either known or discoverable with reasonable diligence, in this case the State made more efforts than in other cases in which "reasonable" efforts had been found not to exist. While Alexander could have been found in Ulysses if the officers had run a warrant check on him, the fact that they didn't does not by itself constitute an unreasonable delay given the other efforts made to locate Alexander.

IF DEFENDANT REFUSES BLOOD TEST, BUT THEN GETS INDEPENDENT TEST OF BLOOD FOR MEDICAL DIAGNOSIS, THOSE RESULTS ARE ADMISSIBLE IN DUI TRIAL

Paul Weilert crashed his motorcycle on a highway in Rooks County. When the police arrived they smelled the odor of consumed alcohol on him and he appeared intoxicated. He was taken to the hospital. The officer read Weilert the implied consent advisories and requested he take a blood test. Weilert refused. Weilert gave permission to medical personnel to take his blood for medical purposes only. He told the medical personnel he did not want them to provide any blood samples to the officer. The officers overheard Weilert tell the medical personnel that he had six hard liquor drinks before the crash. The police subsequently got a court order to obtain the hospital blood test. The issue in *State v. Weilert*, ___Kan.App.2d ___ (March 5, 2010) was whether the test result was admissible in his DUI trial.

The Kansas Court of Appeals held that it was admissible. There is no common-law physician-patient privilege in Kansas. It is entirely statutory. The statute that sets out the privilege, K.S.A. §60-427(b), precludes the assertion of the privilege in any criminal felony case and in any DUI case (felony, misdemeanor or ordinance violation). Therefore, the physician-patient privilege did not prevent its admission.

Weilert next argued that his blood test results and his statements about alcohol consumption to medical personnel were protected by HIPAA. The Court also rejected this argument. HIPAA's privacy regulation specifically provides that information may be disclosed "in the course of any judicial or administrative proceeding" under court order. Such was the case here. And, the Court opined, even if HIPAA prohibited disclosure, the prohibition would not lead to exclusion of the results at a criminal trial. Kansas does not apply the exclusionary doctrine to exclude evidence obtained in violation of HIPAA.

Finally, Weilert argues that because a driver has a legal right to refuse forced testing by law-enforcement officer, the State may not otherwise obtain the results. While the defendant is correct, that once a driver has refused testing the State cannot use a search warrant to obtain the test forcibly, the State is not prohibited from obtaining the results that the driver voluntarily and independently submits to for medical purposes.

IN REFRESHING RECOLLECTION, WITNESS IS ALLOWED TO EXAMINE ANY DOCUMENT THAT MIGHT SERVE TO REFRESH THE RECOLLECTION

Provided a witness has an independent recollection of the subject matter, the witness, either while testifying or prior

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thereto, can refresh his or her recollection by use of **any** memoranda relating to the subject matter. When a witness states he does not recall a prior inconsistent statement, the prior statement itself can be introduced into evidence as long as the witness is given an opportunity to identify, explain or deny the statement. In addition, if the witness admits he gave a prior inconsistent statement, but can't remember its contents or denies the contents, the statement itself can be admitted into evidence. *See*, *State v. Stinson*, ___Kan.App.2d___ (March 26, 2010).

CRIMINAL LAWYERS MUST GIVE IMMIGRATION ADVICE

Jose Padilla, a native of Honduras, a decorated Vietnam War veteran, and a legal permanent resident, has lived in the U.S. legally for 40 years. A truck driver, he was stopped at a weigh station in Kentucky and gave law enforcement permission to search his truck. They found half a ton of marijuana. On the eve of trial, he agreed to plead guilty only after his lawyer assured him that his guilty plea and a five year prison sentence would not affect his immigration status. The lawyer was wrong. The guilty plea triggered a mandatory deportation, to take effect after the prison term was served. When he learned this, Padilla tried to withdraw his plea. He argued ineffective assistance of counsel. The Kentucky Supreme Court ruled against him, concluding that the constitutional right to counsel does not extend to matters that fall outside the criminal case at hand. In other words, the Sixth Amendment does not protect defendants from erroneous deportation advice because deportation is merely a "collateral consequence" of a conviction. On March 31, 2010 the U.S. Supreme Court entered its decision in *Padilla v. Kentucky*, ___U.S.___ (March 31, 2010).

In writing for the majority, Justice Stevens noted that because Congress over the past two decades has made deportation mandatory for a wide variety of crimes, the stakes have been dramatically raised for an immigrant noncitizen pleading guilty. Although staying in the United States may be more important than any potential jail sentence, he said, defendants are often not advised that a guilty plea may result in their deportation. In a case like this, Stevens added, where a simple reading of the statute would have told the lawyer her client would face certain deportation, failing to provide that information denies the defendant effective assistance of counsel. The court pointed out that *"Padilla's crime, like virtually every drug offense except for the most insignificant marijuana offenses, is a deportable offense under 8 U.S.C. §1227 (a)(2)(B)(i)."*

He pointed out that it is difficult to classify the risk of deportation as a direct consequence or a collateral consequence of the criminal proceeding. He also recognized that immigration law is very complex and is a legal specialty of its own. Many criminal defense lawyers may not be well-versed in it. When the law is unclear, the defense attorney only has a duty to advise the client of the **risk** of adverse immigration consequences. But when the consequences are clear, the defense attorney has a duty to give correct legal advice. *"It is our responsibility,"* said the court, *" to ensure that no criminal defendant is left to the mercies of incompetent counsel," and "we now hold that counsel must inform her client whether a plea carries the risk of deportation."* It sent the case back to Kentucky to determine if Padilla had been prejudiced by the ineffective attorney. Justices Scalia and Thomas wrote a dissent worrying that this would open the floodgates for defendants asking to set aside their pleas, giving little finality to judgments. In addition, they felt if this collateral consequence was going to have to be discussed, why not the plethora of other collateral consequences to criminal convictions?

Editor's Note: *In 2002, the Kansas Supreme Court held in* State v. Muriithi*, 273 Kan. 952 (2002) that it was not ineffective assistance of counsel for a criminal defense attorney not to advise her non-citizen client that a domestic violence conviction would result in automatic deportation. The Court did imply that the case turned on the fact that the attorney did not know that her client was not a U.S. citizen.* "The record does not show that Muriithi's counsel knew or should have known that he was an alien. Absent such showing, Muriithi's counsel had no duty to investigate Muriithi's immigration status." *Query whether the result would be the same following* Padilla.

JUDGE CANNOT REQUIRE THAT DEFENDANT POST PICTURES OF HIS VICTIMS IN HIS JAIL CELL

Robert Cluck ran a truck off the road while he was passing it. He was well over the legal limit for DUI. Three people were killed. He was convicted of three counts of involuntary manslaughter while DUI and improper passing. He was sentenced to a little over 14 years in prison and the Court ordered the Department of Corrections to post photographs of the victims in Cluck's cell for the duration of his prison term.

In *State v. Cluck*, ___Kan.App.2d ___ (April 9, 2010) the Court set aside the judge's order regarding posting of the pictures in Cluck's jail cell finding that it was not authorized by the statute. The Court specifically declined to rule on whether such a requirement would be an appropriate probation or parole condition.

RIGHT TO SELF-REPRESENTATION AT PRELIMINARY HEARING

In *State v. Jones*, 40 Kan.App.2d 1146 (2009), the Court of Appeals held that although the denial of the right to self-representation at trial is not subject to a harmless error analy-

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sis, the right to self-representation at preliminary hearing is subject to such an analysis. *See*, *Verdict*, Spring 2009, p. 10.

The Kansas Supreme Court reversed the Court of Appeals decision in *State v. Jones*, ___Kan. ___ (April 15, 2010). The Court found that preliminary hearing is a critical state of the criminal prosecution. Justice Rosen, writing for the majority opined that the right to self-representation is "*as vested at that hearing as it was at trial. To hold that there is no redress for a trial court denying a defendant an essential constitutional right at a preliminary hearing because the error ultimately becomes subordinate to a trial properly conducted with counsel is to turn the constitutional right into an illusory right.*"

The Supreme Court remanded the case back to the district court for a new trial, including a new preliminary hearing.

AUTHENTICATION OF WRITING

A co-defendant in a murder trial allegedly received a handwritten note from the defendant while they were both in jail.

The co-defendant stated that his brother (who was also in jail at the time), got the note from the defendant and delivered it to him. The note was not signed by the defendant. The co-defendant, who was the defendant's best friend, did not testify that he recognized the defendant's handwriting, but he did testify that the contents of the note "sounded like stuff" the defendant would have said. The note, of course, contained incriminating material and referred to facts about the crime. The note was admitted into evidence. The defendant objected on the basis that the co-defendant did not indentify the note as being in the defendant's handwriting.

In *State v. Hill*, ___Kan. ___(April 15, 2010), the Kansas Supreme Court held that identification of the handwriting is not essential to admission of a handwritten note. Under K.S.A. §60-464 "[t]he authorship or authenticity of a letter may be proved by indirect or circumstantial evidence, as other facts." When the contents themselves reveal knowledge peculiarly referable to a certain person, circumstantial evidence is sufficient.

Editor's Note: *Please keep in mind, that only the portion of the cited cases that may relate to issues that arise in municipal court are discussed in the Verdict.*

AND THE GENERAL SAYS……

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

AG OPINION 2010-3
February 11, 2010

Records listing the salaries of public employees are open under the Kansas Open Records Act. "Salary" is fixed compensation paid regularly for services and does not include accrued, but unpaid, vacation or sick leave. Rather, records identifying unpaid accrued vacation and sick leave are individually identifiable records pertaining to public employees and, as such, may be discretionarily closed. However, records of payments made to employees for vacation or sick leave are open.

AG OPINION 2010-7
February 24, 2010

Cities and counties can utilize their home rule authority to regulate lodging establishments by requiring licenses, establishing license fees, and imposing civil penalties for violations of ordinance/resolutions establishing safety and sanitary standards.

AG OPINION 2010-8
March 29, 2010

A regulation requiring that animal breeders have electric power in their kennels does not violate the constitution as it applies to animal breeders who are Old Order Amish and reject the use of electricity. The object of the regulation is to ensure that animals intended to be sold as pets are "provided humane care and treatment," and as such has a neutral effect. It is rationally related to a legitimate governmental purpose of providing humane care and treatment of animals. Accordingly, it passes constitutional muster.

AG OPINION 2010-9
March 29, 2010

Information transmitted between the parties and a mediator during a mediation involving a dispute is confidential provided the mediation is conducted pursuant to the Dispute Resolution Act. The confidentiality provision, as well as the evidentiary privileges, found in the Act and the Rules of Evidence are not limited to disputes referred by a court.

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opinion from 1997, some cities interpreted "crime" to mean that it was only assessed on charges, other than nonmoving traffic violations, that had a state law equivalent. Therefore, they were not assessing the fee on dog-at-large cases, for example. The amendment makes it clear that the $19 assessment is for every case, regardless of whether it is a charge that has a state law equivalent or not.

FAKE MARIJUANA AND ECSTASY BANNED

HB 2411gave Kansas the distinction of being the first state in the union to ban K-2 (fake marijuana) and Legal X (TFMPP). The legislation adds these substances to the list of controlled schedule I drugs in K.S.A. 2009 Supp. §65-4105.

Prior to its prohibition in Kansas, K-2, also known as "fake weed" or "spice" was a legal drug that could be purchased several places in Kansas and reportedly offers a marijuana-type high. It has been sold since 2006 as incense or potpourri for about $10-$15 per bag. It is a mixture of herbal and spice plant products, but it is sprayed with a potent psychotropic drug that is reported to be ten times more potent than THC. It causes hallucinations, vomiting, agitation and other dangerous effects. It does not test positive in a drug screen and its toxicity or how long it stays in the system is not known.

For the same reasons, the bill also makes illegal a substance called TFMPP, street names "Legal X" or "Molly," because when it is combined with benzylpiperazine, or BZP, it mimics the high of ecstasy according to law enforcement officials.

The bill became effective March 18, 2010.

ELECTRONIC CITATIONS

SB 533 amends current law to allow for the use of electronic traffic citations. It recognizes an electronic ticket as a valid notice to appear, complaint or citation. It recognizes the officer's typed name, agency, and agency number as a sufficient electronic signature on the ticket. Likewise, since the defendant can't really sign the electronic ticket, it provides that the officer need only obtain the offender's verbal promise to appear, by asking, *"Do you agree to appear before the _____court on or before _____?"* The officer is to record the defendant's response as "Yes," "No" or "no response." It also allows for the officer to electronically submit the insurance verification form to the court along with the electronic citation transmission.

STATE PASSES BROAD SMOKING BAN "KANSAS CLEAN INDOOR AIR ACT"

HB 2221 prohibits smoking or allowing smoking in any enclosed areas or at any public meeting in the State including public places; taxicabs and limos; restrooms; lobbies; hallways and other common areas in both public and private buildings, condominiums and other multiple-residential facilities and hotels or motels; any access points of all buildings and facilities not exempted; and any place of employment. Exclusions involve private homes; private hotel rooms; outdoor area of a building beyond the access points; gaming floors; smoking areas in adult care homes; tobacco shops; Class A or Class B clubs; and private clubs in areas where minors are prohibited.

"Public places" includes: banks, bars, food service establishments, retail service establishments, medical care facilities, grocery stores, school buses, museums, theaters, auditoriums, arenas, educational facilities, courtrooms, elevators, and recreational facilities to name a few.

All premises must be posted with the international no-smoking symbol and state that smoking is prohibited pursuant to state law. Your City will also have to adopt a smoking policy that complies with the statute and distribute it to existing employees and every new hire.

A violation of the law results in a fine up to a $100 for a first offense, up to $200 for a second offense, and up to $500 for a third or subsequent offense in one year.

No employer can discharge, refuse to hire, discipline or retaliate against any employee, applicant or customer who attempts to report or prosecute a violation of the smoking statute. Each individual allowed to smoke is a separate violation against the business or employer. An employer or business owner or manager is deemed to have allowed smoking to occur if he or she knew it was occurring or acquiesces in it under a "totality of the circumstances." Violations in a day care facility carry additional civil sanctions. It also prohibits selling cigarettes or tobacco products from a vending machine.

STATE ARCHIVIST TO MOVE INTO DIGITAL AGE

HB 2195 directs the State Archivist to prepare and present recommendations to the State Records Board regarding the preservation process for maintaining the authenticity of

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electronic records. In addition, electronic records maintained pursuant to the preservation process and certified by the electronic signature of the State Archivist are to be given the same legal effect as the original document.

TIME LIMITS EXCLUDE DAYS COURT IS NOT ACCESSIBLE

HB 2364 will add ***"days on which the clerk of the court is not accessible"*** to the list of days excluded from time limitations for filings and various court procedures. Currently, time limitations exclude Saturdays, Sundays, and legal holidays when the court is not open for business. This was apparently accomplished to take into account the court staff furloughs and would also seem to come into play if the office were not accessible due to disaster or other emergency closing.

MAKE AND MODEL OF CAR NOW REQUIRED TO BE ON INSURANCE CARD

HB 2492 amends the Kansas Automobile Injury Reparations Act (specifically K.S.A. 2009 Supp. §40-3104) to require insurance companies to include the make and year of an insured vehicle to the list of information required to be included on the insurance identification card.

DOMESTIC VIOLENCE DESIGNATION IN CRIMINAL CASES AND CHANGES TO DOMESTIC VIOLENCE LAW

Sub. for HB 2517 requires that on or after July 1, 2011, the trier of fact in all criminal cases, must determine if the defendant committed a "domestic violence offense," regardless of the crime charged. If so, the court is to place a "domestic violence designation" on the case. Only if the court finds, on the record, that the defendant has not previously committed a domestic violence offense or participated in a diversion agreement on a complaint alleging a domestic violence offense, and the domestic violence offense was not used to coerce, control, punish, intimidate, or take revenge against a person with whom the offender is involved or has been involved in a dating relationship or against a family or household member, would the court be authorized to not place a domestic violence designation on the criminal case or the defendant.

The bill goes on to define "domestic violence," "dating relationship," and "family or household member."

If the case is a domestic violence case or gets a "domestic violence designation," the court must order a "domestic violence assessment" (at the defendant's expense) and compliance therewith. The Court may charge a domestic violence fee to fund programming approved by the Chief Judge in the judicial district.

The bill also changes the domestic violence law to prohibits more than two diversions in a five year period (prior law was a three-year period) for any domestic violence case or case with a domestic violence designation. .

Finally, it changes what must be included in a police department policy on domestic violence arrests with a specific statement that nothing should be construed to require that both parties be arrested when both claim domestic violence, nor that an arrest must be made if there is no probable cause.

Editor's Note: *This will require an amendment to your city ordinance or to POC §3.1.1.*

CRIMINAL HISTORY CHECKS FOR APPLICANTS AT ADULT CARE HOMES OR HOME HEALTH AGENCIES

HB 2323 amends current law concerning background checks of job applicants for adult care homes or home health agencies. The bill would add conviction of felony theft to the list of convictions that prohibit individuals from employment by adult care homes and home health agencies. In addition, the bill would allow employers to submit criminal record check requests for licensed staff and volunteers through the Kansas Department of Health and Environment to the Kansas Bureau of Investigation, but would not require them to do so. However, it remains unlawful for such agencies to hire workers with certain felony convictions in the preceding five years.

PHARMACISTS CAN NOW ADMINISTER VACCINES

HB 2448 amends current law and allow a pharmacist, pharmacy student, or pharmacy intern working under the direct supervision of a pharmacist to administer the influenza vaccine to a person six years of age or older and any vaccine to persons over 18.

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NATIONAL CENTER FOR STATE COURTS PUBLISHES HANDBOOK ON COURT COLLECTIONS ISSUES

The National Center for State Courts has published the Second Edition of its handbook on court fine collections. This 100 page document is one of the best written compilations summarizing various methods to collect court fines. If you are struggling, like most municipal judges, to figure out how to increase your court's collection rate this is really a must read.

Current Practices in Collecting Fines and Fees in State Courts: A Handbook of Collection Issues and Solutions can be accessed at the National Center website: http://www.ncsconline.com

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CLARIFICATION REGARDING TREATMENT OF PRIOR CONVICTIONS UNDER SENTENCING GUIDELINES

HB 2469 amends K.S.A. §21-4710, with respect to criminal history category as follows: *"Prior convictions of any crime shall not be counted in determining the criminal history category if they enhance the severity level ~~or applicable penalties,~~ elevate the classification from misdemeanor to felony, or are elements of the present crime of conviction."*

INSPECTION OF PAROLE OFFICES BY THE DEPARTMENT OF CORRECTIONS

HB 2503 expands current law to allow the Secretary of Corrections the authority to inspect parole offices. Current law gives the Secretary explicit authority to inspect all correctional facilities, including facility management and business practices, offender treatment, and any allegations of improper conduct.

THE ADDICTIONS COUNSELOR LICENSURE ACT

HB 2577 creates the Addictions Counselor Licensure Act to require any person currently licensed as an addiction counselor or substance abuse counselor to be licensed and meet applicable requirements. Addiction counselors or substance abuse counselors would be prohibited from practicing without being licensed by this act, effective August 1, 2011. It also increases the number of members on the Behavioral Science Regulatory Board from 11 to 12 to include a Licensed Addiction Counselor or Licensed Clinical Addiction Counselor.

RELATING TO WORK RELEASE PROGRAMS

HB 2604 authorizes a sentencing **district** court to assign defendants, convicted of misdemeanors or felonies that require imprisonment in the county jail rather than a state correctional facility, to work release programs where the prisoners return to jail at the end of the work day. There was no similar change made to the similar provision in the code of procedure for municipal courts, K.S.A. §12-4509, but in cooperation with the local sheriff, cities could adopt their own ordinances allowing work release.

14TH COURT OF APPEALS JUDGE DELAYED

SB 541 delays the appointment of the 14th Court of Appeals Judge position forward one year from January 1, 2011 to January 1, 2012. The Court of Appeals was expanded in 2001 to 14 judges. In 2005 and 2006, the 12th, 13th and 14th Court of Appeals Judges were delayed for one year. In 2008, the 13th and 14th Court of Appeals Judges were again delayed for one year. The 14th Court of Appeals Judge was again delayed in 2009.

CONCERNING THE CRIMINAL USE OF WEAPONS

SB 497 explicitly exempts the lawful selling, manufacturing, purchasing, possessing, or carrying of certain ordinary pocket knives from prosecution under the criminal weapons use statutes. (K.S.A. 2009 Supp. §21-4201).

Editor's Note: *This will require an amendment to PCO §10.1.*

TECHNICAL CORRECTIONS TO DRUG CRIMES

HB 2661 makes several technical corrections to laws concerning drug crimes within the Kansas Criminal Code.

SITUATIONS IN WHICH SRS REQUIRED TO NOTIFY KDOC OF STATUS OF PEOPLE IN ITS CUSTODY EXPANDED

HB 2440 requires the Kansas Department of Corrections (KDOC) to notify crime victims of the status of a defendant when the defendant is diverted from the criminal justice system for an evaluation of his or her competency to stand trial or for involuntary commitment. State security hospitals, county or private institutions, courts, and the SRS are required to notify KDOC of any changes in defendants' custody resulting from hearings or proceedings for the purpose of providing victim notification. Current law only provides for notification of victims regarding a defendant's status after a criminal conviction, particularly when a convicted defendant is remanded to the custody of KDOC.

ISSUES RELATED TO ELECTRONIC PAYMENT AND ELECTRONIC COMMUNICATIONS IN COURT PROCEEDINGS

SB 519 amends several statutes to allow, for example, fines to be paid by any manner, not just in person or by mail. It allows affidavits for search warrants to be conveyed elec-

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David Martin Price was released from jail March 2, 2010 after serving 7 months for indirect contempt of court. *See*, Verdict, Fall 2009, p. 15. Price had been held for failing to comply with a permanent injunction prohibiting his practice of law without a license. His release was ordered by the Kansas Supreme Court after he signed a consent order agreeing not to practice law without a license.

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tronically. Several statutes are impacted. SB 410 permits state agencies to accept debit cards. It also prohibits any consumer seller or lessor from imposing surcharge for use of a credit or debit card.

CORRECTIONAL SUPERVISION FEES

HB 2581 increases the correctional supervision fee for district court misdemeanors from $25 to $60 and the correctional fee for felonies from $50 to $120. The fees are also to be deposited in a new "Correctional Supervision Fund." The money in the Fund is to be used for training personnel in the administration of the LSIR™ risk assessment tool. *See*, Verdict, p. 6, *supra*. The fee assessment will apply to persons placed on felony or state misdemeanor probation or released on state misdemeanor parole to reside in Kansas and supervised by Kansas court services officers under the interstate compact for offender supervision.

SEX OFFENDER REGISTRATION EXPANDED

HB 2468 amends the Kansas Offender Registration Act to require a person convicted of any attempt, conspiracy, or criminal solicitation of certain sex crimes to register for life. The following sex crimes would require lifetime registration; the attempt, conspiracy, or criminal solicitation to commit aggravated trafficking, rape, aggravated indecent liberties with a child, aggravated criminal sodomy, promoting prostitution if the prostitute is less than 14 years of age, and sexual exploitation of a child. Currently, the Kansas Offender Registration Act requires a person convicted of these crimes to register for ten years.

DISTRICT MAGISTRATE JUDGES

Current law allows counties to supplement the salary of district magistrate judges. Any additional compensation is paid directly to the judge who is directed to file a 1099-MISC to account for the payment. Senate Bill 461 requires that any additional funding be deposited in the state treasury and credited to the District Magistrate Judge Supplemental Compensation Fund. Now the district magistrate judge will receive any additional benefits in the same manner as the judge's conventional salary. Applicable withholding or other taxes, associated retirement or other employer contributions and authorized payroll deductions would apply. Payrolls would be approved by the Chief Justice of the Supreme Court.

CONTENTS OF THE KANSAS REGISTER

SB 439 updates and clarifies the law regarding the publication of the Kansas Register. Specifically, the bill requires that each issue of the Kansas Register contain all notices of hearings on proposed administrative rules and regulations; the full text of all administrative rules and regulations that have been adopted and filed with the Secretary of State; a table of contents; and a cumulative index. The bill also requires that each state agency designate one individual as a liaison through whom all required documents are submitted and that all materials submitted for publication must be submitted electronically

DISCOVERY IN DISTRICT COURT CASES; FORENSIC EXAMINATION TESTIMONY ALLOWED BY VIDEO; AND ADMISSIBILITY OF TAPED TESTIMONY OF CHILD VICTIMS NO LONGER ALLOWED

SB 386 amends the law on discovery and inspection of documents in district court criminal cases and the admissibility of certain evidence in criminal cases.

The bill would clarify that a prosecuting attorney would not be required to provide unredacted vehicle identification numbers or personal identifiers to the defendant unless ordered by the court. If the prosecuting attorney does provide such information to the defendant's attorney, the bill would prevent the defendant's counsel from further disclosing the unredacted numbers or personal identifiers except as authorized by order of the court. The bill would require the prosecuting attorney to provide notice to the defendant's counsel that the prosecuting attorney redacted books, papers, or documents that had numbers or personal identifiers. Any redaction of such information would be required to be by alteration or truncation of such numbers or identifiers and not by removal. Personal identifiers would include, but would not be limited to, birthdates, social security numbers, taxpayer identification numbers, drivers license numbers, account numbers of active financial accounts, home addresses, and personal telephone numbers of any victims or material witnesses.

In addition the bill authorizes district **and municipal courts**, in **any hearing or trial with a forensic examination report, to use two-way interactive video technology to take testimony from the person who prepared the report, if requested by either the prosecution or defense.** The use of any two-way interactive video technology would be required to be in accordance with requirements and guidelines established by the Office of Judicial Administration. All proceedings in a district court (not a municipal court) that use the technology would be required to be recorded verbatim by the court.

Finally, it repeals K.S.A. §22-3433 which allows the admission of recorded statements of child victims under the age of 13.

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NUTS AND BOLTS

Question: A local tow company impounded a car under my orders (2nd time DUI offender). The defendant is refusing to pay the tow and storage fees. Does the tow company have any recourse?

Answer: Yes. K.S.A. §8-1021 provides that if the owner of a vehicle towed pursuant to the DUI statute refuses to pay any towing, impoundment, immobilization or storage fees, or if the person fails to pick the vehicle up within 30 days of the expiration of the impoundment or immobilization period, the vehicle is deemed abandoned and the tow company can dispose of it just as they do other vehicles abandoned in its lot. K.S.A. §8-1103 through §8-1108 set out the process a private tow company goes through for auction of vehicles for the recovery of fees. There are similar provisions for public tow companies at K.S.A. §8-1102.

Question: Defense counsel has objected to the lab report under the right to confront clause. I have reviewed* Laturner *and I interpret it to mean that the rules have changed at least at the present time to require the live testimony of the chemist if there is an objection under the right to confront clause. Is this correct?

Answer: Generally, yes. It depends a little on the lab report. If this was a lab report prepared for the case then you are right (blood test, THC test, etc). If it is a hospital test that was taken as part of the diagnostic process, then it is not testimonial and you don't have a confrontation issue. It can come in as a business record.

The prosecutor can still use the notice and demand statute (K.S.A. §22-3437) as amended by the Supreme Court in *Laturner* and if the defendant doesn't respond or object it comes in without the chemist. But if the defendant does object, the chemist must be brought to testify to get the result in.

However, see, SB 386, p. 19, *supra,* which will allow video testimony of forensic experts.

Question: Do we send in the KBI disposition sheets showing a conviction, even if the defendant files an appeal?

Answer: Yes, according to the KBI. Here is its official response to this question:

"When a person is convicted of DUI or any other reportable offense the conviction should be reported to the Central Repository as usual. When the person files for an appeal we do not need to be notified. Once the appeal has been completed then the appeal court is responsible for reporting the appeal action. If the case has been remanded back to the municipal court then the municipal court should report the new court action (rehearing or resentencing) to the Central Repository.

When the Central Repository receives an appeal that reverses a conviction then the record is changed to "conviction reversed". No other information is needed at that point.

When the Central Repository receives an appeal that reverses and remands the case to be retried or resentenced then the conviction is changed to "reversed and remanded". The Central Repository will then expect the original court to submit the new court action for that case. When the new court action is received then that information is added to the record. "

Kansas Courts Self-Help Center

The Kansas Supreme Court now has a new Self-Help Center on- line. It can be accessed at www.kscourts.org. It contains information about the court process, forms, frequently asked questions, how to find a lawyer and a glossary of terms. It also restates Administrative Order 232 regarding the inability of court clerks to provide legal advice.

Kansas Supreme Court Administrative Order 232, issued January 27, 2009, requires that the following be conspicuously posted at all District Court Clerks Offices and copies be delivered to anyone upon request.

Guidelines for Kansas Court Clerks and Court Staff

Staff MAY	Staff MAY NOT
Encourage self-represented litigants to be informed about their legal rights to consult with an attorney for legal advice. Encourage self-represented litigants to consult with an attorney for legal advice. Provide information about: ▪ Pro bono legal services; ▪ Low-cost legal services; ▪ Lawyer referral services; ▪ List of local attorneys provided by the local bar association.	Provide legal advice, including but not limited to: ▪ Recommending a specific course of action; ▪ Performing legal research for litigants; ▪ Interpreting how the law would apply to a specific situation; ▪ Predicting the outcome of a particular strategy or action; ▪ Computing deadlines specified by statute or court rule.
Provide locations(s) of all appropriate court-approved forms and written instructions. Provide docketed case information. Provide reasonable accommodations required by the Americans with Disabilities Act.	Recommend any specific course of action, including but not limited to: ▪ Whether to file a pleading; ▪ The specific content or phrasing for a pleading; ▪ The types of claims or arguments to assert in pleadings or objections to pleadings; ▪ Whether to settle or appeal.
Provide locations for court-approved, written definitions of commonly used terms.	Assist in completing any forms or advise on how a particular term or definition applies to a specific situation.
Provide general information about courtroom location, other agencies' locations in the building and in-house facilities.	Interpret statutes or rules or advise whether a particular statute or rule applies in a specific situation. Provide information kept confidential by statute or court rule. Recommend or advise concerning rules of evidence, witnesses, objections, or rulings.

Speeding Case in Ohio Supreme Court

Ohio man challenges whether police officer can issue ticket based on sight, not radar gun

By Phil Trexler
Beacon Journal staff writer
Published on Wednesday, Feb 17, 2010

Many people vow they're going to fight their speeding ticket all the way to the Supreme Court. Today, Fairlawn entrepreneur and motorist Mark Jenney will have his day in court.

Jenney, 26, is fighting a speeding ticket he received in his Range Rover nearly two years ago in Copley Township. The legal issue focuses on whether a police officer can gauge a vehicle's speed and issue a ticket strictly on the basis of what he sees and not rely at all on a radar gun.

Appellate courts across the state are split on the issue. In Jenney's case, the 9th District Court of Appeals in Akron upheld his speeding ticket citation and $300 fine.

"As a matter of principle, this is the reason we've taken a speeding ticket all the way to the Ohio Supreme Court," said Jenney's attorney, John M. Kim. *"My client was wrongly accused and wrongly convicted."*

According to his personal blog, Jenney amassed fortunes through an Internet company and now calls himself a "Philanthropist, Entrepreneur, Investor and Visionary." He declined to be interviewed. According to his attorney, Jenney works in information technology. Property records show he owns two homes worth nearly $1.5 million in Fairlawn and Jackson Township. He also boasts on his blog of owning a fleet of pricey vehicles. Court records show Jenney has been cited about 20 times in the past 10 years for various driving offenses. In some, he has fought and won dismissals.

The speeding ticket at issue came in July 2008, when Jenney was driving on state Route 21. Copley Patrolman Christopher Santimarino said he clocked the vehicle on radar going at least 82 miles per hour in a 60-mph zone. As a kind gesture to save Jenney additional costs, a court appearance and points to his driver's license, Santimarino said he wrote the ticket for 70 mph. Jenney maintains he was doing the speed limit and that the officer's radar caught a speeding tractor-trailer that was passing his SUV.

At trial, Barberton Municipal Judge David Fish tossed out the officer's radar reading after Santimarino failed to provide proof of his certification training on the device. Instead, Fish relied on Santimarino's police training to visually mark a driver's speed and found Jenney guilty of traveling 70 mph.

Appellate courts based in Chillicothe, Columbus and Warren have agreed that an officer's visual reading can support a conviction for speeding. Courts based in Cleveland and Lima have found the opposite.
Michelle Banbury, a Barberton assistant prosecutor who will argue the case before the Ohio Supreme Court, said her points to the justices will focus on the officer's eyes.

"My argument is that an officer's visual estimate alone of a defendant's speed is sufficient to sustain a conviction for speeding," she said.

The Ohio Attorney General's Office is also slated to argue the case in favor of the officer. A decision from the Supreme Court is not expected for several months. Kim would not estimate the amount of money Jenney has spent fighting a speeding ticket that could have been settled long ago for about $100 and without a court appearance. He said Jenney is doing this on behalf of other drivers, most of whom can't afford a fight to the Supreme Court.

"I'm willing to bet you, that every individual, and certainly the majority of the citizens in this state, have at one time or another been pulled over for something," Kim said. *"And even though this is just a speeding ticket, I think it has far-reaching implications to the ordinary citizens of this state."*

Editor's Note: *In* Miller v. Jenness, *84 Kan. 608 (1911), which still appears to be good law in Kansas, the Kansas Supreme Court said a lay person could testify as to his estimate of the defendant's speed.* "Where the rate of speed of an automobile is material, any person of ordinary means of observation who may observe the vehicle may estimate the rate of speed at which it was moving." *See also*, *Hampton v. State Hwy. Comm.*, 209 Kan. 565 (1972).

Proposed Rule Change to Kan. Sup. R. 208 Registration of Attorneys

Amendments to Supreme Court Rule 208 relating to attorney registration have been proposed to require registered attorneys to certify on the annual registration form that they are in good standing with the Kansas Department of Revenue regarding the payment of state taxes. Failure to be in good standing could result in suspension from the practice of law. The Court is accepting comments on the proposed rule changes until June 1, 2010. Comments on the proposed rule change may be addressed to Ms. Gayle B. Larkin, Kansas Board for Discipline of Attorneys, 701 Southwest Jackson, First Floor, Topeka, Kansas, 66603, or to Rule208comments@kscourts.org.

DUI COMMISSION SUBMITS INTERIM REPORT

The Kansas DUI Commission submitted its Interim Report to the Legislature at the beginning of the session. Its final report and recommendations are not due until the beginning of the 2011 legislative session.

The Commission divided into four subcommittees: Substance Abuse Evaluation and Treatment, Criminal Justice, Law Enforcement Recordkeeping, and Legislative. Three subcommittees presented tentative recommendations/findings:

Law Enforcement/Recordkeeping:

1. Roadside saliva tests for drug testing should be examined by the KBI.
2. The Kansas Criminal Justice Information System (KCJIS) is the appropriate entity to collect and furnish data to agencies regarding DUI criminal history. The subcommittee envisioned an inquiry to KCJIS that would produce a "certified" record of priors. It also recommended creation of a "subscription and notify" program to alert prosecutors, court officials and probation officers of any interaction by an individual with law enforcement.
3. A protocol should be established for the Administrative Driver's License Hearings (DL Hearings) and a fee should be assessed for requesting a hearing. Statutory changes should be examined regarding the scope of the hearing.
4. All ignition interlocks should be required to have camera technology. In addition failure to obtain or comply with interlock should result in further sanctions.
5. Implied Consent language should be reviewed for possible legislative change.
6. The "two hour" per se rule should be increased to a 3-hour rule.
7. Using the specific date of July 1, 1996 for the "look back' for charging DUI offenses, since the DMV deleted all DUI convictions prior to that date from its records when we had the five year "look back"
8. Examine criminal sanctions for breath test refusal.

Substance Abuse Evaluation and Treatment:

1. Require all ADSAPs to be licensed by SRS-Addiction and Prevention Services.
2. Approval for any state licensed ADSAP provider to provide services in any district or municipal court.
3. Require all DUI/Substance Abuse Evaluations be completed in a standardized electronic format.
4. Revise SRS-ADSAP licensing standards to reflect best practices.
5. Match the offender's education and treatment interventions with the offender's clinical profile. There was a feeling that first-time offenders never get treatment because they are first-time offenders, when treatment may be clinically indicated.
6. Review references to "supervision and monitoring" in existing ADSAP statutes. This is really a probation function, not an ADSAP provider function. The roles should be clarified.
7. Implement evidence-based practice approaches to all DUI treatment.
8. ADSAP fees should be paid directly to ADSAP providers at time of service.
9. Investigate DUI specialty courts.
10. Investigate whether we need ADSAP at all. Current SRS licensing standards address the evaluation and treatment components.

Criminal Justice:

1. No changes recommended for first-time convictions
2. No changes recommended for second-time convictions except all 5 days should be spent in jail not a jail/house arrest combination.
3. Third-time offenses should be a misdemeanor, not a felony, but continue sole jurisdiction in the district court. Require a 10 day mandatory minimum in jail followed by 90 days of some sort of technological monitoring (SCRAM, house arrest, etc.).
4. Examine criminalizing a breath test refusal.
5. No DUI law changes should take place until 2011 when the Commission has had a chance to release its final report.
6. Each judicial district should be encouraged to establish at least one DUI court within its district.
7. Municipal courts wanting jurisdiction over first and second time DUI cases should have to go through an approval/certification process to make sure they meet certain standards. Including use of a standardized risk assessment tool and alcohol/drug evaluation tool and the ability to electronically report information to KCJIS.
8. Treatment be offered during each incarceration, but its impact on parole eligibility should diminish with each subsequent conviction.
9. The subcommittee will continue to examine jurisdiction over DUIs, implied consent issues and plea bargaining.

INTERIM REPORT OF KANSAS SUPREME COURT ELECTRONIC FILING COMMITTEE RELEASED

The Electronic Filing Committee also released its interim report on its plan to implement electronic filing of court papers as part of its on-going efforts to save time, money and further efficiency in the Kansas Courts. The full report can be accessed at: www.kscourts.org and clicking on "Electronic Filing Committee" under "Featured Links."

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IDENTITY THEFT AND IDENTITY FRAUD; CRIMINAL POSSESSION OF A FIREARM

Substitute for SB 67 amends the crimes of mistreatment of a dependent adult, identity theft and identity fraud, and criminal possession of a firearm. The bill increases the severity level of certain crimes committed against a dependent adult. It makes the knowing and intentional infliction of physical injury, unreasonable confinement, or "unreasonable" punishment (instead of the prior language "cruel" punishment) upon a dependent adult a severity level 5,person felony. It also deletes the requirement that taking unfair advantage of a dependent adult's physical or financial resources be committed by a caretaker or another person.

In addition, Sub SB 67 clarifies what constitutes identity theft or identity fraud. It makes it clear that it is not a defense that the person did not know the personal identifying information belonged to another person, living or deceased; and provides a definition for personal identifying information.

Finally, the bill adds the unlawful manufacture of controlled substances, unlawfully arranging a drug transaction using a communication device, and possession of chemicals with the intent to manufacture methamphetamine to the list of drug crimes covered by the crime of criminal possession of a firearm.

REQUIRED SAFETY TRAINING FOR SOCIAL WORKERS

H Sub for SB 25 amends the continuing education requirements for baccalaureate, master, and specialist clinical social workers. Applicants for first-time licensure renewal would be required to have completed, as part of their continuing education requirements, no less than six hours of social worker safety awareness training.

AMENDMENTS TO KELSEY SMITH ACT

Under the Kelsey Smith Act, the KBI is required to maintain a database containing the emergency contact information for all wireless telecommunications carriers registered to do business in the state. HB 2652 extends this to resellers of wireless communication services and requires the companies to update the information annually by June 15 or immediately upon the change of any information. The bill also gives the KBI an extra year to come into full compliance with the Act.

LAB FEES

HB 2605 increases the DNA lab fee from $100 to $200. This fee is assessed on all of those charges for which state statute requires DNA be collected. It also makes clear that the fee is to be assessed regardless of whether the person's DNA sample is already on file with the KBI. The defendant is only relieved from this fee if he or she can establish that his or her DNA is already on file and law enforcement did not take DNA on the presenting offense.

The bill also allows, with regards to the $400 lab fee in the case of DUI blood testing, or marijuana testing, etc., for a municipality to enter an agreement with the laboratory providing services that the $400 fee will be paid directly by the offender to the laboratory as "restitution." The Court is required to order the fee be paid by the offender (either into the Court, to be sent to the lab or by the offender directly to the lab if an agreement is in place with the lab allowing such direct payments).

RECOVERY OF ATTORNEYS FEES IN MOTOR VEHICLE CASES

Under current law, if an action is brought to recover **property damages only** from a motor vehicle collision, and the amount of damages sought is less than $7,500, the prevailing party can recover attorneys fees. Sen. Sub for HB 2432 increases this to $15,000. So if the amount sued for is less than $15,000, the prevailing party can recover attorneys fees.

COUNTY CLERK = SHERIFF?

Sen. Sub for HB 2039 provides that if there is no sheriff or undersheriff in a county, the county clerk shall assume the duties of sheriff until a sheriff is elected or qualified. In addition, if your sheriff is sent to jail, the county clerk will be responsible for the jail as long as the sheriff remains a prisoner therein.

RETIRING TROOPERS CAN PURCHASE THEIR STATE-ISSUED GUNS

SB 30 allows retiring trooper and sworn KHP officer to purchase their state-issued firearm when retiring. They can also purchase the sidearm if they are resigning to accept employment with a local, state or federal law enforcement agency.

RELEASE OF TERMINALLY ILL PRISONERS

HB 2412 allows the Kansas parole board to release any person from prison who has been deemed by a physician to have a terminal medical condition likely to cause death within 30 days. The board's decision is not appealable. The person will remain on post-release supervision at whatever level the board determines appropriate. The release is conditional and if the person's condition improves, if the prisoner doesn't die within 30 days, or if inmate violates any of the terms of release, the board can place the prisoner back into custody.

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Legislative Updates

(Continued from page 23)

JOURNALIST SHIELD LAW

Sen. Sub for HB 2585 creates a journalists' privilege with regard to certain disclosures of information. A journalist will not be compelled to disclose any previously undisclosed information or the source of the information procured while acting as a journalist until the party seeking disclosure establishes that the material is relevant, is of compelling interest and cannot be obtained by alternative means. A hearing must be held and the prevailing party can be awarded attorneys fees.

ATTEMPT, CONSPIRACY AND CRIMINAL SOLICITATION TO COMMIT CERTAIN CRIMES ENHANCED

HB 2435 amends several criminal and sentencing statutes. First, the bill amends current law to clarify that the penalty for an attempt, conspiracy, or criminal solicitation to commit certain sex crime where the victim is a child less than 14 years of age would be an off-grid offense. This clarifies a contradiction between general criminal statutes on attempt conspiracy and conspiracy to commit an offense and the statutes known as Jessica's Law.

HB 2435 also does the following:

- Deletes the definition of "prior conviction event" in the aggravated habitual sex offender statute to clarify that any person convicted of two or more sexually violent crimes, despite the fact that the convictions occur on the same day, is a habitual sex offender subject to a mandatory life sentence without the possibility of parole;
- Amends current law to require the sentence for a violation of aggravated endangering a child to be served consecutively to any other term or terms of imprisonment;
- Amends the statute on terrorism and illegal use of weapons of mass destruction so that an attempt, conspiracy, or criminal solicitation to commit the crime would be an off-grid felony;
- Enhances the severity of the sentence for offenders of certain drug crimes who are 18 years of age or more and the violation occurred on or within 1,000 feet of any school property; and
- Creates a special rule in sentencing to add 30 months imprisonment to the sentence of any defendant convicted of a felony when the trier of fact finds that the defendant wore or used ballistic resistant material during the commission of, attempt to commit, or flight from such felony. The 30 months is presumptive prison and is consecutive to any other sentence. The sentence is not considered a departure, and is not subject to appeal.

AMENDMENTS TO THE OPEN RECORDS ACT

SB 369 makes several amendments to the Kansas Open Records Act. The provisions of interest are:

- Allows the social file of a juvenile offender to be disclosed to the juvenile's guardian ad litem;
- Adds to the list of items that a public entity is **not required to disclose**: "*an individual's e-mail address, cell phone number and other contact information which has been given to the public agency* ***for the purpose of*** *public agency notifications or communications which are widely distributed to the public"*
- States that a public agency does not have to allow a person to get copies of public records by inserting , connecting or otherwise attaching an electronic device provided by said person to the computer or other electronic device of the public agency.

Attorney General Opinions

(Continued from page 15)

AG Opinion 2010-10
April 7, 2010

A contractual provision, which would require appointed counsel to raise the issue of payment of the BIDS application fee at sentencing, does not conflict with the restriction in K.S.A. §22-4520 that prohibits BIDS from making any decision regarding the handling of any case or interfering with appointed counsel in carrying out their professional duties.

"In response to the summary judgment motion, plaintiffs presented the novel, but unsupported argument that they were entitled to maintain the action and obtain the relief sought because they possess a constitutional "right to privacy," which they believe is guaranteed to them by the Fourth Amendment. Plaintiffs' argument is apparently based on the simplistic notion that a private organization with a private clubhouse has a constitutional right to privacy."

Justice Johnson writing for the Kansas Supreme Court in *VFW Post 971 v. City of Newton*, Slip Copy, 2010 WL 786026 (Kan. March 5, 2010) which involved an action challenging the City's smoking ban.

New and Emerging Ignition Interlock Technologies

Ignition interlock devices (IIDs) may be an effective tool in reducing drunk driving recidivism rates, yet when asked, judges say that the main problem with traditional ignition interlocks is that authorities do not know who is providing the breath sample. When faced with a violation, defendants sometimes claim that they were not the person driving the vehicle at the time of the failed breath test. Judges have been left with no proof otherwise. But there is hope on the horizon.

PHOTO ID FOR IID

The latest emerging technology is the use of Photo ID devices along with ignition interlocks. This new combination functions like the regular interlocks device with the addition of a small cameral electronically connected to it. The camera is either placed on the side of the windshield or attached to the bottom of the rearview mirror.

The camera captures an identification picture of the defendant the moment the breath sample is given. The device also captures a picture every time the vehicle is started, on every rolling retest, when the defendant ignores or misses a rolling retest and when a tampering event occurs.

Although the camera itself is an extremely efficient anti-circumvention feature, the photo ID device still uses other anti-circumvention features to deter tampering. These devices continue to require either a hum tone or an inhale/exhale breath pattern while providing the breath sample. This prevents defendants from being able to use an air tank or similar devices to provide a false breath sample. Although the camera is present, additional anti-circumvention features are still utilized since the population being dealt with can be very creative. Device manufacturers want to make it very difficult for users to bypass the device.

Several providers in Kansas have the camera technology available, although it is a bit more expensive to the offender. The DUI Commission Interim Report recommends that only camera-based interlock devices be allowed in Kansas in the future.

IID: ALCOHOL MONITORING DEVICE

Although the main purpose of the photo ID interlock device is to separate intoxicated drivers from their vehicles, these devices do have a dual purpose that courts may find useful. The photo ID device can be utilized as an alcohol monitoring source. Defendants can be required to provide daily breath tests at scheduled times. This allows defendant the convenience of going out to their vehicle to provide their daily preliminary breath test (PBT), rather than driving or finding a ride to a testing facility. The breath test is a monitored breath test because of the camera and courts will still have comfort knowing defendants are not going to drive that vehicle after drinking.

Like the regular interlock, the photo ID devices have an early recall feature. These devices can be set up to call defendants in early after any given number of failed breath tests, even one. This allows the court to be notified of the failed tests within a few days of occurrence.

OTHER ADVANCED FEATURES

In the near future, some advanced features that can be added to the existing photo ID interlock device may become available. The use of Facial Recognition technology may provide monitoring authorities the ability to create a specialized program. That device would be able to accurately identify a specific person. This type of program could either allow the vehicle to start only when a specific offender is driving or it could simply notify the monitoring authority whenever anyone other than the defendant is driving the vehicle.

Another feature is real time downloads. Using this feature, monitoring authorities would be notified, usually by email, of events as they happen.

What else may the future hold? The Automotive Coalition for Traffic Safety (ACTS) and the National Highway Traffic Safety Administration (NHTSA) are working together to fund a five-year research program to explore the use of in-vehicle technology to prevent impaired driving. This jointly funded $10 million project is called Driver Alcohol Detection System Safety (DADSS). Their focus appears to be away from ignition interlock devices because the new technology needs to be passive to allow someone who is not drinking to easily start their vehicle.

Some of the technology they are researching is:

Tissue Spectrometry which estimates a person's BAC level by measuring light absorption from a beam of Near-Infrared reflected from the subject's skin. Data could be accessed through the steering wheel, the gear shift or a touch key ignition.

Distant Spectrometry uses a "sniffer" to measure alcohol concentration through breath exhaled in the vehicle. This technology would be placed near the driver.

In 2007, Nissan Motor Company displayed a concept vehicle equipped with early versions of these technologies. Nissan is also working on a camera that monitors eye movements.

NOTARIOS

Reprinted in part from "Notoriety for Notarios" by G.M. Filisko, published in the December 2009 ABA Journal

In the United States, the legal duties of the notary public are restricted to such tasks as witnessing signatures and certifying the validity of documents. But in Latin America countries, *notarios publico* receive extensive legal training and provide a range of legal services.

The problem is that many immigrants to the United States fail to realize that *notarios* don't have the same standing here that they do in other countries. And many *notarios*, whose signs are common in the business districts of Hispanic neighborhoods in U.S. cities, do nothing to dissuade their customers, or they simply overstep their bounds in efforts to be helpful.

But the result is the same: significant damage to an immigrant's efforts to secure a legal status that will allow him or her to remain in the United States.

"There are notaries engaged in a business for profit—and they have very ambiguous titles on their business cards or storefront windows—who clearly, clearly know they're engaged in practicing law without a license." says Carlina Tapia-Ruano, the founding partner of Tapia-Gurano & Gunn, an immigration law firm in Chicago. *"Many notaries work in their community and do have the intention and motivation to help that community,"* she says. *"They claim all they are doing is filling out forms for much less than attorneys would charge. But as a result of their ignorance, they commit mistakes that prejudice people horribly."*

The problem is not limited to the Hispanic communities. In the Arab-American community, signs just say "immigration expert" or "immigration." People assume the person is an attorney, calling him *muhamin*, or attorney in Arabic. Shops like this have popped up all over Detroit, home to the larges Arab-American population in the United States. They charge $400-$5000 instead of the $1,500 attorneys charge. *"They are just factories,"* says Abed A. Ayoub, a legal advisor at the American-Arab Anti-Discrimination Committee in Washington, D.C. *"There are 20-30 people sitting in a waiting room, and six to seven college kids take information and fill out forms. When they're face with complicated matters, they don't have the expertise."*

David Zetoony, a consumer protection attorney with Bryan Cave in Washington, D.C. partnered with immigration attorneys in the area to bring consumer protection complaints to put *notarios* out of business. Immigration lawyers were interested in his approach, but had been reluctant to initiate such actions because they were unfamiliar with consumer protection law. At the time Texas was one of the few states that had regularly been applying its consumer protection statute to *notarios*. He has been successful in putting two *notarios* out of business, one in Maryland and one in Virginia, with more actions pending. He has also teamed up with Catholic Charities in Washington to petition the FTC to consider its own enforcement initiatives against *notarios*. Finally, he is working with the ABA Commission on Immigration to train attorneys and other advocates on how to bring consumer fraud cases against *notarios* and other immigration consultants.

"At our first training, 200 attorneys showed up," says Zetoony. *"One thing that became clear was that this problem is huge."* He pointed out that it has been a largely unreported problem. *"Immigrants fear they'll get deported when they report this. It's hard to get people to come forward when the don't understand who's their friend or foe."*

In 2008, the Immigration Commission launched **Fight Notario Fraud**, a project to educate immigrants about how to identify and avoid fraudulent activities by *notarios*, and where to get help if they have been defrauded. The Commission also is awarding educational grants to organizations working at ground level in immigrant communities.

Kansas has also addressed the issue of *notarios.* In 2006, the Kansas legislature adopted K.S.A. §53-121 which provides that

"(a) A notary public who is not admitted to the practice of law in this state and who advertises notarial services in a language other than English shall include, in any advertisement, notice, letterhead or sign, a statement prominently displayed, in the same language in which such notarial services are offered, as follows: "I am not authorized to practice law and have no authority to give advice on immigration law or other legal matters."

(b) A notary public who is not admitted to the practice of law in this state shall not use the term "notario publico" or any equivalent non-English term in any business card, advertisement, notice or sign unless it complies with the requirements of subsection (a).

(c) Violation of this section is a class B misdemeanor.

(d) Violation of this section constitutes a deceptive act or practice pursuant to K.S.A. 50-626, and amendments thereto, and shall be subject to the remedies and penalties provided by the Kansas consumer protection act.

Finally, the Kansas Attorney General's Office has been somewhat active in pursuing individuals who are practicing law without a license under consumer protection laws, al-

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Notarios

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though it is unknown whether the office has prosecuted any notarios.

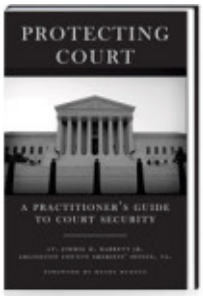
In December 2009 an action was filed against a Derby woman for helping people file lawsuits and complaints in federal court against the Kansas district court and state agencies. Joan Heffinton runs the Association of Honest Attorneys (A.H.A!) which maintains a website at: www.assocforhonestattys.com. The website lists "lawyers to avoid/consider" and says one of its board members is God. The group also endorses a constitutional amendment requiring evaluation of evidence by a computer program. The website says the program is "written to calculate the percentage of likelihood that the alleged defendant is guilty of the wrong for which he is accused."

In addition, last summer, David Price was jailed by the Kansas Supreme Court, where he remains today for contempt of court until he signs a consent order agreeing to refrain from the future unauthorized practice of law. Price is founder of several organizations that believes the legal profession needs competition from non-lawyers, Pro Se Advocates and Kansas Citizens for Equal Access to Justice. *See*, the Verdict, Fall 2009, p. 15 and *supra*, p. 18.

"Here, a reasonable person would know or have reason to know that walking through a lane with parked vehicles could be dangerous. It would be obvious to the reasonable person that walking near vehicular traffic would present a danger."

Craven v. Shively, Slip Copy, 2010 WL 597018 (Kan. App. February 12, 2010)

PROTECTING COURT: A Practitioner's Guide to Court Security



Protecting Court: A Practitioner's Guide to Court Security, a new book written by Lt. Jimmie H. Barrett Jr, with the Arlington County Virginia Sheriff's Office, contains a thorough look at the past, present and future of court security.

Lt. Barrett takes us on a journey of the history of court security and provides reviews of some of the most notorious lapses and how they happened. He examines the need for courts to examine their physical facilities. He gives tips, many of which are very inexpensive, for example the need for back-up lighting in any courtroom that does not have natural light. He urges courthouse personnel to conduct court security assessments. Are there places where people can easily hide and ambush unsuspecting court personnel or parties and witnesses? Is the parking area well lighted and safe? In discussing whether or the judge's bench contains ballistic reinforcement, he suggests that simply placing old bullet resistant vests underneath or behind the bench can be a very low-cost alternative.

Lt. Barrett stresses the importance of having a court administrative order in place concerning what can and cannot be brought into the building and the conditions under which people will be searched. Even something as simple as *"Anything that could be used to threaten, disrupt or jeopardize the judicial system will be prohibited from entering the courthouse"* is better than nothing,. He reminds us that court personnel always have the option of simply requiring people leave the building in lieu of a full search. The visitor should also always maintain the option of voluntarily departing rather than be searched. He provides a good overview of the caselaw regarding the limits of a court security officer's authority under the Fourth Amendment.

He points out that the judge's own actions could have an impact.

"For example, the ore a judge personalizes his/her ruling, the more of a target they become—it is important that the participants see the judge as the "court" and not an individual; after all, they represent and symbolize the rule of law, not the rule of men."

Lt. Barrett also discusses the use of screening devices and reinforces the position that even though courts will be inundated with requests from attorneys to be allowed to by-pass such screening, they should hold firm and not allow exceptions in the interest of total building security and safety.

This book is a short, easy read that is full of information about the importance of court security and its implementation regardless of the size or budget of your court.

The book can be ordered directly from the author at his website:
http://www.protectingcourt.com/

Race & Gender of Judges Make Enormous Differences in Rulings, Studies Find

By Edward Adams
Reprinted from ABA Journal website

A judge's race or gender makes for a dramatic difference in the outcome of cases they hear—at least for cases in which race and gender allegedly play a role in the conduct of the parties, according to two recent studies.

The results were the focus of a program about *"Diversity on the Bench: Is the 'Wise Latina' a Myth?,"* sponsored by the ABA Judicial Division at the ABA Midyear Meeting in Orlando in February 2010.

In federal racial harassment cases, one study found that plaintiffs lost just 54 percent of the time when the judge handling the case was an African-American. Yet plaintiffs lost 81 percent of the time when the judge was Hispanic, 79 percent when the judge was white, and 67 percent of the time when the judge was Asian American.

The comprehensive study, by professors from the University of Pittsburgh School of Law and Carnegie Mellon University's Tepper School of Business, examined a random assortment of 40 percent of all reported racial harassment cases from six federal circuits between 1981 and 2003.

A second study, looked at 556 federal appellate cases involving allegations of sexual harassment or sex discrimination in violation of Title VII of the Civil Rights Act of 1964. The finding: plaintiffs were at least twice as likely to win if a female judge was on the appellate panel.

University of Pittsburgh School of Law Professor Pat K. Chew, who co-authored the racial harassment study, said she found "the rule of law is intact" in the cases she reviewed. Judges—no matter which side they ruled for—took the same procedural steps to reach their decisions, she said.

But judges of different races took different approaches *"on how to interpret the facts of the cases,"* she said.

Pressed on whether the rule of law could actually be considered intact when outcomes varied so much depending on the race of the judge, she replied: *"It's always made a difference who the judge was. We've long known, for instance, that a judge's political affiliation makes a difference."*

Judge Carol E. Jackson of U.S. District Court for the Eastern District of Missouri said she was heartened that diversity has crept into the federal court system, where today 20 percent of judges are women and 15 percent are members of minority groups.

"It's important that different voices are being heard," she said.

The program took its title from a much-debated comment made years ago by U.S. Supreme Court Justice Sonia Sotomayor : *"I would hope that a wise Latina woman with the richness of her experiences would more often than not reach a better conclusion than a white male who hasn't lived that life."*

The participants never answered the question of whether a Latina judge reaches better conclusions, but at least in some cases, it appears likely that she would reach a different result.

THE IMPORTANCE OF A DIVERSE JUDICIARY

As a general rule, society believes that democracy requires that the institutions of government reflect the citizens of the nation. It is of particular importance that the American court system which decides disputes between adversarial parties renders justice fairly and impartially and maintains the appearance of fairness. Unless members of the racially and ethnically diverse public see people who look like them on the bench, they will tend to lose confidence and trust in our courts.

However, perhaps the most important argument for diversity in the judiciary is that it benefits judicial decision making. Judges from different backgrounds and a diversity of experiences help to guard against the possibility of narrow decisions. Respected Supreme Court Justice Oliver Wendell Holmes once said, *"It is experience that can give a person a common touch and a sense of compassion, an understanding of how the world works and how ordinary people live."*

Many years later, Justice David Souter wrote: *"Anyone who has ever sat on a bench with other judges knows that judges are supposed to influence each other, and they do. One may see something the others did not see, and then they all take another look." Calderon v. Thompson,* 523 U.S. 528 (1998).

The League of Women Voters has embarked upon a two year project entitled "Safeguarding U.S. Democracy: The Quest for a More Diverse Judiciary." To learn more, go to http://www.lwv.org The project's efforts are currently concentrated in Kansas.

DAY FINES

Recently the internet was all abuzz about a Swiss court that slapped a wealthy speeder with a $290,000 fine. The judges in St. Gallen, in eastern Switzerland, based the record-breaking fine on the speeder's estimated wealth of over $20 million. The driver was ticketed with driving 35 miles over the speed limit. This fine was more than twice the previous Swiss record fine of $107,000.

The idea of basing fines on the offender's income level is not unique to Switzerland. These fine systems are sometimes called "unit fines" or "day fines" and are most common in Scandinavian countries.

Finland adopted such a system in 1921 to ensure "equal severity of the fine for offenders of different income and wealth." The idea was that a traffic fine should hurt a millionaire as much as a minimum-wage worker.

Under such a system, a fine is imposed in units. The more serious the violation, the more units. There is often a statutory maximum of units. The amount of one unit depends on the income and assets of the convicted person. A wealthier person has a higher unit price than a poorer one. If the accused can't account for his or her income, the court will assess the same. Lying about one's income is a crime punishable by jail and/or fine. The calculation includes many variables, such as the number of dependants and the value of real-estate holdings. However, the "day fine" generally is equal to half the offender's daily disposable income. If a person fails to pay the fine, a "recovery" hearing is held and a day in prison can be given for every three unpaid day fines.

For example, a typical drunk-driving charge might be worth 40 "units." An offender earning about $2,000 a month would be fined $1,050; a person earning $7,900 a month would pay closer to $5,000 for the same offense. Eighty percent of Finns surveyed think the practice is fair. Although there is no evidence that the day fine system reduces the number of traffic violations, it does help fund free education and healthcare for all in Finland.

The United Kingdom has experimented with day fines in the past under certain circumstances, but abolished them completely in 1993, under the insistence of Prime Minister Tony Blair. Instead judges were required to consider an offender's means in imposing a fine, but they were not required to apply a mathematical formula. Germany, Sweden, Denmark, Mexico and Macao have also experimented with day fines. In addition, France, Portugal and Greece use various forms of the "ability to pay" concept. A white paper written by an Australian think tank recommended such a process, but it was rejected as too difficult to administer.

A few local governments in the United States have also experimented with the day fine concept. The Vera Institute for Justice, a non-profit criminal justice research organization has led several efforts and published papers on the topic and encourages the use of what it calls "structured fines" as opposed to typical "tariff fines." *See*, http://www.vera.org/ The Institute's monograph, *"How to Use Structured Fines (Day Fines) as an Intermediate Sanction,"* published with the support of the Bureau of Justice Assistance in 1996, gives an interesting historical and present-day look at this concept for those who would like to know more. Demonstration projects were initiated in Oregon, Connecticut, Staten Island, New York, Iowa and Maricopa County, Arizona. The entire publication can be found on the VIJ website by typing in the search term "structured fines."

See also, *"Traffic Fines and Poverty"* by Sonya Matsunaga, Estuardo Novillos and Bill Fulton, presented as part of Equal Justice Seminar Fall 2002 of the Minnesota Justice Foundation, access on-line at: http://www.lsej.org/documents/118871Traffic%20Fines.pdf

"Finally, we note Bowie's argument that sending him to prison* [for violating his probation] *will promote prison overcrowding. We leave such policy considerations to the legislature."

State v. Bowie, Slip Copy, 2010 WL 923084 (Kan. App. March 12, 2010).

WAY TOO MUCH TO DRINK

Police in Punxsutawney, Pennsylvania charged a man with public drunkenness after he was seen trying to resuscitate a long-dead opossum along a highway.

According to police, one person saw 55-year-old Donald Wolfe kneeling before the animal and gesturing as though he were conducting a séance. Another witness told police Wolfe attempted to give mouth-to-mouth resuscitation.

Trooper Jamie Levier reported that the man was "extremely intoxicated" and did have his mouth in the area of the animal's mouth.

Associated Press story, March 26, 2010

Unpublished Opinions

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

REQUEST TO RE-TAKE BREATH TEST AFTER DEFICIENT SAMPLE: ADMISSIBILITY OF SAMPLE AND/OR REFUSAL

Unpublished Decision

Lindsey May was arrested for DUI following a single car collision. She agreed to take the breath test at the station. However, she would not blow a sufficient sample to get a full reading on the Intoxilyzer 8000. She started and stopped mid-blow several times in spite of repeated instructions and warnings by the officer. After 3-4 minutes of this, a deficient sample reading printed out showing a reading of .156.

Consistent with K.S.A. §8-1001(q), the officer advised May that her failure to provide an adequate sample would be considered a refusal. May immediately requested another opportunity to provide a breath sample. The officer denied her request because, he testified, he felt that she had already had an adequate opportunity to provide a breath sample.

The issue in *State v. May*, Slip Copy, 2009 WL 5206248 (December 31, 2009), was whether the deficient sample evidence should be admitted into evidence and/or whether the "refusal" could be used against her at trial as allowed by K.S.A. §8-1001(k)(8). The district court suppressed the result, holding that May's request to take another breath test was akin to a request for an independent test and the proper remedy was suppression of the result and the refusal.

The Court of Appeals first examined whether May had sufficiently rescinded her prior refusal as allowed in *Standish v. Department of Revenue*, 235 Kan. 900 (1984). It found she had. She asked immediately after the deficient sample; the officer could have accommodated the request within 5 minutes with little inconvenience; and she was standing right next to the Intoxilyzer and had never been out of the officer's presence. Therefore, May's refusal was cured and the fact that she "refused" the test could not be used against her at trial.

But what about introduction of the "deficient" sample?

K.S.A. §8-1013(f) allows partial BAC readings to be admitted as "other competent evidence" when a defendant is charged with "operating under the influence of alcohol to the extent that the driver could not safely operate the vehicle pursuant to K.S.A. §8-1567(a)(3) (STO §30(a)(3)). *See also*, *State v. Stevens*, 36 Kan.App.2d 323, *aff'd in part* 285 Kan. 307 (2007). In addition, under the Court's holding in *State v. Herrman*, 33 Kan.App.2d 46 (2004) a deficient sample could not be admitted as "other competent evidence" in a prosecution for a violation under K.S.A. §8-1567(a)(1) (STO §30(a)(1)).

Since May was charged with "operating under the influence to the extent that she could not safely operate the vehicle" (K.S.A. §8-1567(a)(3)) a deficient sample would normally be admissible. But not so fast, opined the Court.

K.S.A. §8-1004 states that in the event the officer refuses to permit a suspect to obtain independent testing, the results of the initial breath test are not admissible. "Independent" testing means a test that is not subject to the control or influence of police. Therefore, the statute does not guarantee a suspect the right for **police** to do additional testing upon request. So, the deficient sample comes in, right? Again, it ain't over till it's over.

Since May rescinded her initial refusal to take the test and the officer did not honor that request, the appropriate remedy is suppression of the deficient sample. To reach this conclusion the Court relied on *State v. Gray*, 270 Kan. 793 (2001). In *Gray*, the Supreme Court recognized the fact that a driver could rescind a refusal to take the breath test as long as the rescission occurs according to the requirements set forth in *Standish*. The *Gray* Court stated that in such a situation the proper remedy is suppression of any reference to the testing procedures. Therefore, the Court of Appeals held that May's deficient sample was properly suppressed by the district court judge.

Judge Buser filed a detailed opinion, dissenting to the suppression of the refusal and the deficient sample. He argued that May did not refuse to take the test and then rescind the refusal. She failed to complete the test she agreed to take. Therefore, *Gray* has no application to this case. To say that under such circumstances neither the refusal nor the deficient sample are admitted, *"encourages deceptive practices and rewards that deceptiveness."* Motorists could continue such practices to delay the test in hopes that their BAC would drop.

In fact, Judge Buser points out, K.S.A. §8-1001 (h) stated at the time that upon a failure to complete the test, additional testing "shall **not** be given." (***Editor's Note:*** That

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language was removed from K.S.A. §8-1001 in 2008). Therefore, he would have admitted the "refusal" as defined by statute, into evidence.

He would not have admitted the deficient sample as it relates to a violation of subsection (a)(1) of K.S.A. §8-1567. In addition, he believes the same argument can be made for a violation of the per se section, K.S.A. §8-1567 (a)(2) and he would not admit a deficient sample under that subsection. But May was also charged in the alternative with a violation of K.S.A. §8-1567 (a)(3) and a deficient sample is clearly admissible when presenting proof of a violation under said subsection. Therefore, he would have admitted it.

ONLY CLIENT CAN WAIVE JURY TRIAL AND THEN ONLY AFTER COURT HAS EXPLAINED

Unpublished Decision

Noah Daniel's attorney advised the Court that his client was waiving jury trial on his possession of methamphetamine charge and agreeing to a trial before the Court. In addition, his attorney stated that the case would be tried on stipulated facts. The Court conducted a bench trial on stipulated facts and found the Daniel guilty. He appealed and argued that he was entitled to a new trial before a jury because he had not adequately waived his right to jury trial. In *State v. Daniel*, Slip Copy, 2010 WL 348285 (Kan. App. January 22, 2010), the Court of Appeals agreed.

"A defense attorney cannot waive the constitutional rights of his client unless the record shows he or she has discussed the waiver of those rights with the client and the client has voluntarily waived those rights." There is no indication, the Court found, that the attorney ever discussed the waiver with Daniel. There is no indication that the Court ever advised Daniel of his right to a jury trial, nor any indication that Daniel himself waived the right in writing or in open court. Waiver will not be presumed from a silent record.

Daniel's conviction was reversed and the matter remanded for a new trial.

WRITTEN WAIVER OF JURY TRIAL ON FELONY NOT ENOUGH

Unpublished Decision

Defendant's attorney requested a bench trial and presented the district court judge with a written waiver of jury trial on the record before proceeding with the bench trial. He was convicted of aggravated battery.

In *State v. Frye*, Slip Copy, 2010 WL 744799 (February 26, 2010) the Court of Appeals reversed his conviction and remanded the case for a new trial because before a district court can accept a written or oral waiver of jury trial, the Court must personally advise the defendant of his or her right to a jury trial in open court. A written waiver presented in open court does not suffice.

"DEFENSE OF OTHERS" REQUIRES THAT ACTUAL FORCE BE USED BY PERSON CLAIMING THE DEFENSE

Unpublished Decision

Defendant's girlfriend became involved in a heated exchange with two men as they leave a bar. As the defendant walked to his car, a scuffle ensued between them and the defendant's girlfriend fell to the ground. Defendant got a gun out his car and walked across the street to the men who were standing around his "downed" girlfriend. He pointed the gun at one of the men. They immediately backed away and his girlfriend was able to get up and the two of them walked away. Defendant was charged with aggravated assault and claimed he was entitled to a "defense of another" defense.

In *State v. Flint*, Slip Copy, 2010 WL 445934 (Kan. App. January 29, 2010), the Kansas Court of Appeals followed the recent decision of the Kansas Supreme Court in *State v. Hendrix*, 289 Kan. 859 (2009) and held that K.S.A. §21-3211 requires that "self-defense" and "defense of others" is only available if actual force is used. Since the defendant merely threatened force by pointing the gun, the defense was not available to him.

Judge Greene issued a concurring opinion to point out that this factual situation is just the situation that Chief Justice Davis warned about in his dissent in *Hendrix*. He wrote, *"The fact that Flint has been deprived of self-defense here demonstrates the wisdom of Chief Justice Davis' dissent and the urgent need for a legislative fix of K.S.A.§ 21-3211.*

PROSECUTION NOT REQUIRED TO PRODUCE MANUFACTURER'S MANUAL IN ORDER TO INTRODUCE BREATH TEST RESULTS

Unpublished Decision

Defendant was arrested for DUI and taken to the police station. The defendant submitted a breath test with a .138 result. He argues that the breath test result was improperly admitted into evidence because the prosecution was unable to produce the manufacturer's manual for the intoxilyzer, thus preventing him from establishing that the officer followed the required protocol.

In *State v. Rivera*, Slip Copy, 2010 WL 445689 (Kan.App. January 29, 2010), the Kansas Court of Appeals found that in order to get the breath test result admitted, the prosecution was required to establish that the testing equipment was certified by KDHE, the procedures used were in com-

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pliance with the KDHE requirements, and the equipment operator was certified by KDHE. The Court found that these minimum foundation requirements were met when the prosecution admitted the DC-27 form. The DC-27 established that the machine and the officer were certified by KDHE and that the procedures used complied with KDHE testing protocol. Above and beyond that, the prosecution introduced the intoxilyzer certificate, the officer's certification certificate, and a video of the officer administering the breath test, which showed he followed the proper protocol. Finally, Corp. Brown, the custodian of the intoxilyzer information, testified that he was present during the administration of the breath test and the machine was working properly. There was substantial competent evidence to admit the result. The prosecution was not required to produce the manual as part of its foundational requirements to introduce the intoxilyzer results. In fact, the officer isn't even required to read the operating manual, as long as he follow the KDHE protocol.

PROSECUTOR COMMENTS REGARDING WHY DEFENDANT DIDN'T CALL CERTAIN WITNESS IF HE FELT THEY WOULD BE HELPFUL NOT REVERSIBLE IF DEFENDANT PROVOKED THE COMMENT BY HIS OWN QUESTIONING OF WHY THE PROSECUTION DIDN'T CALL THE WITNESS

Unpublished Decision

In closing statements, defense counsel noted that the prosecution did not call a particular witness and therefore failed to prove its case. In response, the prosecutor pointed out to the jury that the defendant had subpoena powers and could have called the witness himself if he felt he had something relevant to say. On appeal, the defendant argued that this constitute reversible prosecutorial misconduct. He argued that this shifted the burden of proof.

In *State v. Diaz*, Slip Copy, 2010 WL 481258 (Kan. App. February 5, 2010), the Court held that defense comments in questioning why the prosecution did not call a certain witness allow the prosecution to equally respond. Here the prosecutor's statements were provoked and therefore proper.

THE POWER OF THE IN-CAR VIDEO

Unpublished Decision

Several court cases over the last year have interpreted K.S.A. §8-1522 (STO §46). Since the statute states that a person must maintain a single lane "as nearly as practicable," the Kansas Supreme Court opined in *State v. Marx*, 289 Kan. 659 (2009), that "*the State must present the court with some evidence from which it can conclude that the driver was not driving within the lane markers 'as nearly as practicable.'*" In *Marx*, it required the prosecution to present testimony from which the court could at least infer that it was not practicable to maintain a single lane.

Ketsem Rudolph was stopped for failing to maintain a single lane of traffic and was eventually arrested for DUI. Not only did the trooper testify that there was nothing interfering with Rudolph's ability to maintain a single lane, but the prosecution presented the officer's in-car video which showed Rudolph's car weaving within its own lane and also crossing over the lane marker. Nothing in the video indicated that it was impracticable for Rudolph to stay in his lane. In fact, the video showed that there were cars in adjacent lanes. Since the videotape was admitted into evidence, the Court of Appeals in *State v. Rudolph*, Slip Copy, 2010 WL 348274 (Kan.App. January 22, 2010) was able to see Rudolph's actions for itself and was able to conclude that Rudolph violated the statute.

An interesting side note in the case was the trooper's allegation that Rudolph almost hit a guardrail as he abruptly turned onto an exit ramp. Inexplicably, the trooper's camera turned off and there was a 19-20 second gap in the video when this movement allegedly took place. The trooper had the camera inspected after the stop and subsequently had to have it replaced. The defense hired a licensed private investigator to make a videotape of the area where the trooper's camera stopped recording. The investigator testified and the videotape showed that there was no guardrail on either side of the ramp that the defendant could have "almost hit." The district court and the Court of Appeals found that regardless of whether there was a guardrail, there was sufficient basis to stop Rudolph based on his driving that was captured on the video.

PEDESTRIAN STOP FOR SOLE PURPOSE OF CHECKING FOR OUTSTANDING WARRANTS

Unpublished Decision

Deron Williams was walking in the area of 22nd and Quindaro in KCK at 2:25 a.m. There is no dispute and it is a well-known fact that this is an extremely high crime area, including an area of significant drug use. A police car pulled up beside him with its "wigwag" lights on *"to indicate to oncoming traffic that the patrol car was stopped."* Williams stopped walking at the back corner of the patrol car. The police officers stepped from their car, stood on each side of him and asked him general questions about where he was going, what he was doing, and if he had seen anyone suspicious. The officers testified that they considered this a "pedestrian check." The stated purpose of a "pedestrian check" is to find out information on what is going on in an area. One of the officers also said that he stops pedestrians under these circumstances to get them identified and see if they have warrants. The questions and answers with Williams took 2-4 minutes. The officers were standing 5-7 feet from Williams and never told him he was free to leave.

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After questioning, the officer asked Williams if he could see his ID and run him in the computer. Williams handed the officer his ID. The police ran the ID and discovered an outstanding warrant. They arrested Williams and took him to jail. After the arrest, they searched him and found drugs in his shoe. He was charged with possession of cocaine.

Williams moved to suppress the evidence on the basis of an unlawful stop and the district judge agreed, stating that the act of asking for identification for the purpose of running a warrant check exceeded the lawful bounds of the police officer's authority. He granted the motion to suppress and the State filed an interlocutory appeal to the Kansas Court of Appeals.

In a 2-1 decision, in which Judge Standridge filed a dissent, the Court of Appeals reversed the district court and found that based on the "attenuation doctrine" the evidence obtained was admissible and not subject to suppression. *See*, *State v. Williams*, Slip Copy, 2010 WL 348286 (Kan. App. January 22, 2010).

The "attenuation doctrine" states that "a court may find that the poisonous taint of an unlawful search or seizure has dissipated because the connection between the unlawful law enforcement conduct and the challenged evidence became attenuated." The majority held in this case that the "*time between the improper acts by the police and discovery of the warrant was short. There were no intervening circumstances, and the purpose of the stop was to get information to run for possible outstanding warrants. However, the officers did not exhibit overbearing behavior and proceeded quickly with the process...therefore,…the interaction between the officer and the citizen was voluntary. Any taint that might have existed was attenuated by the manner in which the interaction took place. The discovery of the outstanding warrant was therefore either without taint or that taint was attenuated."*

In this case the majority opinion was written by Judge Pierron. Judge Buser wrote a lengthy concurring opinion and Judge Standridge wrote a well-reasoned and lengthy dissent. Even though it is a ten page, highly charged discussion, it is still an unpublished opinion. It is, however, an interesting example of how even three appellate judges can view a set of facts very differently.

PRIOR DRUG CONVICTION INADMISSIBLE IN POSSESSION CASE WHERE DEFENDANT DENIES POSSESSION

Unpublished Decision

A defendant's prior drug conviction is not admissible in a possession of drugs case when the defendant denies possession. It is admissible if the defendant admits possession, but asserts an innocent reason for same. In the case of a general denial, prior drug use is not relevant to prove a material fact of the case. *See*, *State v. Diaz*, Slip Copy, 2010 WL 481258 (Kan. App. February 5, 2010),

UNREFUTED TESTIMONY THAT OFFICER FOLLOWED THE KDHE PROTOCOLS THAT WERE POSTED OVER THE INSTRUMENT IS SUFFICIENT TO OVERCOME A MOTION TO SUPPRESS

Unpublished Decision

During Wesley Luken's DUI trial, the officer testified that he followed the KDHE protocols, *"which were posted in front of me on the board,"* in administering the breath test to the defendant. He argues that this was insufficient conclusory testimony that lacked specificity; therefore the breath test should have been suppressed.

The Court of Appeals, in *State v. Luken*, Slip Copy, 2010 WL 481281 (Kan. App. February 5, 2010) found that *"once uncontroverted evidence is admitted that the officer followed the pretest protocol, that evidence constituted substantial evidence"* thus supporting the denial of a motion to suppress.

"There was unrefuted testimony from the officer administering the breath test that he followed the prescribed protocol. Lukens does not assert that the Intoxilyzer malfunctioned in any way. He does not argue that the officer failed to comply with the KDHE protocol but rather that the officer's testimony failed to establish that he did. Evidence that the officer followed the KDHE protocol was admitted, and on appeal Lukens does not argue that it was error to do so, but rather that the evidence was insufficient once admitted. We disagree. Either the officer followed the pretest protocol or he did not. He testified that he did. This evidence is uncontradicted. We do not reevaluate the officer's credibility on this point."

IMPROPERLY OBTAINED INFORMATION FROM SRS

Unpublished Decision

Jason Rose was being developed as a suspect in an aggravated arson case in Lawrence in which three residents died in an apartment complex fire. Because of some statements he had made in initial interviews about living in the Villages (a group home for troubled youth), the detective investigating the case contacted SRS and left a message asking someone to call him regarding whether or not Rose had ever been in their custody and if so, why.

An SRS employee returned the call. After the detective explained that there had been an apartment fire in the complex where Rose lived and that he was interested in knowing whether there was anything in Rose's past relating to fires, the SRS employee immediately responded, *"Yes,*

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Jason has a history with fires and starting fires." The detective asked the employee if she would be willing to fax him information about it, and she agreed and did so.

The faxed documents received (about 20 pages) were stamped, "Prohibition on Disclosure", which the detective thought meant he was not to disclose it to others. *The detective testified, "I asked for it and they gave it to me. I figured they would have told me no if they didn't want to do that. Some agencies did and some didn't."* It turns out Jason was 20 years old and had just recently been released from SRS custody and was living on his own in an apartment. At some point later, a search warrant was served on SRS and 7,500 pages of Rose's records were turned over.

In *State v. Rose*, Slip Copy, 2010 WL 481255 (Kan. App. February 10, 2010), Rose argued that detectives unlawfully obtained the faxed SRS records and any information they got after that was fruit of the poisonous tree. The Kansas Court of Appeals agreed that SRS had improperly given information from Rose's confidential file to the detectives and improperly faxed information from his files. However, the Court found that Rose was a person of interest before the SRS information was received. Therefore, it was inevitable that detectives would have issued a search warrant on SRS, as they did later in the case. So, in this case, the inevitable discovery rule saves the improper release of confidential records. It should be noted that Rose's argument was seriously undercut by the fact that he offered the 20 pages of SRS-faxed material into evidence himself during the trial.

CONFRONTATION CLAUSE RIGHTS NOT VIOLATED AS LONG AS DEFENSE HAD A CHANCE TO CROSS-EXAMINE WITNESS AT PRELIMINARY HEARING, REGARDLESS OF WHETHER HE TOOK THE FULL OPPORTUNITY TO DO SO

Unpublished Decision

Thomas Wilson was charged with aggravated robbery for stealing rings and money at gunpoint from James Mullins. Mullins (the victim) testified at the preliminary hearing and was subjected to cross-examination by Wilson's attorney. The attorney provided very limited cross-examination and basically just asked Mullins if his testimony was similar to the statements he gave to the police. By the time the trial came around Mullins had died (unrelated to the robbery). The parties agreed that the transcript of Mullins' prelim testimony could be used at trial. However, Wilson objected to any out-of-court statements made by Mullins that he was not cross-examined about. Basically, he took the position that the confrontation clause requirement that any unavailable witness must have been subject to cross-examination, means only the statements he was cross-examined about could be admitted. He should not be allowed to present evidence regarding what Mullins had told the police officers (since he wasn't actually cross-examined about it).

In *State v. Wilson*, Slip Copy, 2010 WL 653126 (Kan. App. February 19, 2010), the Court of Appeals found that Mullins' prior statements to the investigating officer were admissible because Wilson had the opportunity to cross-examine Mullins about them, even if he failed to do so. The admission of Mullins' statements through the officer did not implicate the Confrontation Clause.

"We note Wilson's dilemma. The preliminary hearing at which a defendant has the opportunity to cross-examine a witness may occur prior to the time the defendant has completed his or her own investigation. Even if the defendant is prepared, it forces the defense to perhaps reveal its strategy and allows the State to prepare better for trial. However, this appears to be the law."

EFFECT OF INTERVENING ALCOHOL USE IN DRIVER'S LICENSE SUSPENSION ACTION

Unpublished Decision

Two cases have recently looked at issues surrounding a claim by a driver that he or she consumed alcohol after driving and the effect such a claim has on suspension of the driver's license.

In *Swank v. Kansas Department of Revenue*, Slip Copy, 2010 WL 446036 (Kan. App. January 29, 2010), Kathryn Swank got into an altercation at a private home and chased a person related to the disturbance in her automobile as he drove home. According to the person being chased, Swank was driving erratically and nearly hit his vehicle. He also told officers that Swank was extremely intoxicated. Officers came upon Swank at a private residence after this chase had taken place. She admitted to drinking some alcohol before driving the car, but indicated that she consumed much more after she got to the residence where police encountered her. She was arrested for suspicion of DUI and blew over .08 at the police station. Her license was suspended. She argued that police did not have a reasonable basis to believe she drove a vehicle while intoxicated, due to intervening use; therefore her license should not have been suspended.

In *Schepmann v. Kansas Department of Revenue*, Slip Copy, 2010 WL 445887 (Kan. App. January 29, 2010) a different panel heard the story of Jake Schepmann. Schepmann struck a deer while driving home. He pulled his truck to the side of the road and somehow managed to lose his cell phone in the ditch. Because he couldn't call for help, he was forced to just sit and wait for help to come. He decided to drink and had 5-6 beers and threw the empties into the back of his pick-up truck. He eventually fell asleep and was awakened by police. He did not respond when the officer asked if he had consumed any alcohol. He was disoriented, his eyes were bloodshot, he smelled of

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alcohol, failed dexterity tests and slurred his words. He was arrested for DUI, taken to the station and blew .177. He also argued that his license should not be suspended due to post-driving consumption.

In both cases the court held that it looks at the evidence the officer had at the time she requested the driver take the test. In both cases, the officers had sufficient evidence to reasonably believe that the defendants were intoxicated when they operated their vehicles. A subsequent claim of intervening use does not negate the reasonableness of an officer's request. In *Schepmann*, the defendant never mentioned intervening use and the officer had no reason to believe there had been any. In *Swank*, the officer had the admission of drinking prior to driving and a witness who described Swank's erratic driving and intoxication. In both cases the drivers' licenses were properly suspended.

OFFICER NOT REQUIRED TO RELEASE DUI SUSPECT SIMPLY BECAUSE THE PBT SHOWS READING BELOW .08

Unpublished Decision

Driver was stopped for a traffic infraction and officer developed reason to believe he may be operating his vehicle under the influence of alcohol. He asked the driver to take a PBT and the result was .07. He advised the driver that he was 'legal to drive", but after consulting his sergeant, he asked the driver to step out of the car and perform field sobriety tests. The results supported the officer's early belief that the defendant could not safely operate the vehicle and he arrested him for DUI. At the station, the defendant blew .279. The defendant moved to suppress the breath test taken at the station on the basis that the officer had no basis to arrest him for DUI, since the PBT showed that he was "legal to drive," in the officer's own words.

In *State v. Burner*, Slip Copy, 2010 WL 597019 (Kan. App. February 12, 2010), the Kansas Court of Appeals held that based on a totality of the circumstances the officer had a reasonable and articulable suspicion that the driver was impaired by alcohol and his continued detention and arrest was supported by the field sobriety tests. The Court concluded by stating:

"[W]e acknowledges …that the statutorily defined .08 blood alcohol limit simply creates a presumption that, at that level of intoxication, a driver is unsafe on the roadways. Similarly, a blood alcohol content below .08 does not immunize a driver from a DUI conviction. Thus, the results of the PBT did not mandate a course of action…"

IN ORDER TO BE GUILTY OF OBSTRUCTION OF OFFICIAL DUTY, OFFICER MUST BE DISCHARGING OFFICIAL DUTY IN CONNECTION WITH A FELONY, MISDEMEANOR OR CIVIL CASE

Unpublished Decision

While firefighters were battling a fire in downtown Oskaloosa, officers blocked off the street to prevent traffic from entering the area. In addition, as people began gathering to watch, the police established a perimeter around the scene so the firefighters could perform their duties without interference from the public. Phillip Cline, who owned the building next to the one on fire, became angry when he was not allowed to breach the perimeter and go to his building. He began swearing at the officers, ignored their orders and attempted to move toward the firefighters. The officers ordered him to leave the area or be arrested. He refused to leave and was arrested. He was charged with obstructing official duty, a class A misdemeanor and was found guilty after trial.

In *State v. Cline*, Slip Copy, 2010 WL 596990 (Kan. App. February 12, 2010), the Court of Appeals threw out his conviction on the basis that K.S.A. §21-3808 (POC §7.2) requires that the prosecution establish that the person obstructed a law enforcement officer while that officer was discharging an official duty in connection with a felony, misdemeanor, or civil cases. Since establishing a perimeter around a fire has nothing to do with enforcing a felony, misdemeanor or civil case, Cline could not be convicted of a violation of said statute. The Court pointed out that the same is true of a traffic infraction. Interfering with an officer while he is writing a traffic ticket cannot be the basis for an obstruction charge. *See also*, *State v. Hagen*, 242 Kan. 707 (1988).

OFFICER CAN TESTIFY THAT SHE BELIEVED DEFENDANT WAS UNDER THE INFLUENCE OF ALCOHOL TO THE EXTENT THAT HE COULD NOT SAFELY OPERATE THE VEHICLE

Unpublished Decision

In *State v. Germann*, Slip Copy, 2010 WL 481268 Kan. App. February 5, 2010), the defendant objected to the officer's testimony that based upon her observations of the defendant (odor of alcohol, bloodshot and glassy eyes, slurred speech, and performance on the field sobriety tests) she believed he was intoxicated and intoxicated to the extent that he was not capable of driving safely. The defense argued that this invaded the province of the jury, as this was the ultimate factual issue in the case. The Court of Appeals, following Kansas Supreme Court precedent in *State v. Kendall*, 274 Kan. 1003 (2002), held that as long as the officer does not give an opinion that the defendant is guilty of a crime, the officer can testify as to his observations. The officer did not opine that Germann was guilty

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of a crime, and his testimony regarding intoxication properly assisted the jury in arriving at a reasonable factual conclusion from the evidence. Likewise, it does not matter if the testimony is characterized as expert or lay testimony because either type of testimony is acceptable even if it embraces the ultimate issue to be decided by the jury.

DEFENDANT DOES NOT GET CHARGED WITH THE CONTINUANCE WHEN DEFENSE COUNSEL REQUESTS CONTINUANCE, BUT DEFENDANT VOCALLY STATES OPPOSITION TO SAID CONTINUANCE

Unpublished Decision

Prior to trial, defense counsel requested a continuance for more time to prepare a defense. The defendant objected to his lawyer's request and indicated he would not waive his speedy trial rights. The case was continued. After he was convicted, the defendant appealed and argued ineffective assistance of counsel for not raising a speedy trial issue in the case. If the continuance requested by his attorney (to which he objected) was charged against the speedy trial limit instead of to him, there was no dispute that the speedy trial clock had run by the time the case went to trial.

In *Fonseca v. State*, Slip Copy, 2010 WL 744797 (February 26, 2010), the Kansas Court of Appeals agreed and found it to be ineffective assistance of counsel not to raise the speedy trial issue. The Court cited *State v. Hines*, 269 Kan. 698 (2000) which held that a continuance requested by defense counsel over the defendant's "strenuous objection" *would* be counted against the speedy trial time limit." This was particularly true when there was no indication the district court attempted to reschedule the trial the second time within the speedy trial limit or the district court was prevented from doing so by circumstances which would justify a continuance under the statutory speedy trial provision. Therefore, actions of defense counsel are attributable to the defendant in computing speedy trial violations *unless the defendant timely voices his or her disagreement with those actions* " The Court went on to point out, based on some other Kansas cases, that this may not be the case when the defendant's competency is in issue and the continuances to which the defendant objects are requested by defense counsel to determine the defendant's competency.

The defendant's convictions were vacated and his charges dismissed.

DEFENDANT MUST BE PRESENT WHEN JUDGE REVIEWS AND RESPONDS TO JUROR QUESTIONS

Unpublished Decision

Defendant was charged with the rape of a 17 year-old girl. During jury deliberations, the jury sent a question to the judge asking what the legal age for consent to intercourse was in Kansas. The judge responded that the answer was contained in the jury instructions and they should refer back to the instructions. Later that day, they sent another note to the judge, this time indicating they were deadlocked and asking what they should do next. The judge responded that they should "continue deliberation and attempt to achieve an unanimous verdict." Three hours later they returned a guilty verdict.

Although the Court of Appeals in *State v. Bonnett*, Slip Copy, 2010 WL 744755 (February 26, 2010), found that that the Judge's responses were not improper, it reversed the conviction on the basis that the judge did not review and respond to the juror questions in open court with the defendant and his attorney present and with a chance to object to the responses given or request a mistrial. This is a critical stage of the trial and unless it can be said to be harmless, it is reversible error.

JUDGE NOT REQUIRED TO FOLLOW PLEA AGREEMENT

Unpublished Decision

Defendant pled guilty to a third time DUI offense and the prosecution agreed to recommend a one-year sentence, with probation after serving 90 days. When it came time for sentencing, it was determined that the defendant was actually a 5th time offender. The judge imposed a one year sentence, but denied probation. The defendant appealed arguing that the judge abused his discretion by not going along with the plea agreement.

In *State v. Adair*, Slip Copy, 2010 WL 921047 (Kan. App. March 5, 2010), the Court of Appeals held that the sentencing court is not bound by the terms of a plea agreement. In addition, the judge had a reasonable basis to depart from the recommended sentence based on the defendant's criminal history. He stayed within the statutory parameters and there was no allegation that the decision was the result of partiality, prejudice, oppression, or corrupt motive.

MISTAKE OF LAW NOT A VALID EXCUSE FOR ILLEGAL SEARCH

Unpublished Decision

After a rape on a college campus and discussions with the victim, police narrowed in on two possible dorm rooms in which the rape could have occurred. They could not get a warrant for one or both rooms because they did not have enough information (without looking inside the rooms) to choose between room 314 or room 315. The officers decided to see if college officials would open the rooms for them so they could take a picture of each room to show the victim. Presumably, she could then identify the room in which the rape occurred.

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Officer Golden consulted with the dorm's resident director. He advised the officer that the college could open a room if resident safety was at issue, but he needed permission from the dean of students to open a room when the resident wasn't there. He told the officers that he thought they could look in the room, but they couldn't touch anything. The dorm director called the dean of students and got his permission to open the rooms for police. The dean knew the only reason to open the rooms was to aid the police in their investigation.

You can't get a warrant for all the houses on Main Street just because you have information that a crime occurred in one of them."

Judge Leben, writing for the majority in State v. Jordan, Slip Copy, 2010 WL 921144 (Kan.App. March 5, 2010)

The resident director actually unlocked and opened one of the rooms while the officer waited outside. He told the officer what it looked like inside. After determining that the room matched the description given by the victim, the officer asked the director to open it again and take a picture of the inside of the room. He did so, while the officer peeked inside. Officer Golden showed the picture to the victim who said she recognized some items in the room. With that information, the officer obtained a search warrant for Jeffrey Jordan's room.

At Jordan's rape trial he moved to suppress all evidence obtained from opening the door and looking into the room and from the photograph on the basis that this was an unconstitutional, warrantless entry.

The Court of Appeals agreed. In *State v. Jordan*, Slip Copy, 2010 WL 921144 (Kan.App. March 5, 2010) it held that warrantless entry of a residence by police is improper unless a recognized exception to the warrant requirement applies. The only exception that could possibly apply in this case would be a consent theory, to wit: dorm residents give consent for college officials to enter their rooms. *"However, while some circumstances may exist where college officials could open a dorm room for the college's purposes, the dean of students opened the room solely to assist the police in a criminal investigation... the prosecution did not present any evidence that the defendant had in any way, through a housing contract or otherwise, waived his Fourth Amendment rights should college officials choose to assist in police investigations."*

The prosecution argued that even if the director did not have the right to enter the room, the police reasonably relied on his assertions that he did, otherwise known as the "apparent-authority doctrine." But the Court pointed out that the "apparent-authority doctrine" only applies to an officer's factual mistake that someone had authority, when they didn't. For example, when a person appears to be a roommate with authority over the room (keys, clothes, etc.), but turns out later not to be a resident.

This was not a factual mistake, the Court opined, it was a legal one. The officer was not mistaken on the facts. He knew that the resident had not been located or asked for permission. He relied on college officials for the *legal* opinion that they had authority to enter a student's locked room when helping the police with an investigation. The police can't insulate themselves from an illegal search by asking their third-party agent (the resident director) for a legal opinion that blesses a Fourth Amendment violation. A mistake of law does not shield their actions.

Clearly this holding resulted in a rapist being set free. The Court, through Judge Leben, indicated its on-going sensitivity to such situations.

"The work police officers do is difficult, and that difficulty is made greater because we expect them to understand Fourth Amendment requirements to a degree that sometimes exceeds what a good law student might know-sometimes even on questions that sharply divide judges. We also understand that when evidence is thrown out, the guilty may go free, and the rights of victims may not be vindicated in criminal court. But we, like the police, must follow the law, which today generally requires the exclusion of evidence that has been obtained in violation of a person's constitutional rights primarily for the purpose of determining future police misconduct. ..Were we to allow an officer to avoid Fourth Amendment restrictions by relying on a third party's legal conclusion ...we would provide a ready route to evade the Fourth Amendment restrictions in later cases."

It should be noted that the prosecution never raised the issue of inevitable-discovery. In other words, if it could establish that the police would have eventually discovered Jordan's identity and searched his room, the evidence could be admitted. Its attempt to raise if for the first time on appeal was declined.

WHEN IS A ROADBLOCK NOT A ROADBLOCK?

Unpublished Decision

A stolen backhoe was located by police along the side of a road. Police blocked off the road while the owner returned to retrieve it. Normal vehicles arriving at the roadblock would turn around. Police had no contact with these drivers. Then Zach Loveland rolled up to the scene and instead of turning around he parked behind the patrol car and remained in his car. At first, police thought he might be the owner of or somehow related to the backhoe. Police approached the vehicle, asked him to roll down his window. They asked him if he lived on the road and was try-

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ing to get home. He responded that he was trying to get home, but he didn't live on the blocked road. While talking to him, the officer almost immediately developed probable cause for a DUI arrest.

The issue in *State v. Loveland*, Slip Copy, 2010 WL 921102 (Kan. App. March 5, 2010) was whether police improperly seized Loveland by approaching him without any probable cause. In addition, the defendant argued that this was an improper "roadblock" under *State v. Deskins*, 234 Kan. 529 (1983).

The Court of Appeals did not buy either argument. First, this was not a roadblock with the purpose of seizing or detaining vehicles. It was a temporary roadblock due to conditions on the road (to wit: the removal of a backhoe). The officers were there to deter traffic from traversing the road, not to detain it.

Second, the police did not seize the vehicle by walking up to it and asking Loveland to roll down his window. Officers did not follow or stop the vehicle. They did not block its exit. They did not demand Loveland answer questions. This was a consensual, voluntary encounter .

The district court decision granting the motion to suppress was reversed and the case was remanded for trial.

TRIAL ON STIPULATED FACTS DOES NOT DEPRIVE DEFENDANT OF AN OPEN AND PUBLIC TRIAL

Unpublished Decision

Defendant was charged with felony possession of marijuana. He filed a motion to suppress, which was denied. He then waived his right to a jury and the case was set for trial. A stipulation of facts was entered between the defendant and the prosecution and presented to the judge. The stipulation indicated that the officer would testify consistently with his testimony in the preliminary hearing and the suppression hearing. The defendant reserved the right in the stipulation to appeal the suppression issue. This is apparently a common practice in Reno County when a person wants to preserve a suppression issue, but has no other defense at trial.

The court cancelled the bench trial that was set and entered a finding of guilty based on the stipulated facts.

In *State v. Wallace*, Slip Copy, 2010 WL 920082 (Kan. App. March 5, 2010), the defendant argued that his rights to a public trial and to be present were violated when the judge found him guilty without holding a bench trial.

The Court found that a criminal defendant can waive any fundamental right. In this case Wallace waived his right to a public trial, and his right to be present by entering the stipulation. The formal stipulation was presented in open court with the defendant and his attorney present. Even if there wasn't a waiver, the Court of Appeals found this to be invited error.

DON'T HAVE TO CHARGE "AIDING AND ABETTING" IN COMPLAINT TO PURSUE SAID THEORY

Unpublished Decision

In *State v. Griffin*, Slip Copy, 2010 WL 923145 (Kan. App. March 12, 2010), the Kansas Court of Appeals held that the prosecution does not have to charge aiding and abetting in the complaint in order to purse an aiding and abetting theory of guilt at trial. As long as the factfinder can conclude from a totality of the evidence that the defendant aided and abetted another in the commission of the crime, said theory can be considered in rendering a decision. The Court cites *State v. Pennington*, 254 Kan. 757 (1994).

EXCUSABLE NEGLECT IN TIME COMPUTATION FOR DRIVER'S LICENSE HEARINGS

Unpublished Decision

In *Shields v. Kansas Department of Revenue,* Slip Copy, 2010 WL 923004 (Kan. App. March 12, 2010), the Court of Appeals found that "excusable neglect" is a valid basis for allowing a request for an administrative driver's license hearing to be made out of time.

In *Shields*, the request for an administrative hearing following a DUI arrest was made the day after the arrest. However, the fax from the attorney's office did not go through and the attorney did not follow up to make sure it went through. The driver was able to present proof that the fax was sent, but not received and that other faxes that day from the same attorney's office did go through fine.

The Court of Appeals found that based on a 2007 amendment to K.S.A. §8-1020(v), the provisions of K.S.A. §60-206 with regards to computation of time were applicable to driver's license administrative hearing procedures. Since K.S.A. §60-206 recognizes "excusable neglect" as a basis for the judge to extend the statutory time limits, it is equally applicable in a driver's license hearing case.

TWO CONVICTIONS, TWO FINES, BUT ONLY ONE FORGED CHECK

Unpublished Decision

Deborah Sprecker wrote one forged check for $324.68. She was charged with two counts of forgery. One was for violating K..S.A. §21-3710(a)(1) (knowingly making a written instrument purporting to have been made by someone else without their consent) and K.S.A. §21-3710(a)(2) (knowingly deliver a forged instrument). She pled guilty to both counts. A first conviction for a violation of the

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forgery statute is a fine of the amount of the forged instrument or $500, whichever is smaller. A second conviction is the amount of the forged instrument or $1,000, whichever is smaller. She was fined the amount of the forged instrument on each count for a total of $649.36.

In *State v. Sprecker*, Slip Copy, 2010 WL 922654 (Kan. App. March 12, 2010), Sprecker argued that she should only be fined $324.68, because there was only one forged check and since both charges arose out of the same event, she had two "first" time convictions.

The Court of Appeals disagreed and found that she was correctly fined. It opined that since the penalty provision does not require that convictions be "prior" convictions and is only a count of the number of convictions, she could be sentenced as a first on one and a second on the other and therefore be fined twice.

Although Sprecker did not argue multiplicity, that argument was made in *State v. Plummer*, 2010 WL 1253612 (Kan. App. March 26, 2010) in which the Court specifically denied a multiplicity argument involving the charging of K.S.A. §21-3710(a)(1) for falsely endorsing a check and K.S.A. §21-3701(a)(2) for delivering said check, all based one event. The Court sited *State v. Utterback*, 256 Kan. 340 (1994) for its position that since they do not require proof of the same elements, they are not multiplicitous.

Editor's note: *Query, how would this be any different than the DUI statute? There are several ways to violate the statute: operating under the influence of alcohol, operating under the influence of drugs, or a per se .08 violation. However, if more than one section is charged and proved out of one set of facts, the defendant isn't convicted of two DUIs. Likewise, you could violate the disorderly conduct statute by engaging in brawling or fighting or by using obscene or abusive language. If you engaged in fighting and yelled obscenities after the fight, few would view that as two disorderly conduct charges. Or what if a person has the wrong tag on his or her car, and the tag is also expired, would that be two separate charges under K.S.A. §8-142? So it is unclear, to this author, why the forgery statute would be different, or maybe it's not.*

BAIL BONDSMAN CHARGED WITH THEFT OF SERVICES

Unpublished Decision

State v. Lowen, Slip Copy, 2010 WL 1078477 (Kan. App. March 19, 2010), is reviewed here simply to point out that sometimes those involved in the system do not act honorably.

When defendants are housed at the Reno county jail they are allowed free calls to their attorney or their bondsman. However, they must pay for any other calls. To prevent inmates from bypassing this rule, three-way calls are not allowed. To further prevent such calls, if there is a lull in the conversation (as would happen if attempts were made to connect a third caller), the call will disconnect.

Jory Lowen is a bail bondsman in Reno county. He started helping inmates make free calls to others by having them call him and then he would patch in a third caller. Lowen instructed inmates on how to avoid a disconnect by advising them to continue to talk while he was making the connection. Reno county estimated that it lost about $1,063 as a result of the 206 times Lowen made such calls. Lowen was charged with theft of services and the Court of Appeals found that the evidence presented established sufficient probable cause to be bound over after preliminary hearing.

AMENDMENT OF COMPLAINT AT END OF PROSECUTION'S CASE

Unpublished Decision

Malcolm Glover was charged with aggravated robbery. The State alleged in the complaint that he took money by threat of force while armed with a pistol. During the course of his case, Glover repeatedly denied taking any money, but admitted taking marijuana. During trial, the victim admitted that he initially told the police Glover only took money, but later changed his story and admitted Glover also took marijuana. At the close of the State's case, the prosecutor moved to amend the complaint to add marijuana to the property that was stolen. Glover was convicted.

In *State v. Glover*, Slip Copy, 2010 WL 1078442 (Kan. App. March 19, 2010), Glover argued that the amendment was prejudicial and should not have been allowed. He had based his entire defense on the fact that he did not steal money, just marijuana. The Court of Appeals found that Glover was not prejudiced by the amendment. He was not surprised by the State's amendment. He knew the State intended to present evidence that he took marijuana. The victim had changed his story well before trial and Glover had received a copy of said reports.

FACTUAL BASIS FOR PLEA

Unpublished Decision

Pursuant to K.S.A. §22-3210(a)(4) before taking a plea the judge must be satisfied that there is a factual basis for the plea. The judge does not have to have the prosecutor set out the facts. Reading the complaint or information to the defendant, if it sets out the factual details and essential elements of the charged crime, is sufficient. *See*, *State v. Ebaben*, Slip Copy, 2010 WL 1078464 (Kan. App. March 19, 2010). The Court of Appeals relied on *State v. Shaw*, 259 Kan. 3 (1996). In *Shaw*, the Kansas Supreme Court

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found that reading the following to the defendant as part of the plea was sufficient to establish a "factual basis."

"That count [2] alleges that between July 7 and July 17 of 1993, while in Reno County, Kansas, you unlawfully and feloniously and wilfully engaged in the lewd fondling or touching of a child done or submitted to with the intent to arouse or satisfy the sexual desires of the child or yourself or both when the child was under fourteen years of age."

Editor's note: *The code of procedure for municipal courts does not contain any provision similar to K.S.A. §22-3210(a)(4).*

CURRENCY IS NOT A "WRITING" FOR PURPOSES OF THE BEST EVIDENCE RULE AND A PHOTOGRAPH OF SEIZED CASH IS SUFFICIENT

Unpublished Decision

Juan had approximately $4,600 in his house. He had $3,000 of it in three stacks bound by colored elastic bands, yellow, blue and green respectively. The remainder was loose. He was robbed in an incident that involved a fight, stabbing and blood. Timothy Stokes was found with money on his person. Two bundles of money were wrapped with elastic bands, one blue and one yellow. Over $4,600 was found on him. The money was covered in blood. Photographs were taken of the money and the photographs were admitted at trial instead of the actual blood stained money. The defendant objected to the admission of the photographs because it was not the "best evidence."

The Kansas best evidence rule, codified at K.S.A. §60-467 (a), states that no evidence other than the writing itself is admissible to prove the contents of the writing.

In *State v. Stokes*, Slip Copy, 2010 WL 1078419 (Kan. App. March 19, 2010), the Court of Appeals defined the threshold question as whether or not currency falls under the definition of a "writing." It found that currency does not fit the definition of a "writing." In addition, K.S.A. §60-472 states that in any prosecution for a crime involving the wrongful taking of property, photographs of the property are competent evidence of the property and are admissible to the same extent as if such property had been introduced into evidence.

In fact, the money didn't have to be admitted at all. The officers who seized and counted the money could have testified as to what they recovered based on personal knowledge. The best evidence rule is not applicable when a witness testifies from personal knowledge of a matter, even though the same information is contained in a writing.

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

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

Confirmed programs to date include:

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

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

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

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

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

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

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

Brochures will be mailed in the early spring.
To be added to the mailing list:
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TRASH PULLS

Unpublished Decision

In companion cases, *State v. Martin*, Slip Copy, 2010 WL 1253752 (Kan.App. March 26, 2010) and *State v. Wheeler*, Slip Copy, 2010 WL 1253751 (Kan. App. March 26, 2010), a divided Court of Appeals was faced with the situation of what is commonly referred to as a "trash pull."

Police received a tip that Wheeler and Martin (hereafter referred to as the "Martins" for simplicity) were selling drugs out of their house. They had contracted with a trash collection service to pick up their trash and deliver it to a transfer station (presumably where it when on to a landfill). The sign at the entrance to the transfer station states that trash cannot be removed once it is placed there. Their trash was clearly left out for pickup within the curtilage of their home. There is no dispute that police could not enter on the Martin's property to search their trash under existing caselaw.

Police contacted the trash hauler. The Martin's were the last stop on the pickup. The trash hauler agreed to segregate the Martin's trash, and stop about two miles after leaving their residence, but before arriving at the transfer station, for the police to go through the trash bags. They did and based upon the items recovered obtained a search warrant for the house. The Martins were eventually charged with possession of methamphetamine, possession of marijuana and possession of drug paraphernalia. The district judge granted the Martin's motion to suppress the evidence seized from their home, based on an illegal search, since the search warrant, they argued, was based on their illegally searched trash.

There was not a lot of agreement on the approach to be taken to the case. Judge Malone wrote the opinion, Judge Green wrote a concurring opinion, and Judge McAnany wrote a dissent. In the end, the Court agreed with the district court and found that the evidence was properly suppressed. The majority hung its hat on the fact that the trash hauler had become an agent of law enforcement and as such law enforcement was not allowed to do anything indirectly that it couldn't do directly. Judge McAnany dissented on the basis that the parties never argued the issue of "agency" at any time during the proceedings, nor in the appeals. The case does contain a good compilation and discussion of the cases in Kansas and elsewhere on the subject of trash pulls.

COURT SETS ASIDE INDIRECT CONTEMPT OF COURT FINDING DUE TO LACK OF PROPER SERVICE

Unpublished Decision

The grandfather of a juvenile offender was ordered not to be at the Juvenile Division of the District Court in Wichita, nor to be on the premises of Youthville unless he had a confirmed appointment. If he had an appointment, he was to leave immediately after the appointment ended. He was to be escorted by security at all times he was on the premises. He was ordered to conduct himself appropriately at all times. The order went on to state that failure to comply would result in indirect contempt of court proceedings or disorderly conduct charges. A month later, the district judge filed a second order stating all the prior conditions, plus adding that it applied to telephone contact as well. A few days later, the State filed a motion to have the grandfather held in indirect contempt of court for threatening several Youthville workers.

The district court held a hearing to determine whether the grandfather was in indirect contempt of court. The grandfather attended the hearing. Evidence was presented from the Youthville workers. The grandfather objected to the proceedings on the basis of lack of adequate notice and therefore an inability to present mitigating evidence. The district court judge found the grandfather in indirect contempt of court and sentenced him to six months in jail. The judge suspended all but 30 days on the condition there be no further violations of the court's order. The grandfather appealed arguing that there had never been sufficient due process for issuance of the original order.

In *In re; A.A.R.*, Slip Copy, 2010 WL 1253749 (Kan. App. March 26, 2010), since the defendant was sentenced to a specific period of confinement, the Court of Appeals identified this as an indirect criminal contempt action. K.S.A. §20-1204a(b) requires that a notice to appear and show cause must be served on the party alleged to be in indirect contempt. *Pork Motel, Corp. v. Kansas Dept. of Health and Environment*, 234 Kan. 374 (1983) modifies this slightly to suggest that a defendant can waive this requirement. However, it continues to be clear that **unless a defendant waives personal service**, he or she must be personally served by the sheriff or some other authorized person appointed by the court with an order to show cause an notice of hearing before he or she can be found in indirect criminal contempt of court.

The grandfather argued that he was not personally served with the show cause order. The only notice he received was notice of the contempt hearing, which was tacked to his door the day before the hearing. The Court of Appeals agreed and found that proper service of process is a prerequisite to a court exercising jurisdiction over a party. A judgment entered without proper service is void and can be set aside at anytime. The Court of Appeals remanded the case and ordered the district judge to vacate his finding of indirect contempt.

The Verdict

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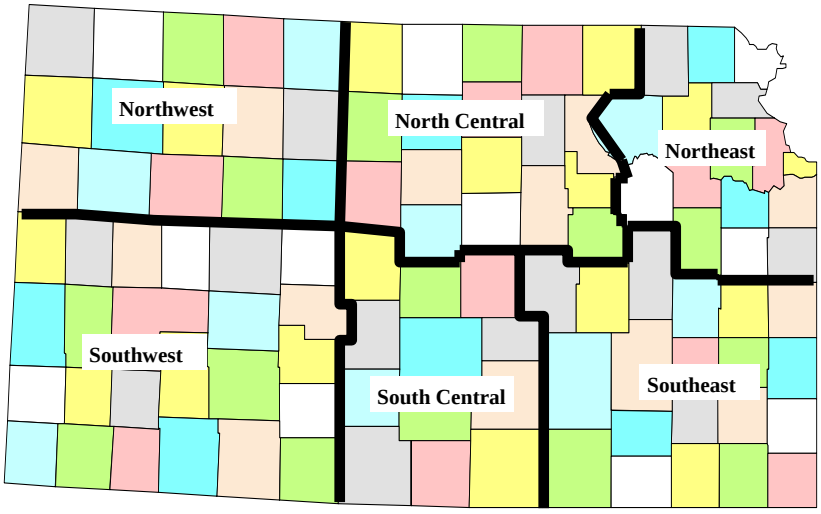

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Secretary
Treasurer
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See map above to determine your region. Anyone interested should contact

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