The Verdict

The Official Publication of the Kansas Municipal Judges Association

Issue 44 Summer 2008

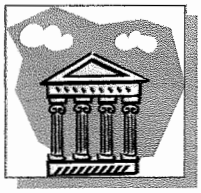
If you would like to submit an article or would like to see a topic addressed, please send it to Judge Arnold-Burger.

LEGISLATIVE UPDATES

Following is summary of bills which have been signed by the Governor since the last issue. They are in addition to those already reported in the Spring edition of *The Verdict.*

MUNICIPAL COURT CAN CHARGE FEE FOR SENDING THE 30-DAY LETTER

SB 366 authorizes a district or municipal court to charge an additional fee of $5 for mailing written notice that failure to appear in district court or municipal court or pay all fines, court costs, and any penalties within 30 days of the notice will result in the Division of Vehicles being notified to suspend the person's driver's license. It also clarifies that the "30 days to comply" begins with the mailing of the notice from the court, not its receipt by the offender.



TRAFFIC CITATION MUST CONTAIN NOTICE OF POSSIBLE SUSPENSION

SB 366 also amends K.S.A. §8-2106(f) to provide that traffic citations must not only contain notification to the offender that he or she may enter a written entry of appearance, waive the right to a trial and plead guilty or no contest, but it now must also contain *"a provision that the per-*

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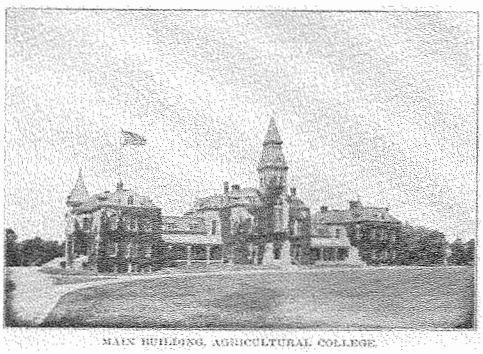
A STEP BACK IN TIME

Kansas State University has come a long way since it was originally known as the State Agricultural College. In 1999 it was chosen to house the National Agricultural Biosecurity Center. *See,* http://nabc.ksu.edu/ for information about the Center. But at the turn of the last century, it had its own biological threat infect the campus, smallpox.



MAIN BUILDING, AGRICULTURAL COLLEGE.

(Continued on page 3)

SPOTLIGHT ON: DOUG THOMPSON

Racing has been a huge part of Judge Doug Thompson's life. Doug is the municipal judge in Abilene. Although he was born in Abilene, he spent his formative years in Junction City. His father died when he was very young, and his stepfather was a farmer in the Junction City area. When a race track went in about a mile from the farm, Doug and his brothers were hooked. He started amateur stock car racing when he was nine.

After graduating high school Doug did a stint in the Army Reserve before going to Emporia State University, where he received a bachelor's and master's degree in History. He went from there to Washburn University Law School and then to Abilene to practice law, where he has been ever since. To finance his college education he raced cars professionally. He started his professional career in 1969 racing late models and since then has won a total of 353 feature events. Although he keeps his racing local these days, he has raced NASCAR as part of the Goody's Dash Series and the Crafts-

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Spotlight on: Doug Thompson

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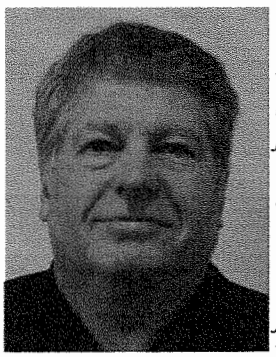
man Truck Series. He won the National Championship (non-NASCAR) in 1988 and 1992. He and his team, Covenant Racing Team, have also won three Kansas state titles and nine track championships. He owns the Kansas Auto Racing Museum in Chapman and Kansas Racing Products. Check it out at: www.kansasautoracingmuseum.org. He used to broadcast a syndicated radio program on the Motorsports Radio Network called *"In the Pits"* and he used to publish a weekly racing journal called *"Jayhawk Racing Journal."* As if all this is not enough, he and his brother own the Whiskey Lake Raceway by Junction City.

He is involved in and president of his church, Emmanuel Methodist. He has just finished producing a full length Christian movie entitled "Can We Talk?" about a "bad" kid that finds his way through racing. It is the first production of his company, Covenant Films, LLC and is produced in conjunction with Emmanuel Pictures. It was filmed in Chapman and had just wrapped production when the tornado hit. It is scheduled for distribution around Christmas of this year.

He is married to Connie. He has three children ranging in age from 12 to 39. None of them race. *"I don't think their mother or I could handle that."* He also serves as city attorney for Chapman and Milford. He was appointed municipal judge in Abilene about 5 years ago. He enjoys the position immensely. *"Like all of us, I view it as a real chance to make a difference in someone's life. I want to impart upon them a good feeling about the system. I feel it is important to be polite and have them leave with a sense that the proceeding was fair. Their speeding ticket may be their only contact with the justice system and I want it to be as positive as it can be given the circumstances."*

Doug also serves as the Administrative Hearing Officer for the 8th Judicial District, hearing child support issues.

He had this to say about his involvement in the Kansas Municipal Judges Association:



"The annual conferences are invaluable. I've been to each one since I was appointed. The sharing of information and camaraderie among judges is so helpful. You can usually always find someone who has encountered the same issues you have which is encouraging given that we all operate in somewhat of a vacuum. I feel like I can call on any of my fellow judges to get ideas or guidance. You walk away with the assurance that what you are doing is consistent with the rest of the state."

Updates from O.J.A.

ANNOUNCING NEW JUDGES!!

Since our Spring 2008 issue, the following new municipal judges have been appointed or elected:

-Joey Duncant	Cimarron
-Leslie Felts	Dexter
-Blaine Carter	Westmoreland
-Mark Schemm	Kensington
-Patricia Miklos	Kincaid
-Keith Collett	Lincolnville
-Faith Maughn	Colwich

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2008 CONFERENCE

The 2008 Conference was held April 28-29 at the Topeka Capitol Plaza Hotel. 169 judges attended the conference.

The conference programs received high ratings from conference participants. Participants were asked to rate the programs form 1 to 5, with a 3 being a "Good" rating and a 5 being an "Excellent" rating. The highest ranked program was the *DUI Mock Trial* (Judge Karl Grube) which received a rating of 4.5.

The conference night out was held at the Kansas Museum of History. The evening included a museum tour, a steak dinner, and great entertainment by the Walnut River String Band. Please mark your calendars and plan to attend the 2009 Conference which will be held April 27-28 at the Wichita Marriott Hotel.

CORRECTION!!

The fee for municipal court appeals increases to $73.50 beginning July 1, 2008. After June 30, 2010 the fee is reduced to $71.50. It was erroneously reported in the Spring Verdict that the new fee effective July 1, 2008 would be $71.50. See, HB 2968, §8.

Step Back in Time

(Continued from page 1)

According to the Center for Disease Control, smallpox is a serious, contagious, and sometimes fatal infectious disease. There is no specific treatment for smallpox disease, and the only prevention is vaccination. The *pox* part of *smallpox* is derived from the Latin word for "spotted" and refers to the raised bumps that appear on the face and body of an infected person. The disease was effectively eradicated in 1980 as a result of massive global vaccination programs.

In 1909, Manhattan, Kansas was home to the State Agricultural College. The 1910 census listed the population of Manhattan at approximately 5,700. There were approximately 2,000 students at the College. Large numbers of students were located in club and rooming houses throughout the city. In the spring of 1909, a smallpox outbreak occurred among the students and increased to such an extent that *"the health officers were unable to control or diminish the contagion by the ordinary methods of quarantine."*

Apparently, the owners of the rooming houses had initially concealed the presence of the disease to avoid being closed by quarantine regulations. An epidemic seemed imminent. City officials decided that a "pesthouse" was necessary to manage the threatened epidemic. Webster's dictionary defines a "pesthouse" as "a shelter or hospital for those infected with a pestilential or contagious disease." A stone building belonging to the city and formerly used for a floral hall when fairs were being held stood in the city park unoccupied. Twelve patients were placed there. No other suitable building could be found in the city. Guards were placed outside the building to prevent further spread of the disease. John Hessin lived 500 feet from the building. He was afraid that he would become infected, so he filed an injunctive action to stop the city from placing more patients in the building and to remove those in the building within 10 days. The district judge granted the injunction and the city appealed to the Kansas Supreme Court.

In *City of Manhattan v. Hessen*, 81 Kan. 153 (1909). the Supreme Court unanimously held that a public officer required by law to perform duties involving the exercise of discretion cannot be controlled by injunction. State law required health officials to set up a quarantine and protect the infected and the public. They had to act promptly. Wherever they located the pesthouse *"would naturally be nearer the residence of some citizens than others, and would necessarily expose some citizens to more danger from contagion than others; but this condition could not be avoided."* The injunction was dissolved.

Treasurer's Report

Prepared by Kay Ross, K.M.J.A. Treasurer

INCOME:

Balance as of 04/20/07	$20, 064.58
Income from dues	$ 5,050.00
Bank interest	$ 141.46
K.M.J.A. Outing Fees	$ 1,390.00
Total Income 04/20/7 to 04/21/08	$ 6,581.46

TOTAL INCOME TO DATE **$26,646.04**

EXPENSES:

Bus Expense	$ 380.00
Kansas Cosmosphere	$ 1,284.60
Dues Report Printing Expenses	$ 18.31
CNA Surety Bond, Treasurer	$ 100.00
Hospitality Room expense	$ 730.36
Verdict Printing	$ 485.90
Trivia Prizes	$ 120.84
Lee Reed, 30 year pins	$ 349.80
KMJA BBQ	$ 730.36
Printing fees	$ 48.31
August Bd. Meeting Kirby House	$ 213.07
Mileage Expense for Board	$1,117.66
City of Greensburg Donation	$ 1,500.00
Internet Fees	$ 216.00
2008 Conference Expenses	
KMJA Outing, Kansas History	$560.00
President and Barbara Award	$ 224.12
Wark's, KMJA T-Shirts	$2,354.76

TOTAL EXPENSES TO DATE..... $ 10,272.20

BALANCE ON HAND 04/21/08..... $ 16,373.84

Judicial Ethics Opinions

JE-161
May 8, 2008

Prior to becoming a judge, the judge was the plaintiff's lawyer in a currently pending civil action that is now assigned to a different judge. Also, the defendant now has a different lawyer. At this time a motion is pending in this civil action pertaining, in part, to the interpretation of a provision in a Journal Entry that the prior judge had signed. The judge has been asked to provide an affidavit for attachment to the response to this motion concerning the recollections of the judge about the events at that time and the meaning of the court's order.

Canon 3B(9) provides in pertinent part:

"A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing..." (2007 Kan.Ct.R.Annot. 626).

We are of the opinion that the requested affidavit would constitute public comment and that it might reasonably be expected to affect the outcome or impair the fairness of the civil action involved. Providing the requested affidavit would, therefore, be a violation of Canon 3B(9).

JE-162
May 8, 2008

The question presented is whether an active reserve deputy sheriff may be appointed as a municipal court judge of a city located in the county in which the deputy serves. If appointed, the active reserve deputy would serve both as a judge and as an active reserve deputy sheriff.

Canon 4C(2) is the applicable Canon. This Canon provides in pertinent part:

"A judge shall not accept appointment to a ...governmental position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system or the administration of justice..." (2007 Kan.Ct.R.Annot. 632).

The position of active reserve deputy sheriff is concerned with issues of fact and policy on matters other than the improvement of the law, the legal system and the administration of justice, and it is very clear that the underlying premise of Canon 4C(2) is that a judge may not hold a position such as an active reserve deputy sheriff while such person is a judge.

JE-163
May 8, 2008

A judge asks if the judge may submit a letter to the editor of a newspaper discussing issues regarding the criminal code in response to an editorial.

The specific editorial involved states that a particular individual "either faces criminal charges or has been convicted in five Kansas counties." The editorial further states that the convicted person "faces additional charges and civil suits in those jurisdictions."

The judge further indicates that the judge would not be identified as a judge if a response to the editorial was made.

Canon 3B(9) provides in pertinent part:

"A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing..." (2007 Kan.Ct.R.Annot. 626).

We are of the opinion that any response to the editorial would constitute a public comment that might reasonably be expected to affect the outcome of a pending proceeding or a situation where the person involved may fact additional charges or civil suits. Based on the specific facts of the question submitted, a response by a judge to the editorial would be a violation of Canon 3B(9).

We are further of the opinion that for a judge to make any permissible response where the judge was not identified as a judge would be a violation of Canon 2 which states "A judge shall avoid impropriety and the appearance of impropriety in all of the judges activities." (2007 Kan.Ct.R.Annot 621).

MUNICIPAL JUDGE REPORT

June 1, 2008

COURTS.....387

JUDGES.....260

Lawyers.....164

Nonlawyers.....61

District Magistrates.....35

KMJA Minutes

MINUTES FOR THE KMJA
EXECUTIVE BOARD MEETING

April 28, 2008 at 7:30 a.m. at Topeka Capitol Plaza Hotel

President Ken Lamoreaux called the meeting to order. Also present were Greg Keith, Scott Condray, Lee Parker, James Campbell, Dorothy Reinert, Tom Buffington, Kay Ross, Charles Hull, John McLoughlin, Randy McGrath, Karen Arnold-Burger and Brenda Stoss.

Minutes of the last executive board meeting were read. The minutes were corrected to show the Michael Barbara award being given to Betty Lammerding. John moved and Charles seconded to approve the minutes as corrected. Motion carried.

Kay gave the treasurer's report, a copy of which is attached. She also shared a thank you letter from the City of Greensburg for the donation. Charles moved and John seconded to approve the treasurer's report. Motion carried.

There were no committee reports. There was no old business. For new business, there will be openings for two regional directors – the north central region and the southwest region. Scott Condray is willing to be nominated for another term as the north central director and Charles Hull is willing to be nominated for another term as the southwest director. Karen will ask Steve Ebberts to consider being nominated for the position of secretary. Brenda is willing to be nominated to be president-elect. Under the by-laws, John moves into the position of president at the end of Ken's term without any election.

James commented about inviting district magistrate judges to our conference. Many of them are also municipal court judges and are included already, but some magistrates, particularly non-lawyer magistrates, might find a lot of the topics at our conference applicable to their duties as well.

The next board meeting will be August 1, 2008 at the Kirby House Restaurant in Abilene.

There being no further business, the meeting was adjourned.

Respectfully submitted, Brenda Stoss, Secretary

KANSAS MUNICIPAL JUDGES ASSOCIATION
Minutes of the Annual Meeting April 28, 2008
Topeka Capitol Plaza Hotel

President Ken Lamoreaux called the meeting to order.

John McLaughlin moved to waive reading of the minutes of the 2007 annual meeting. The motion was seconded. Motion carried.

Treasurer Kay Ross gave the treasurer's report. Kay also announced that membership pins were available for members celebrating 5, 10, 20 and 30 years of membership in the association. John McLaughlin moved to accept the treasurer's report. The motion was seconded. Motion carried.

Nominees were presented for board of directors positions as follows:

North Central regional director – Scott Condray
Southwest regional director – Charles Hull
Secretary – Steve Ebberts
President-elect – Brenda Stoss

There were no nominations from the floor. Following votes, each nominee was elected to the respective position.

There being no further business, the meeting was adjourned.

Respectfully submitted,

Brenda Stoss, Secretary

Disposition of Docketed Complaints 2007

Dismissed after investigation	19
Dismissed with caution	3
Caution	2
Private cease and desist	2
Public cease and desist	2
Complaints pending year-end	12

Source: 2007 Annual Report, Kansas Commission on Judicial Qualifications

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.

WHETHER A DESCRIPTION OF THE SUSPECT PROVIDED BY THE DISPATCHER IS HEARSAY

Topeka police officers received a dispatch advising them that an anonymous call had come in reporting a suspicious person going to doors, peeping in windows and ringing doorbells in a certain area of Topeka. The individual was described as a *"white male, possibly balding, wearing a white tank top and blue [jean]shorts."* They located a person in that area matching the description. After further investigation, they arrested the individual and found he had stolen items with him. He was later convicted of burglary. The police dispatcher, nor the anonymous caller, were present for trial. The issue was whether or not the report from the dispatcher about the description of the suspect was hearsay.

In *State v. Barney*, ___Kan.App.2d___(October 5, 2007, designated for publication May 7, 2008) the Court held that the statements were not hearsay because they were not offered for the truth of the matter asserted, simply to explain the officers' actions. However, the Court recognized that sometimes a description can be so specific as to constitute inadmissible hearsay. For example, when the caller identifies the suspect by name. In such a case, the dispatcher is really identifying the person who committed the crime, therefore it is admitted to prove that the person described by name committed the crime. A mere description of a person acting suspiciously in a particular neighborhood is not offered to prove that the person stopped committed the crime, therefore it is not hearsay.

SEARCH RESULTING FROM ARREST IN VIOLATION OF STATE LAW, IS NOT A VIOLATION OF THE FOURTH AMENDMENT

Portsmouth, Virginia police lawfully stopped David Lee Moore for driving on a suspended license. Driving on a suspended license is a misdemeanor under Virginia law punishable by a year in jail and a $2,500 fine. The officers arrested him, searched him incident to the arrest and found 16 grams of cocaine. So what's wrong with this picture? It seems that under Virginia law officers should have issued him a summons instead of arresting him. In Virginia, DWS is not an arrestable offense unless the person fails or refuses to discontinue the violation or the officer reasonably believes the person is likely to disregard the summons or harm themselves. It was determined that none of those circumstances applied to this case. Moore moved to suppress the cocaine on the basis of the unlawful arrest. He had an uphill battle because Virginia law also does not, as a general mater, require suppression of evidence obtained in violation of state law. So Moore argued that suppression was required by the Fourth Amendment. The case made it all the way to the United States Supreme Court. In a unanimous opinion, the Court held in *Virginia v. Moore*, ___S.Ct.___ (April 23, 2008), that the Fourth Amendment was not violated.

As usual, Justice Scalia takes the reader on a historical journey through Fourth Amendment jurisprudence. The Court concludes that whether state law authorizes the search is irrelevant. States are free to impose higher standards on searches and seizures than required by the Federal Constitution. However, whether or not a search is reasonable within the meaning of the Fourth Amendment has never depended on the law of the particular State in which the search occurs. The same applies to seizures. While laws and practices may vary from state to state and time to time, Fourth Amendment protections are not so variable. Warrantless arrests for crimes committed in the officer's presence, regardless of how minor, are reasonable under the Constitution.

"CAN WE FINISH THIS IN THE MORNING?" IS NOT AN UNEQUIVOCAL INVOCATION OF RIGHT TO REMAIN SILENT AND THEREFORE QUESTIONING MAY CONTINUE

Defendant was being questioned about his involvement in a murder. After several hours of questioning, the defendant said *"Can we finish this in the morning, man? Please?"* The officers continued to question him. He asked a second time if they could finish in the morning and the officers continued to question him. He eventually confessed. He moved to suppress the confession on the basis that by asking that questioning stop and continue in the morning he had invoked his right to remain silent. In *State v. Scott*, ___Kan. ___ (May 16, 2008) a unanimous Kansas Supreme Court held that the defendant's statements were ambiguous. A suspect can control the time at which questioning occurs through the use of his or her power to exercise the right to remain silent. That is, the suspect can decide he or she does not want to answer questions at the time and invoke his or her right to remain silent, thus forcing police to question him or her at a different time. However, the defendant must unequivocally invoke the right. In this case, the defendant never said he did not wish to talk to police, he simply said he desired to finish his statement the next morning. Therefore, the officers were not required to stop questioning.

ISSUANCE OF SUBPOENAS *DUCES TECUM* BY CITIZEN-PETITION GRAND JURY

A citizen petition was submitted in Sedgwick County requiring the summoning of a grand jury to investigate alleged

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Legislative Updates

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son's failure to either pay such fine and court costs or appear at the specified time may result in suspension of the person's driver's license as provided in K.S.A. §8-2110."

INCREASING PHOTO FEES FOR DRIVER'S LICENSES

SB 23 provides more resources to the Department of Revenue to make drivers license photos more secure and to prepare Kansas for compliance with the federal REAL ID Act. The fee will increase from $4 to $8.

MANDATORY BLOOD AND URINE DRAWS IN THE CASE OF COLLISION RESULTING IN SERIOUS INJURY OR DEATH

HB 2617 sets up a slightly different procedure for obtaining blood and urine tests when a person has been involved in a collision involving serious injury or death. In the case of just regular injuries, the officer must have reasonable grounds to believe the person was operating a vehicle under the influence of alcohol or drugs and has either arrested the person for DUI or the person was involved in a collision involving injuries. The person still maintains the right to refuse to take the test.

However, under the amendments, if a person is involved in a collision involving serious injury or death, and the operator could be charged with **any** traffic offense (as defined in K.S.A. 8-2117), the officer can order a test of blood, breath or urine without any further probable cause for DUI.

Serious injury is defined as any injury to any person involved in the collision which has the effect of (1) disabling a person from the physical capacity to remove themselves from the scene; (2) rendering the person unconscious; (3) the immediate loss of or absence of the normal use of at least one limb; (4) an injury determined by a physician to require surgery; or (5) other wise indicates the person may die or be permanently disabled by the injury.

If there is a serious injury, the officer is required to get both a blood and urine sample from the drivers involved, unless the officer has reasonable grounds to believe the actions of the driver did not contribute to the collision. The driver has no right to refuse the tests. If necessary, the officer may use "reasonable restraint practices" to restrain the person in order to obtain the appropriate samples.

Editor's Note: *K.S.A. 2007 Supp. §8-2117(d) defines "traffic offense" as any violations in the uniform act regulating traffic on the highways, any of the provisions regarding driver's licenses in articles 1 and 2 of chapter 8 and the proof of insurance statute, and any mirror ordinances or county resolutions. Therefore, if the collision involved death or serious injury and the officer cannot find proof of insurance at the scene, he or she can order a blood or urine draw.*

ACTIONS REQUIRED BY MEDICAL PERSONNEL AND LAW ENFORCEMENT OFFICERS FOR DUI BLOOD AND URINE DRAWS

HB 2617 also contains some very specific provisions regarding blood and urine draws for DUI purposes.

First, when directed **in writing** by a law enforcement officer, medical personnel are required to draw the sample (blood and/or urine, the officer can request both) and deliver it to the officer as soon as practical as along as the collection of the sample itself does not jeopardize the person's life, cause serious injury to the person or impede the medical assessment care and treatment of the person. The medical professional shall not require the person to sign any additional consent or waiver form. The samples taken are to be independent samples and not a portion of a sample collected for medical purposes. The person collecting the sample is required to complete the collection portion of the document provided by the law enforcement officer.

If the person is required to be restrained to collect the sample, law enforcement is responsible for applying said restraint *"utilizing acceptable law enforcement restraint practices."* The restraint must be effective in controlling the person in a manner not to jeopardize the person's safety or that of the medical personnel during the drawing of the sample and without interfering with medical treatment. When the sample is a urine sample, and the person is able to provide it independently, whenever possible, a same sex law enforcement officer shall supervise (witness) the collection.

It is made clear that the testing requested for DUI purposes is not considered to have been conducted for any medical care or treatment purposes. The test results are not subject to physician-patient privilege or any other law that would appear to prohibit the transfer, release, or disclosure of the sample. The hospital is required to provide the law enforcement officer with the results of the test, the person's name whose bodily substance was drawn or tested, the location of the test procedure, the names of all health care providers and personnel who participated in the procedure or test, and the date and time of the test or procedure. The bill also adds "licensed physicians assistants" to the list of persons who can draw blood. All such personnel are immune from civil or criminal liability when acting at the direction of a law enforcement officer.

All costs of conducting the tests including the cost of evidence collection kits are to be **paid by the county** where the alleged offense was committed. The county can be reimbursed such costs by the defendant as part of a court cost assessment. The cost cannot exceed the current Medicaid rate for such procedure or test, or both.

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Legislative Updates

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GUARDIAN AND CONSERVATOR TRAINING

SB 703 requires that every person appointed as a guardian or conservator after January 1, 2009 must file with the court evidence of completion of a basic instructional program concerning the duties and responsibilities of a guardian or conservator prior to the issuance of letters of guardianship or conservatorship. The Kansas Judicial Council is charged with preparing such a program.

FLAME RETARDANT CIGARETTES?

SB 178 requires all cigarettes sold in Kansas to be "flame retardant" and tested for ignition strength prior to sale. Corporations or persons violating the act face a civil penalty of up to $1,000 on a first offense and up to $5,000 on a subsequent offense. The cigarettes are subject to forfeiture and destruction. The civil fines collected are to be placed in a separate fund to fund fire safety and prevention programs. Cities are prohibited from adopting any ordinances in conflict with the act.

JODI'S LAW AMENDS STALKING STATUTE

SB 414, also known as "Jodi's Law" after Jodi Sanderholm the 19 year old Arkansas City coed killed by a man who had been stalking her and other girls in the area, amends the current stalking law in an attempt to allow law enforcement officers to intervene earlier in these cases. Stalking was previously defined as *"an intentional, malicious and repeated following or harassment of another person and making a credible threat with the intent to place such person in reasonable fear for such person's safety."* The new definition is *"intentionally or recklessly engaging in a course of conduct targeted at a specific person which would cause a reasonable person in the circumstances of the targeted person to fear for such person's safety, or the safety of a member of such person's immediate family and the targeted person is actually placed in such fear or intentionally engaging in a course of conduct targeted at a specific person which the individual knows will place the targeted person in fear for such person's safety or the safety of a member of such person's family."* The term "course of conduct" is defined in much more detail than the prior law, listing specific acts that would be included in the definition including threatening, following, destroying property, placing an object on property, communicating in any way, or causing injury to pets. The definition of "communication" is also broadened greatly. The term "credible threat" does not appear in the new law.

Under the new law, a first conviction is a class A misdemeanor unless the person is also violating a protective order while still stalking, in which case a first conviction is a severity level 9 person felony. Second and subsequent convictions are felonies. Under the prior law, first offenses were felonies. The new law also encourages law enforcement training programs to address procedures for officers to follow when responding to allegations of stalking. It requires all law enforcement agencies and prosecutor's offices that prosecute stalking cases to adopt written policies regarding allegations of stalking. This new statute sets out what those policies must contain.

Editor's Note: *Since this creates a new misdemeanor level offense, your city may adopt such an ordinance and prosecute violations through municipal court. Watch for the new POC issued by the League of Kansas Municipalities to see if it includes this new misdemeanor as well.*

TWO BILLS ADDRESS ISSUES OF MILITARY FAMILIES

SB 32 provides that when a divorced or separated military parent receives deployment orders, they are required to establish permanent parenting plans, including provisions for custody and parenting time while deployed.

HB 2923 allows full-time military service members who have or will be deployed outside the United States to defer all or part of the real property tax owed on his or her home in Kansas for up to two years while serving on active duty. In addition, it provides free annual hunting and fishing licenses for disabled veterans and makes military persons currently on active duty eligible for distinctive license plates. It also increases the one-time activation payment provided to deployed state employees from $1,000 to $1,500.

Editor's Note: *Remember along these same lines, K.S.A. 2007 Supp. §8-2110(d) requires that the municipal court waive reinstatement fees if the failure to comply with the traffic citation was the result of such person enlisting in or being called into service by the armed forces.*

REGULATING ADOPTIONS

HB 2186 requires that any person who advertises adoption services be licensed by the state. The advertisement must include a professional license number. Violation of the statute is an unclassified misdemeanor with a fine of up to $1,000.

REGULATING AMUSEMENT RIDES

Joining several other states this year, Kansas adopted regulations regarding operation, inspection, insurance and safety testing on amusement rides. It creates a new class B misdemeanor for an owner or operator to permit the operation of the ride in violation of the act. It is a class C misdemeanor to fail to post safety instructions for patrons and safety certificates. In addition, the statute specifically allows cities and counties to establish and enforce safety standards in

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Legislative Updates

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addition to (but not in conflict with) those provided in the state law.

COMMISSION ON JUDICIAL PERFORMANCE AND FOURTEENTH APPELLATE JUDGE

HB 2642 grants immunity in any civil action to the Kansas Supreme Court, the Commission on Judicial Performance, the Judicial Council, and the staff of these entities for any act, error, or omission within the scope of their official duties. This bill also exempts the Commission from the application of the campaign finance law when the Commission is performing its statutory duties. Finally, the bill delays the appointment of the fourteenth Court of Appeals judge until 2010.

AGGRAVATED CRIMINAL THREAT

SB 430 makes the crime of aggravated criminal threat a severity level 5, person felony, regardless of economic loss. Previously, the level of aggravated criminal threat was based upon different levels of economic damage.

SILENCERS, SAWED-OFF SHOTGUNS AND MACHINE GUNS OK IN KANSAS

SB 46 amends K.S.A. §21-4201 such that any person or entity in compliance with the National Firearms Act, 26 U.S.C. 5801, et seq., will be authorized to possess a silencer, sawed-off shotgun, or machine gun. The NFA requires the registration and taxing of these Class 3 weapons under federal law. Licensed dealers will now be able to possess these items to the extent allowed by federal law. This legislation addresses the prior inconsistency between Kansas law and federal law as pointed out by the Attorney General in AG Opinion 2007-41.

KANSAS PAROLE BOARD SUITABILITY FACTORS

SB 411 adds three factors to the list of factors considered by the Kansas Parole Board when making determinations regarding parole suitability. The three new factors are: Risk factors revealed by any risk assessment of the inmate; recommendations by the staff of the facility where the inmate is incarcerated; and proportionality of the time the inmates has served to the sentence a person would receive under the Kansas Sentencing Guidelines for the conduct that resulted in the inmate's incarceration.

KPERS SUNSET REMOVED REGARDING NURSES WORKING AFTER RETIREMENT

SB 309 removes a June 30, 2008 sunset date for an exemption in the KPERS law regarding working after retirement. The exemption applies only to nurses at certain state medical institutions and removes the $20,000 earnings cap for work for the same KPERS employer after retirement.

EMERGENCY POWERS OF LOCAL GOVERNMENT

HB 2280 prohibits officials, during a declared state of emergency, from forcibly dispossessing an owner of any firearm not otherwise prohibited by law, or from requiring registration of firearms not required to be registered under state law. It also provides a civil remedy including the assessment of attorney's fees for the unlawful seizure of a weapon from a person authorized to have such weapon unless it is seized as part of a criminal investigation.

LONG-TERM CARE FACILITIES CAN BE DESIGNATED AS VOTING SITES

To ensure that Kansans in long-term care facilities can participate in our democracy, SB 562 (later corrected by HB 2307) allows nursing facilities, assisted living facilities and hospital-based long-term care facilities to serve as voting locations for residents who are registered to vote.

INSURANCE DISCLOSURE FOR DIVORCED PARENTS

SB 545 authorizes the court to order each parent to provide all information and releases necessary so that both parents can communicate with the health insurance provider, no matter which parent provides the insurance coverage.

ADDING CERTAIN HALLUCINOGENICS AS CONTROLLED SUBSTANCES

SB 481 amends current law to add the hallucinogenic drugs salvia divinorumand and datura stramonium to the schedule I of the Kansas Controlled Substances Act, making it illegal to possess, use or sell these drugs. Slavia divinorumand is also known as "sage of the seers" or "diviners sage" and has starting gaining popularity among younger teens. There have been few reported incidents of medical problems or addiction from this herb of the mint family. The effects are very short lived. The current interest seems to have begun with reports that teenager from Delaware, who purchased it over the internet from Canada, committed suicide 4 months later and some blame the herb for his death. It has been around for many years and virtually unrestricted in the U.S. until now. It primarily grows in Mexico.

Daturs stramonium also goes by the names jimson weed, gypsum weed, angel's trumpet, ditch weed, stink weed, loco weed, mad hatter, crazy tea, and many more. It has also been referred to as Jamestown weed. Reportedly, British soldiers were secretly or accidently drugged with it in Jamestown, Virginia. They reportedly spent several days chasing feathers, making monkey faces and generally appearing to have gone insane. When the fruit of the plant is crushed, it has a

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distasteful odor. It is primarily native to southern Canada, although many Kansans will recognize it growing across the state. There have been some reported hospitalizations and deaths from its recreational use. It produces true and strong hallucinations.

FURNISHING ALCOHOL TO A MINOR

HB 2908 amends K.S.A. §21-3610 to provide a defense to the charge if the person presented to the defendant a driver's license or official document that "reasonably appeared" to contain a photograph of the minor and purporting to establish that the minor was 21 or over. This bill also made some amendments to provisions concerning farm wineries.

Editor's Note: *This will require amendment to POC §5.2 or any similar ordinances your city may have.*

SCHOOL SAFETY VIOLATIONS

K.S.A. 2007 Supp. §72-89c02 requires school districts to notify the police whenever someone 13 years old or more is found in possession of a weapon or illegal drug at school, on school property or at school supervised activity or if the child has engaged in behavior that could have resulted in serious bodily injury to others. The police are then required to investigate and notify the division of motor vehicles of the student's actions. The division will then give notice of driver's license suspension. SB 470 makes some minor amendments to the time frames when reporting and notices have to be given and to the hearing procedure before the DMV.

The bill also amends current law to make a conviction of a crime of endangering a child result in a 5 year ban from the teaching profession. A conviction for sexual battery when the victim is under the age of 18 will not result in a lifetime ban from teaching.

OPEN MEETINGS NOW REQUIRED WHEN MAJORITY OF BODY MEETS, NOT MAJORITY OF QUORUM; SERIAL MEETINGS PROHIBITED

Sen. Sub. for HB 2947 makes several important changes to the Open Meetings Act. First, the definition of meeting was changed to the gathering of a *"majority of the membership"* of a body rather than a *"majority of a quorum"* for the purpose of discussing the business or affairs of a body. Second, the definition of meeting was expanded to include any gathering or assembly in person *"or through the use of a telephone or any other medium for interactive communication."* This would seem to include emails. Finally, it requires that meetings in a "series" be open to the public if they collectively involve a majority of the membership of the body or agency, share a common topic of discussion concerning the business or affairs of the body **and** are intended by any or all of the participants to reach agreement on a matter that would require binding action to be taken by the body. Fines will not be imposed for a violation of the "serial" meeting provision until July 1, 2009.

DUI CLEAN-UP LANGUAGE

Due to the fact that K.S.A. §8-1567 was amended twice during the 2007 Legislative Session, one version had the *Elliott* – inspired jurisdiction language and the other did not, HB 2617 clarifies the version that was intended, which includes the *Elliott* jurisdiction language at §8-1567 (p). See, *State v. Elliott*, 281 Kan. 583 (2006).

DOMESTIC BATTERY FINES

HB 2780 increases the maximum fine for a second or subsequent conviction for domestic battery form $2,500 to $7,500.

MANDATORY MINIMUM AND MAXIMUM FINES FOR CRUELTY TO ANIMALS

HB 2780 sets a minimum and maximum fine for second time cruelty to animals charges (which is a felony) of $500 - $2,500. The minimum and maximum jail penalties remain the same (5 days - one year).

EXPUNGEMENT

HB 2780 amends K.S.A. 21-4619 to add aggravated child endangerment to the list of crimes that cannot be expunged.

HB 2359 allows disclosure of expunged conviction information for both state and city charges when someone applies to get a conceal and carry weapons permit. However, K.S.A. 2007 Supp. §75-7c04 was amended to allow a person to get a permit if they have a prior felony conviction or diversion as long as it has been properly expunged.

MICRO UTILITY TRUCKS

HB 2119 defines a micro utility truck as a motor vehicle which is (1) not a work-site utility vehicle; (2) is over 48" wide; (3) is not more than 144" long; (4) weighs over 1500 lbs; (5) manufactured with a metal cab; and (5) is able to exceed 40 mph. Highway registration and insurance are not required. The bill makes it unlawful to operate a micro utility truck on any interstate, federal, or state highway; within the corporate limits of any city unless authorized by such city; and or any public highway unless the vehicle complies with equipment requirements. It can cross the highway. In addition, anyone who sells five or more of these vehicles would come under the Vehicle Dealer Licensing Act.

This bill also repeals K.S.A. §8-15,505 (STO §114.2), which

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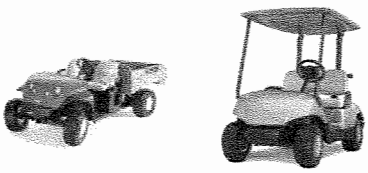
prohibited the operation of work-site utility vehicles on highways and amends the definition of work-site utility vehicle at K.S.A. §8-1493 (STO §1) to exclude micro utility trucks. It seems to leave work-site utility vehicles unregulated. The bill did originally have some language regulating golf carts (which fit the definition of work-site utility vehicle), that language was removed before final passage.

Micro Utility Truck



Work-Site Utility Vehicles

MAYORAL APPOINTMENTS

SB 2217 requires that any appointment to any board, commission, advisory group or other body made by the mayor of any city which is subject to the approval of the governing body of the city must be acted upon by the governing body within 45 days of the appointment or it is deemed approved. The governing body is required to approve the appointment unless it specifically finds by resolution that the person is either unqualified or unfit to hold the office.

SEXUAL ASSAULT KITS

SB 2727 amends K.S.A. 65-448 to allow a victim of sexual assault to request a sexual assault examination. Before, only a law enforcement officer could make such a request. If the victim is the only requestor, a law enforcement agency would not be notified without the written consent of the victim. Immunity would be allowed for a medical facility as a result of notifying or failing to notify any law enforcement agency and no fee would be charged to the victim (even if the police were not involved in the request). The county is responsible for all kits and collection costs. Examination kits are to be kept under seal for 5 years after collection.

ENHANCED PENALTY FOR AIDING ESCAPE BY AN EMPLOYEE OR VOLUNTEER OF DOC

HB 2845 states that the crime of aiding in the escape of an inmate at the Kansas Department of Corrections by an employee or volunteer is punishable as a severity level 4 non-person felony. Non-employees and volunteers are only guilty of a level 8, non-person felony.

GOVERNOR VETOES ELECTION PROCESS TO REPLACE A U.S. SENATOR

HB 2683 was vetoed by Governor Sebelius. Under current Kansas law, if a vacancy is declared in the position of U.S. Senator, the governor appoints a person to fill the vacancy until the next election. HB 2683 attempted to change that process to call for a special election. In her veto message, Governor Sebelius pointed out that the existing law had been used effectively since its passage 81 years ago and had served Kansas well. *"Absent any compelling public policy reason to change this statute at this time"* she chose to veto the bill.

FEE FOR CREDIT CARD USE FOR CITY PAYMENTS

HB 2440 allows any city to accept debit cards and credit cards for the payment of taxes, utility fees, or other services and further allows the city to set a fee to be added to each transaction equal to the charge paid by the city for the use of the credit card by the person. If the city imposes such a fee it must give notice of the fee to the person making the payment .

PRIMA FACIE EVIDENCE OF "INTENT TO PERMANENTLY DEPRIVE" EXPANDED IN AREA OF LEASED OR BORROWED VEHICLES

HB 2707 amends K.S.A 21-3702 by adding two additional circumstances which will constitute prima facie evidence of intent to permanently deprive another of property under the theft statute. Both involve return of leased or borrowed vehicles.

Editor's Note: *This will require an amendment to POC §6.2 or similar ordinances.*

THIRD-TIME TEMPORARY DEPRIVATION NOW A FELONY

HB 2707 makes a third time conviction for criminal deprivation of property (aka temporary deprivation) under K.S.A. §21-3705 (POC §6.5) a severity level 9, non-person felony.

REQUIRING SUBSTANCE ABUSE TREATMENT FOR CERTAIN FELONS

HB 2707 authorizes the court to place certain felons in a substance abuse treatment program established by the Depart-

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ment of Corrections for at least four months. The bill also authorizes a court to retain jurisdiction to modify an offender's sentence to a less severe penalty after the successful completion of the substance abuse treatment program.

It establishes a substance abuse policy board to advise the Kansas criminal justice coordinating council concerning issues and policies pertaining to the treatment, sentencing, rehabilitation and supervision of substance abuse offenders. The board is to specifically analyze and study driving under the influence and the use of drug courts by other states.

Finally, the bill provides that no downward dispositional departure can be imposed for any crime of extreme sexual violence.

Accepting Nominations for Barbara Award

The KMJA Board of Directors is currently accepting nominations for the Michael A. Barbara Award. The award was established in 1995 to honor Judge Barbara for his commitment to the KMJA. Besides being a former District Court Judge and author of the *Kansas Rules of Evidence with Evidence Objections*, Judge Barbara often offered his expertise at the KMJA annual conference by providing interesting and entertaining training sessions.

This year the award was presented to Bette Lammerding of Marysville for her commitment to the KMJA over the years and her service on the Municipal Judges Manual Committee. Previous recipients have included Sen. Jay Emler, Lindsborg, Denise Kilwein, Office of Judicial Administration, the late Fred Benson, Karen Arnold-Burger, Overland Park, George Catt, Lawrence, Joe Cox, Topeka, Tom Buffington, Marquette, James Wells, Topeka, Lee Parker, Andale, and Pat Caffey, Manhattan, Betty Lammerding, Marysville and Beverly Batt.

The award is given to a member or a non-member who has provided exemplary service to the KMJA.

Please send your nominations to KMJA President, Ken Lamoreaux so that we can have a plaque and comments prepared for the April 2009 conference.

Examples of Judicial Conduct Found to Be Improper in 2007*

♦A judge was found to have violated canon 3B(7) by discussing a case with a family member in order to obtain a professional medical opinion. The judge was cautioned to refrain from discussing the merits of a pending proceeding outside the presence of the parties.

♦A judge, who followed an alternative procedure which resulted in pro se pleadings being returned unfiled, was publicly ordered to cease and desist from establishing procedures which prevent filing of pleadings with the clerk of the court.

♦A judge, who had not signed an oath for each term of service was informally advised to sign an oath for each contractual term.

♦A judge, who supplied process to a family member of the defendant instead of mailing the material, was cautioned to follow proper procedure for obtaining service of process.

♦A judge was privately ordered to cease and desist from participating in ex parte communications that deal with substantive matters or issues on the merits.

♦A judge, who serves as treasurer of a college house corporation, was cautioned about being involved in rent collection.

♦A judge, who conducted a hearing without making a record and participated in a closed meeting, was publicly ordered to cease and desist from conducting court proceedings without making a record which assures the law has been followed and high standards of conduct maintained.

♦A judge was cautioned to refrain from conducting weddings for parties who appear before the judge.

♦A retired judge, who inappropriately touched a non-judicial employee in a sexually suggestive manner, was privately ordered to cease and desist and agree not to accept further judicial assignments anywhere in the State of Kansas.

♦A judge was informally advised to follow Supreme Court Rule 2.04 which provides that indigency determinations are made by the district court judge.

***Source:** 2007 Annual Report Kansas Commission on Judicial Qualifications*

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illegal abortions by Dr. George Tiller and others at the Women's Health Care Services clinic in Wichita. While conducting its investigation, the grand jury issued subpoenas *duces tecum* requesting copies of patient health care records for patients who received abortions at the clinic over a 5 year period. Attorneys on behalf of the patients as well as attorneys for Dr. Tiller and the Clinic moved to quash the subpoenas. When the district judges failed to quash, they filed a writ of mandamus against the judges. In *Tiller v. Corrigan*, ___Kan. ___(May 6, 2008), a unanimous Supreme Court held first that the citizen-petition grand jury statutes are not unconstitutional on their face. The grand jury does have the authority to issue subpoenas *duces tecum*. However, the right to invade patient privacy is not absolute. The district court must evaluate any motion to quash by weighing competing interests of the State and the patients. If the court decides patient records should be provided, it must permit the subpoena recipient to redact patient identifying information and submit the records to an independent attorney and physician for review and redaction of irrelevant information regardless of whether the information is patient identifying. The district court must also issue a protective order prohibiting dissemination of the records. The matter was remanded for the district court judges to conduct an appropriate review.

OK TO REQUIRE VOTER PHOTO ID

The U.S. Supreme Court held in a 6-3 decision in *Crawford v. Marion County Election Board*, ___S.Ct. ___ (April 28, 2008) that Indiana's law requiring government issued photo identification to vote did not violate the Fourteenth Amendment right to vote nor the Voting Rights Act. The voter cards were free and the inconvenience of going to the DMV, gathering required documents, and posing for a photograph does not qualify as a substantial burden on voting rights. The severity of the heavier burden that may be placed on a limited number of persons, e.g., elderly persons born out-of-state who may have difficulty obtaining a birth certificate is mitigated by the fact that eligible voters without photo identification may cast provisional ballots that will be counted if they execute the required affidavit at the circuit court clerk's office. The State has a compelling interest in protecting public confidence in elections and preventing voter fraud.

Editor's Note: *The Kansas Legislature passed a similar law this session, HB 2019, which was vetoed by Governor Sebelius. In her veto message she stated, "HB 2019 seeks to solve a problem of voter fraud which does not exist in our state..."*

CONDUCT OCCURRING AFTER THE END OF PROBATION TERM CANNOT SERVE AS BASIS OF PROBATION REVOCATION BUT CAN BE CONSIDERED IN DETERMINING DISPOSITION

The defendant was convicted of felony DUI. While on probation, he failed to report as required, failed to notify his probation officer of change of address and phone and failed to pay the fines. A timely motion to revoke was filed and a warrant issued for his arrest. The probation would have ended on April 8. On June 28, the defendant was arrested on the warrant when he was stopped for failing to provide proof of insurance, not have a driver's license in his possession and failing to yield on making a left turn. In considering whether the defendant's probation should be revoked the district court declined to consider the charges of June 28. Instead, it considered the items in the first motion to revoke, which the defendant stipulated to, and elected to reinstate defendant's probation for an additional six months. The State appealed arguing that the timely filed motion gives the court continuing jurisdiction over probationers for all purposes during the pendency of the probation violation proceedings. Even if it isn't considered for "revocation" purposes, at a minimum it should be considered for "dispositional" purposes.

In *State v. Skolaut*, ___Kan. ___(May 10, 2008), the Kansas Supreme Court held that filing of a motion to revoke probation does not toll the probation period or otherwise extend the probationary conditions or the court's jurisdiction over all of the probationer's conduct through the date of the hearing. However, once a violation of probation has been established, the Court can consider post-probationary-period conduct during the disposition stage as part of its discretion. In other words, once a violation is established, the Court then determines what to do about it. In making the decision regarding "what to do about it" or what the punishment shall be, the Court can consider the defendant's post-probation conduct.

PLEA AGREEMENTS REVIEWED UNDER PRINCIPLES OF CONTRACT LAW

Wayne Perry pled guilty to a nonresidential burglary as part of a plea agreement. As part of the plea agreement he agreed to pay the costs of the action as well as appointed counsel fees in the amount of $150. The journal entry reflected that Perry was ordered to pay the BID fee of $100 and attorney fees of $150. Typically, the district court is required to consider the defendant's financial resources before assessing court-appointed attorney fees. The judge must specifically state on the record how the court weighed the burden imposed by payment. In *State v. Perry*, ___Kan.App.2d ___(May 16, 2008), however, the Court held that such a hearing and order can be dispensed with when there is a valid plea agreement that addresses payment of said fees. It held that a plea agreement is a contract and both parties are bound by its terms. The very nature of such

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agreements is that the defendant waives certain statutory rights or constitutional rights in exchange for dismissal of charges or agreed upon recommendations by the prosecutor at the time of sentencing. So long as the agreement is entered into voluntarily, knowingly and intelligently, the terms of such an agreement are clearly enforceable as a matter of law. The statutory right to have the judge review the defendant's financial resources (as well as many more substantial rights) can be waived by plea agreement.

CONFESS OR LOOSE YOUR KIDS = CLASSIC PENALTY SITUATION

In *State v. Brown*, ___Kan. ___(May 16, 2008) the Kansas Supreme Court followed the rationale of the Kansas Court of Appeals in 37 Kan.App. 2d 726 (2007) and found that the Fifth Amendment is violated when the State compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is waived. *See, Verdict*, Summer 2007, p. 21. Chris Brown was threatened by SRS with severance of parental rights, for both he and his wife, to all three of their children unless he "admit how injuries to his baby occurred." The day of the severance hearing he walked into the police station and confessed. The Court called this the "classic penalty" situation. A classic penalty is a substantial penalty capable of coercing incriminating testimony. In a classic penalty situation, the defendant does not have to assert his privilege against self-incrimination, it is self-executing and he can raise it later to suppress the confession. The State argued that this was not police action, but SRS action and SRS is not prohibited from coercing confessions under the Constitution. The Court disagreed and found that the test is whether the confession was extracted by any sort of threats, regardless of which government agency does the threatening. The State further argued that the defendant was not forced to confess to abusing his child. He was merely forced to provide an explanation for his baby's injuries that was consistent with medical findings. However, Brown's unrefuted testimony was that the case plan required the parents to "admit to how the injuries occurred." He was forced to make incriminating statements or lose his fundamental right to his children.

The Court declined to adopt an absolute rule that requiring an admission of abuse as a condition of reunification violates a parent's rights under the Fifth Amendment. However, if such admissions are required, they will be excluded from evidence when the parent becomes a defendant in criminal proceedings.

IF STATE IS CLAIMING 'INEVITABLE DISCOVERY' OF EVIDENCE, IT HAS BURDEN OF PROOF

In *State v. Stowell*, ___Kan. ___(May 16, 2008), the issue was whether or not the police had the authority to search a pouch that was attached to the defendant's key ring which contained methamphetamine. It was determined that the search of the pouch was unlawful. The State argued that once the defendant was arrested (on other charges that night) and booked into jail, the pouch would have been subject to search at the jail, so the inevitable discovery rule applied. The defendant argues he had enough cash on his person to bond out and therefore, he would have never been booked into the jail. The Court held that the State had the burden of showing by a preponderance of the evidence that the discovery of the methamphetamine was inevitable. The State failed to present any evidence that the defendant would have been booked into the jail or any evidence of jail procedures. Therefore, the evidence must be suppressed.

MOTORIST MUST SIGNAL INTENT TO TURN AT LEAST 100 FEET PRIOR TO TURN, REGARDLESS OF WHEN HE OR SHE FORMED THE INTENT TO TURN

In *State v. Greever*, 37 Kan.App.2d 145 (2007) the Court of Appeals suppressed drugs found in Greever's car on the basis that the stop was unlawful. Greever had been stopped for failing to signal a turn at least 100 feet prior to the turn in violation of K.S.A. §8-1548. The Court found that one cannot be required to signal a turn before forming the intention to turn. It further found that an officer should be able to infer a motorists intent from the totality of the circumstances and in this case signaling only after stopping at the stop sign, was sufficient to relay his intent. *See, Verdict*, Spring 2007, p. 6.

In *State v. Greever*, ___Kan. ___ (May 16, 2008) the Kansas Supreme Court overruled the Court of Appeals decision, siding with Justice Buser's dissent. K.S.A. §8-1548 (identical to STO §46) states:

> *(a) No person shall turn a vehicle or move right or left upon a roadway unless and until such movement can be made with reasonable safety, nor without giving an appropriate signal in the manner hereinafter provided.*
>
> *(b) A signal of intention to turn or move right or left when required shall be given continuously during not less than the last one hundred (100) feet traveled by the vehicle before turning.*

The Court held that this is an absolute liability offense, with no showing of intent required. The only proof required is that the individual engaged in the prohibited conduct. The Court of Appeals decision to the contrary "added ambiguity where none existed." The Court of Appeals had found that the defendant "substantially complied with the intent of the statute" when "substantial compliance" has no application to a strict liability traffic infraction. The Court followed the reasoning of *Whren v. U.S.*, 517 U.S. 806 (1996) and said even if the officer's stop of the defendant was pretextual, the Court is not going to examine the subjective motivation of the officer in making the stop. The officer had probable cause to believe Greever committed a traffic offense, the stop was lawful, and the Court of Appeals opinion to the contrary was reversed.

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PASSENGER SEIZED WHEN VEHICLE STOPPED AND SHE DOES NOT FLEE; SHE CANNOT CONSENT TO A SEARCH (UNRELATED TO THE STOP) UNTIL THE SEIZURE HAS ENDED AND SHE HAS BEEN TOLD SHE IS FREE TO LEAVE

Officers stopped a vehicle with a broken taillight. The tag turned out to be illegal as well. The officer decided he was going to give the driver a ticket and tow the car. Lacy Smith was a passenger in the car. She got out of the car and sat down on some nearby steps while the officer was talking to the driver. The officer's backup arrived and recognized the passenger as someone he believed might have drugs. He approached her and asked how she was doing. He then asked her if he could look inside her purse. She consented and the officer discovered a bag of methamphetamine. She was arrested. At the station drug paraphernalia was found on her person and she made incriminating statements. The issue in *State v. Smith*, ___Kan. ___(May 30, 2008) was whether the contraband should be suppressed because of an illegal search.

First, the Court found that Smith was seized. The Court relied on the recent U.S. Supreme Court decision in *Brendlin v. California*, 551 U.S. ___(2007), which held that a passenger in a vehicle is seized for Fourth Amendment purposes when a law enforcement officer stops the vehicle through a show of authority and the passenger does not flee.

Second, it reiterated its "longstanding rule" that consensual searches during the period of detention for the traffic stop are invalid under the Fourth Amendment to the U.S. Constitution and §15 of the Kansas Constitution Bill of Rights. For the consent to be valid in those circumstances, the police must end the encounter, give the driver back his license and allow him to leave, so there is no longer a seizure, even when talking to the passenger rather than the driver. It rejected the Court of Appeals' reliance on *Muehler v. Mena*, 544 U.S. 93 (2005) as representing an abandonment of the rules regarding the limited scope of questioning allowed during a *Terry* stop.

Finally, it found that Smith's consent was not voluntary because it was tainted by the impermissible detention. The Court overruled an unpublished Court of Appeals decision in the case and ordered the evidence seized from Smith's purse and her statements at the station suppressed.

SMELL OF BURNT MARIJUANA ALONG WITH OTHER EVIDENCE OF DRUG USE CAN ESTABLISH PROBABLE CAUSE TO SEARCH

Trooper stopped vehicle for speeding. As he approached passenger side of vehicle he smelled a strong odor of burnt marijuana coming from the passenger's compartment. He asked the driver to step to the rear of the vehicle and questioned him about the smell. The driver initially denied there was any smell and then told him that the passenger had been smoking marijuana earlier. He had the driver sit on the bumper while he went to speak with the passenger. The passenger eventually admitted smoking marijuana in the car, but said there was none left because he had smoked it all. The Trooper searched him and found three bags of marijuana and $1,000 cash. He arrested the passenger and put him in the patrol car. He then re-contacted the driver.

The driver asked the Trooper if he could leave because he needed to pick up the passenger's girlfriend. The Trooper reminded the driver that he still had his driver's license and asked the driver if he had "anything" on him. The driver replied in the negative. The Trooper patted down the driver and found a switchblade knife, a glass pipe and a bent spoon, When questioned about these items, the driver said he "dabbled in cocaine." The Trooper handcuffed the driver and waited for his back-up to arrive. Once the back-up arrived, the Trooper finished the search wearing Kevlar gloves and found a small bag of cocaine clinched in the driver's hand.

In *State v. Fewell*, ___Kan. ___(May 30, 2008), the driver moved to suppress the evidence based on an illegal search. The Court conceded that although no court has yet held that the smell of burnt marijuana, by itself, is enough to establish probable cause to search the driver and the passengers, in this case the totality of the evidence supported the search. The Court pointed to the odor of recently smoked marijuana; the initial denial by the driver that there was any smell; the eventual admission of both the driver and the passenger that marijuana had been smoked in the car; the passenger's statement that "all the marijuana was gone," which was a lie and the desire of the driver to quickly leave the scene all combined to support the officer's actions. The evidence comes in.

See also, *Verdict*, Spring 2007, p. 23.

"IMPERFECT SELF-DEFENSE" NOT AVAILABLE FOR CRIMES OTHER THAN HOMICIDES; PROPRIETY OF OFFICER SITTING AT COUNSEL TABLE WITH PROSECUTOR; JUDGE QUOTING THE BIBLE IN PRELIMINARY ADMONITION TO JURY

State v. Kirkpatrick, ___Kan. ___ (May 30, 2008) involved several interesting issues. Factually it involved the defendant returning to a house after a verbal altercation earlier in the evening. The defendant returned to the home with several friends, a pit bull and a gun. The defendant fired the gun into the front door. It ended up killing someone on the other side of the door. He was charged with first-degree felony murder with the underlying felony being criminal discharge of a firearm at an occupied dwelling.

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The defendant argued that he was entitled to a self-defense instruction, particularly one on "imperfect self-defense."

Imperfect self-defense is codified at K.SA. 21-3403 (1995): *"Voluntary manslaughter is the intentional killing of a human being committed...**upon an unreasonable but honest belief that circumstances existed that justified deadly force...**"* *See also*, PIK 3rd 56.05. Under this doctrine, when the trier of fact finds that the defendant killed another person because the defendant actually but unreasonably believed the he or she was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and thus cannot be convicted of any crime greater than involuntary manslaughter.

The defendant argued that even though this was felony murder, he was entitled to an imperfect self-defense instruction as it related to the underlying felony of discharging a firearm into an occupied building. The Court rejected this argument. It found that in a felony murder context, the felonious conduct is held tantamount to the elements of deliberation and premeditation. Therefore, an imperfect self-defense instruction is not available when the underlying felony is a forcible felony. *See also*, K.S.A. §21-3214(1) which provides that even a regular self-defense instruction in not available to a person who commits a forcible felony.

The case was further complicated by the fact that the district judge allowed a regular self-defense instruction, although contrary to case law. The defendant argued that since he was entitled to a self-defense instruction on the underlying felony, he was also entitled to imperfect self-defense instructions as well as lesser included offenses of involuntary manslaughter. The Court found he was not entitled to the self-defense instruction to begin with and it was not going to build its analysis on a "legally defective foundation." Outside of homicide law, the concept of imperfect self-defense doesn't exist. There is no imperfect self-defense to discharge of a firearm into an occupied building.

The defendant next argued that by allowing the lead investigator to sit next to the prosecutor at the counsel table, the prosecutor was attempting to lend credibility to his testimony. However, the defendant did not invoke the sequestration rule. The prosecutor argued that the investigator was necessary at the table for convenience, in order to ask questions and provide assistance. In fact, it would result in less disruption than having to assist from the back of the courtroom.

The Court held that this is a matter within the sound discretion of the trial court. It acknowledged that there is always the danger that the jury will be overly impressed by the testimony of an officer who is allowed to sit at the prosecution table. Accordingly, it discouraged the practice in jury trials. However, it found that in this case they could not find an abuse of discretion.

Finally, during his admonition at the beginning of trial, the district judge advised the jury to keep an open and attentive mind throughout the trial and not make up their minds until the conclusion of the entire case. He went on to say, *"I like to remind the jury what's found in Proverbs 18. It says, The one who first states a case seems right until the other comes and cross-examines. There are two sides to the issue."*

The defendant argued that quoting the Bible deprived him of his right to a fair trial. He argues that he couldn't object at the time because jurors would take a *"dim view of a contemporaneous objection by defense counsel to the trial court's appeal to biblical authority."* He argued that by quoting a religious text, the judge *"opened the door for the jurors to use the Bible as an extrajudicial source of law."* The State argued that there was no showing of prejudice and no indication that the jurors ever consulted the Bible or had any Biblical material in the jury deliberation room.

The Court found that the district court should have avoided references to extrajudicial material, but there is no evidence that the comment prejudiced the defendant's substantial rights. There is no dispute that the judge was well-intentioned.

"Finally, we note that the comment at issue is not inherently religious in nature. It could just as easily have been a quotation from a United States Supreme Court opinion or Abraham Lincoln."

UNJUSTIFIED EXTENSION OF PARKING TICKET TO A BODY CAVITY SEARCH OF THE PASSENGER

Officers on routine patrol in Wichita see a driver standing outside a parked car. Upon seeing a police car, the driver "snapped his neck back" once, quickly got into his car and started driving. The officers followed the car. The car traveled a short distance, then abruptly parked. The driver got out and started walking toward a house. The car was parked 4-5 feet from a driveway. Wichita ordinance makes it a parking violation to park within 8 feet of a driveway.

The officer pulled the patrol car parallel to the parked car. The car had a Missouri tag. The officer in the passenger seat of the patrol car rolled down his window and yelled to the driver asking whether or not he was from Kansas City. The driver replied in the negative. The officer told the driver that the car was illegally parked and asked the driver what he was doing there. The driver said he was visiting a friend. When asked the friend's name, the driver did not know it. The driver kept looking toward the parked car. Although there were tinted windows, the officer could see someone moving in the car and surmised that there was a passenger inside.

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The officer got out of his patrol car and ordered the driver back to his patrol car. The officer testified both the driver and passenger were detained and no longer free to leave. The officer continued to question the driver for some time about where he was going, who the passenger was, whether he had sexual relations with her, his drug history, etc. The other officer then went up to the car to confront the passenger, Vanessa Gross. He asked her to roll down her window or open the car door. He began questioning her while standing between the open door and the interior of the car. She too stated that they were there to visit a friend but she didn't know the friend's name. The questioning continued for some time, with Gross protesting that she was being required to answer all of the officer's questions. Eventually, she admitted she was lying about why they were there. By this time the patrol car had moved to block the driver's exit and its lights were flashing.

The officer smelled the odor of burnt marijuana coming from the interior of the car. He ordered Gross out of the car so he could search it. The search occurred about 45 minutes into the stop. The officer found marijuana, a glass pipe and residue. While Gross was out of the car, she complained that she had to go to the bathroom. She walked with her "knees locked together." She was subjected to a body cavity search and paraphernalia and crack cocaine were found in her underwear. She was charged with possession of cocaine.

In *State v. Gross*, ___Kan.App.2d___ (June 6, 2008), the Court of Appeals reversed Vanessa's conviction on the basis of an illegal detention and subsequent search. The Court had little problem finding that Vanessa had been seized. It was not a voluntary encounter. Although the initial stop for a parking infraction was justified, the detention far exceeded the scope of such a detention. The officer never issued a citation for the parking violation and instead spent all of his time questioning the parties about unrelated matters. There was no reason to gather any information from Vanessa concerning the parking violation. The officers had no reasonable and articulable suspicion that she was involved in any criminal activity, just a hunch. All evidence recovered must be suppressed.

PUBLIC SAFETY STOP MUST INVOLVE WEIGHING RISK TO PUBLIC IF IMMEDIATE STOP IS NOT MADE

Around midnight, police receive an anonymous call concerning a disturbance between a man and a woman at a residence. The caller said the man left the residence in a white Dodge Neon saying he was going to the hospital. Police spotted a white Dodge Neon about half a block away (3-4 minutes after the call). There was nothing unusual about how it was being driven. The officer stopped the Neon, smelled the odor of consumed alcohol and a DUI arrest resulted. The defendant moved to suppress on the basis that their was no basis for the stop. The State argued that this was a public safety stop.

In a 2-1 decision, with a dissent filed by Judge Pierron, the Court found in *State v. McCaddon*, ___Kan.App.2d ___ (June 134, 2008) that this did not meet the criteria for a public safety stop. Since there was no reasonable and articulable suspicion of criminal activity, the stop was unlawful and the evidence giving rise to the DUI must be suppressed.

In analyzing the validity of a stop, the risks to the public that would occur if an immediate stop is not conducted must be weighed against the right of an individual to be free from stops. Where the danger to the public is clear, urgent, and immediate, the equation must be weighted in favor of protecting the public and removing the danger. In this case, the Court found the risk assessment to be low. The caller did not indicate anyone was injured, the officer did not see any erratic driving, there was no evidence that there was particularly heavy travel posing a risk to others on the roadway, the driver did not appear to be in any distress and, in fact, pulled over appropriately when the police activated lights and sirens. The small amount of information given by the anonymous caller and the lack of any corroboration by the officer, do not tip the scales in favor of a public safety stop. The risk to the public was not urgent. There was sufficient time for the officer to try to verify all aspects of the tip prior to stopping the defendant.

Judge Pierron questioned what the majority felt the officer should do in a case such as this. *"There is no evidence that the officer was doing anything except what we would want a police officer to do in a murky situation like this. We do not know everything about the factual background of the disputed and the stated need to go to the hospital. At the time, neither did the officer. But the actions he took were reasonable under the facts. ...I see nothing in the officer's activities to justify our punishing his actions."*

CONDITION OF PROBATION AUTHORIZING NONCONSENSUAL, SUSPICIONLESS SEARCHES IS UNCONSTITUTIONAL

In *State v. Bennet*, ___Kan.App.2d ___ (June 13, 2008), the Court found that while a probationer's expectation of privacy is generally significantly diminished by their status as probationers, there are constitutional limits on the degree to which a probationer's rights can be restricted. Nonconsensual, suspicionless searches as a condition of probation are unconstitutional. Interestingly, the Court goes on to state that if the state statute setting out the allowed conditions of probation allowed such searches the result may be different, apparently suggesting that the state could abrogate constitutional requirements by statute.

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See also, State v. Weimaster, Slip Copy, *unpublished*, 2008 WL 2424443 (Kan. App. June 13, 2008); *State v. Kasper*, Slip Copy, *unpublished*, 2008 WL 2424372 (Kan.App. June 13, 2008); *State v. Smith*, Slip Copy, *unpublished*, 2008 WL 2425642 (Kan. App. June 13, 2008);

JUVENILES HAVE CONSTITUTIONAL RIGHT TO JURY TRIAL

Saying that the Kansas Juvenile Justice Code has become *"more akin to an adult prosecution"* with the changes that have occurred over the last 24 years, the Supreme Court ruled, 6-1, that juveniles have a constitutional right to a jury trial. The decision in *In the Matter of L.M.*, ___Kan. ___ (June 20, 2008), applies to all juvenile cases pending on appeal or not yet final as of the date of the ruling.

The Court held that changes in the juvenile code *"have eroded the benevolent, child-cognizant, and rehabilitative"* and paternalistic nature of the code that distinguished it from the adult criminal system.

"While there is wide variability in the juvenile offender laws throughout the country, it nevertheless seems apparent to us that the KJJC, in its tilt towards applying adult standards of criminal procedure and sentencing, removed the paternalistic protections previously accorded juveniles while continuing to deny those juveniles the constitutional right to a jury trial. Although we do not find total support from the courts in some of our sister states, we are undaunted in our belief that juveniles are entitled to the right to a jury trial guaranteed to all citizens under the 6th and 14th Amendments to the United States Constitution."

The state statute making jury trials for juveniles discretionary, K.S.A. 2007 Supp. §38-2357, was therefore ruled unconstitutional. Chief Justice McFarland was the lone dissenter.

JUDGE RECEIVES PUBLIC CENSURE FOR COMMENTS TO JURY

A Sedgwick County district court judge received a public censure for her actions in berating members of a jury panel and thereby failing to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary. Her actions provided the basis for a motion for mistrial and a claim of error on appeal in the case of *State v. Gaither*, 283, 283 Kan. 671, 682-683 (2007). *See, Verdict, Summer 2007, p. 7.* The Court held that the judge's failure to control her temper and frustrations and her conduct toward potential members of the jury in open court greatly detracted from the honor and dignity of the judiciary and negatively impacted the proper administration of justice in a felony criminal trial. *In re Pilshaw*, ___Kan. ___(June 27, 2008).

PROSECUTION CAN CHARGE BOTH CHILD ENDANGERMENT AND DUI (WITH A CHILD UNDER THE AGE OF 14 IN THE CAR) BECAUSE THE STATUTES ARE COMPATIBLE

Nicole Cott was stopped for DUI. She had her 4 year old son in the car with her. She pled no contest to the charges, but was later allowed to withdraw her plea. In response, the prosecutor dismissed the charges and later refiled them adding a count of aggravated endangerment of a child and following too close. The district court dismissed the endangerment charge ruling "the more specific §8-1567(h) would trump K.S.A. §21-3608a." The Kansas Supreme Court disagreed and reversed the dismissal in *State v. Cott*, ___Kan. ___ (June 27, 2008).

K.S.A. §8-1567(h) provides a one month sentence enhancement if a person convicted of DUI had a child under the age of 14 in the car at the time of the offense. K.S.A §21-3608a(1) makes it a felony to intentionally cause or permit a child under the age of 18 "to be placed in a situation in which the child's life, body or health is injured or endangered." The Court found that the two statutes are compatible and that choosing which statute to charge is a matter of prosecutorial discretion. The Court also found, in response to the defendant's claim of prosecutorial vindictiveness, that it not improper or unlawful for a prosecutor to dismiss lesser charges after a plea withdrawal only to file more serious charges.

STATE CANNOT ADOPT A BLANKET BAN OF HANDGUNS

"A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed."

The Supreme Court has ruled that pursuant to the Second Amendment (above), Americans have the right to own guns for self-defense and hunting. *District of Columbia v. Heller*, ___ S.Ct. ___(June 26, 2008).

The Court had not had an opportunity to conclusively interpret the Second Amendment since its ratification in 1791. The District of Columbia passed an absolute ban on handguns. Other types of guns had to be registered. The Chief of Police could issue a license to carry a handgun for a one year period. However, residents were required to keep their lawfully owned firearms, such as registered long guns, "unloaded and dissembled or bound by a trigger lock or similar device" unless they are located in a place of business or being used for lawful recreational activities.

Justice Scalia, writing for the majority, found that the Second Amendment does not simply convey the right to possess and carry a firearm in connection with militia service (as was argued by the dissenters, Souter, Ginsberg, Breyer and Stevens). Instead the right is exercised individually and belongs to all Americans.

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The majority conceded that the right to bear arms is not unlimited. Prohibitions on carrying concealed weapons, possession of firearms by felons and the mentally ill or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings or laws imposing conditions and qualifications of the commercial sale of arms are all lawful limitations. It also held that the Second Amendment protects the possession of weapons that were commonly used by citizens at the time of the drafting of the Constitution. Therefore, prohibitions regarding modern day M-16s, machine guns, short barreled shot guns, bombers and tanks are constitutional. However, the D.C. ban goes too far. It bans the most common form of weapon of the masses, the handgun. It extends the ban into the home and even if licensed, renders it useless for the lawful purpose of self-defense.

"Some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct"

DEATH PENALTY FOR CHILD RAPISTS IS CRUEL AND UNUSUAL PUNISHMENT

The Supreme Court has ruled that the death penalty is unconstitutional if applied to anything other than a death case. *Kennedy v. Louisiana*, ___S.Ct. ___ (June 25, 2008). Justice Anthony Kennedy, writing for the majority, stated, *"The death penalty is not a proportional punishment for the rape of a child "* and as such it violates the Eighth Amendment prohibition against cruel and unusual punishment.

In addition, the majority opined, there are systematic concerns in prosecuting child rape, including the documented problem of unreliable, induced, and even imagined child testimony, which creates a "special risk of wrongful execution" in some cases. It also may add to the risk of non-reporting child rape out of fear of negative consequences for the perpetrator, especially if he is a family member. And finally, by in effect making the punishment for child rape and murder equivalent, a State may remove a strong incentive for the rapist not to kill his victim. Justices Alito, Roberts, Scalia and Thomas dissented.

"FORFEITURE BY WRONGDOING" IS NOT AN EXCEPTION TO THE SIXTH AMENDMENT CONFRONTATION REQUIREMENT UNLESS DEFENDANT'S CONDUCT WAS INTENTIONALLY DESIGNED TO PREVENT THE WITNESS'S TESTIMONY

In *Giles v. California*, ___S.Ct. ____(June 25, 2008), defendant was convicted of first degree murder of his former girlfriend. No witnesses saw the murder. Giles claimed self-defense. Prosecutors introduced statements made by the victim about 3 weeks before during a domestic-violence call involving the two. She described to police the beating that she had endured and told them that he had threatened to kill her if he ever found her cheating on him. Giles challenged the admission of this evidence in light of *Crawford v. Washington*, 541 U.S. 36 (2004) because he did not have the chance to cross-examine the victim regarding these statements. The lower courts had found that based on the theory of "forfeiture by wrongdoing" the statement was admissible. Under this theory, which has also been recognized by the Kansas courts (*State v. Henderson*, 284 Kan. 267 (2007)), a defendant forfeits his right to confront a witness who is unavailable to testify due to a criminal act on the part of the defendant.

The Supreme Court disagreed and found this general and broad definition of "forfeiture by wrongdoing" is not an exception to the Sixth Amendment confrontation requirement because it was not an exception established at the time the Constitution was written. The exception recognized at that time related only to circumstances in which the defendant actually connived or schemed to prevent the witness from testifying. The defendant's conduct must have been *designed* to prevent the witness's testimony. The conviction was reversed and the case remanded for a new trial.

"UNFAIR CONDUCT" BY INTERROGATOR MAY VIOLATE THE DEFENDANT'S DUE PROCESS RIGHTS EVEN THOUGH THE STATEMENTS MADE ARE NOT BARRED BY *MIRANDA*

This may be a classic case of bad facts muddying the legal landscape.

Karin Morton was investigated for "misappropriation for personal use" of federal surplus property. When his suspicions were raised, the director of the federal surplus property program turned the matter over to local law enforcement and to the General Services Administration (GSA). The Ottawa Police Department investigated. The investigation was concluded for insufficient evidence.

The GSA then started its own investigation. Special Agent Pontius reviewed the police report and decided that there were some additional questions he wanted to ask Ms. Morton. He first called her attorney, who advised that he wasn't sure if he was still going to be representing her. So he called Morton, and she agreed to meet him at the Ottawa Police Department. At this point Morton was under the belief that the county attorney had decline prosecution and she had been cleared. Morton asked Agent Pontius if she should bring her attorney. He replied, *"No, it's not that kind of interview. Some people bring their attorneys but it's nothing you'll need an attorney for."* Agent Pontius did not provide Morton with *Miranda* warnings before questioning her. They met in a break room and he told her

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she was not under arrest; she did not have to answer his questions and she could leave at any time. During the interview, she admitted filling out certain forms and identified her signature on the forms. At the end of the interview he advised her he was going to forward the matter to the county attorney, which he did. The county attorney subsequently charged Morton with making a false information to defraud, obstruct or induce official action, a felony. Morton moved to suppress the statements made to Agent Pontius, *sans Miranda.*

In a 5-2 decision with Justices McFarland and Davis filing dissents, the Court held in *State v. Morton,* ___Kan. ___ (July 3, 2008), that this was not a custodial interrogation, so *Miranda* was not required. *"However, that is not the end of the analysis....the statements may nevertheless be inadmissible if they were obtained in violation of the due process voluntariness requirement."*

The Court explained that while *Miranda* may be the first line of inquiry, voluntariness is the ultimate criterion for admissibility of a confession. Was the statement the product of the defendant's free and independent will? The behavior of law enforcement officers may be such as to overbear the defendant's will to resist and bring about confessions "not freely self-determined." According to the Court, that is exactly what happened in this case.

The Court agreed with the District Court that the agent's conduct was unfair because Morton clearly believed that the criminal investigation was over and no charges were to be filed. Agent Pontius' whole purpose in questioning her was to get enough information to charge her. His statement to her that she did not need an attorney was fundamentally unfair. Although giving a suspect false information about the status of the investigation, standing alone, does not render a confession involuntary, giving the suspect false or misleading information about the law is more problematic.

The knowingly false statement by Agent Pontius that Morton did not need a lawyer, seemed to turn this case for the majority. He knew she had an attorney before and he knew from her question about whether she needed an attorney that she wanted to have the benefit and advise of counsel if this was a criminal investigation. He never made it clear to her that he was a criminal investigator. The Court concludes, that had she known the truth, she would not have agreed to the interview without her attorney.

The evidence obtained by Agent Pontius was correctly suppressed.

AND THE GENERAL SAYS.....

What follows are opinions from the office of Kansas Attorney General Stephen Six that may be of interest to municipal judges. The full text of all AG opinions can be found at: ww.accesskansas.org.

AG Opinion 2008-4
February 25, 2008

The Uniform Electronic Transactions Act does not authorize the use of an unsworn, electronic digitally-signed complaint to commence a criminal prosecution pursuant to K.S.A. §22-2301 or an unsworn, electronic digitally-signed supporting affidavit to make a probable cause determination for issuing an arrest warrant or summons to appear pursuant to K.S.A §22-2302. However, where a district court has adopted local rules meeting the requirements in Kansas Supreme Court Rule 122 and the provisions in K.S.A. §53-601 are met, an electronic sworn, digitally-signed complaint can be used to commence a criminal prosecution pursuant to K.S.A. §22-2301 and an electronic unsworn, digitally-signed supporting affidavit can be used to make a probable cause determination for issuing an arrest warrant or summons to appear pursuant to K.S.A. §22-2302.

AG Opinion 2008-13
June 3, 2008

The application of whitening products to a consumer's teeth may be limited to dentists or dental hygienists. Although a criminal prosecution may be instituted for practicing dentistry or practicing dental hygiene without a license, the person charged may be able to claim a due process violation due to the lack of clear statutory and regulatory authority. Although a previous AG Opinion indicated that the sale of whitening toothpaste or whitening gels or impression materials do not constitute the treatment of a physical condition of human teeth, the application of whitening products probably does meet that definition. The AG encouraged the Kansas Dental Board to adopt clear regulations on this topic

GUIDE TO HIRING WOMEN

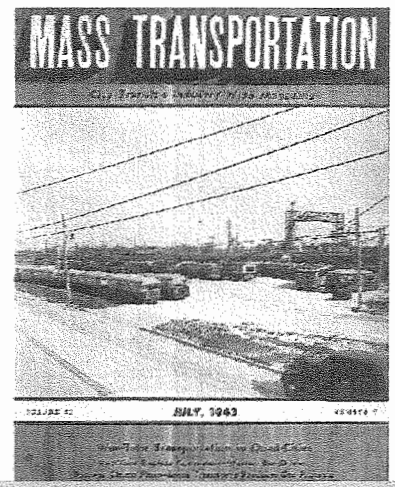
The following is an excerpt from the July 1943 edition of Mass Transportation Magazine. It was written for male supervisors of women in the work force during World War II. We've certainly come a long way, baby!

Eleven Tips on Getting More Efficiency Out of Women Employees

There's no longer any question whether transit companies should hire women for jobs formerly held by men. The draft and manpower shortage has settled that point. The important things now are to select the most efficient women available and how to use them to the best advantage.

Here are eleven helpful tips on the subject from Western Properties:

1. Pick young married women. They usually have more of a sense of responsibility than their unmarried sisters, they're less likely to be flirtatious, they need the work or they wouldn't be doing it, they still have the pep and interest to work hard and to deal with the public efficiently.
2. When you have to use older women, try to get ones who have worked outside the home at some time in their lives. Older women who have never contacted the public have a hard time adapting themselves and are inclined to be cantankerous and fussy. It's always well to impress upon older women the importance of friendliness and courtesy.
3. General experience indicates that "husky" girls—those who are just a little on the heavy side-are more even tempered and efficient than their underweight sisters.
4. Retain a physician to give each woman you hire a special physical examination—one covering female conditions. This step not only protects the property against the possibilities of lawsuit, but reveals whether the employee-to-be has any female weaknesses which would make her mentally or physically unfit for the job.
5. Stress at the outset the importance of time the fact that a minute or two lost here and there makes serious inroads on schedules. Until this point is gotten across, service is likely to be slowed up.
6. Give the female employee a definite day-long schedule of duties so that they'll keep busy without bothering management for instructions every few minutes. Numerous properties say that women make excellent workers when they have their jobs cut out for them, but they lack initiative in finding work themselves.
7. Whenever possible, let the inside employee change from one job to another at some time during the day. Women are inclined to be less nervous and happier with change.
8. Give every girl an adequate number of rest periods during the day. You have to make some allowances for feminine psychology. A girl has more confidence and is more efficient if she can keep her hair tidied, apply fresh lipstick and wash her hands several times a day.
9. Be tactful when issuing instructions or in making criticisms. Women are often sensitive; they can't shrug off harsh words the way men do. Never ridicule a woman—it breaks her spirit and cuts off her efficiency.
10. Be reasonably considerate about using strong language around women. Even though a girl's husband or father may swear vociferously, she'll grow to dislike a place of business where she hears too much of this.
11. Get enough size variety in operator's uniforms to that each girl can have a proper fit. This point can't be stressed too much in keeping women happy.



"Although WBC's members steadfastly maintain that their message about public and elected officials is apolitical, a story about Abraham Lincoln during his trial attorney days may be helpful in understanding the members' assertion. Lincoln is said to have cross-examined a witness as follows:

"How many legs does a horse have?"

"Four," said the witness.

"Right." said Abe.

"Now, if you call the tail a leg, how many legs does a horse have?"

"Five," answered the witness.

"Nope," said Abe, "callin' a tail a leg don't make it a leg."

So merely saying a message is apolitical does not make it so."

In re Tax Exemption Application of Westboro Baptist Church, ___Kan. App. 2d ____ (July 25, 2008).

NUTS and BOLTS

Question: Can courts tack on an additional amount of money to the fine totals for offenders submitted to the debt set-off program to help defray the collection fee costs? If so, what is the statute?

Answer: Yes. *See*, K.S.A. 2007 Supp. §12-4119, effective July 1, 2007. However, once the debt that you report to set-off is collected, they will not collect anymore. This is part of the set-off contract you sign to participate in the program. Therefore, you would have to collect the "set-off fee" without the help of the set-off program.

Question: I was asked to perform a wedding in Johnson County, yet the marriage license was obtained in Wyandotte County. Can I perform a wedding in a county other than the county from which the license was issued?

Answer: Yes. The marriage license is good anywhere in the state of Kansas and a sitting Kansas municipal judge can perform a wedding anywhere in the state of Kansas.

Question: What is the difference between an arrest warrant and a bench warrant?

Answer: Black's Law Dictionary defines the two types of warrants as follows:

> **"arrest warrant"** is a warrant issued only on probable cause, directing a law-enforcement officer to arrest and bring a person to court, also termed "warrant of arrest."
>
> **"bench warrant"** is a warrant issued directly by a judge to a law-enforcement officer, especially for the arrest of a person who has been held in contempt, has been indicted, has disobeyed a subpoena, or has failed to appear for a hearing or trial.

The term "*capias* warrant" is also often used to describe a bench warrant. The term "*capias*" is Latin for "that you take", so it is an order to take a person into custody usually for failure to follow some order or direction of the court.

There appear to be several more differences as well.

Although, he Fourth Amendment to the U.S. Constitution and the Kansas Constitution Bill of Rights §15 require that no warrant be issued except upon probable cause supported by oath or affirmation, this appears to apply solely to arrest warrants.

K.S.A. 2007 Supp. §12-4209(a) and (d) state, in part:

"(a) The city attorney shall cause a notice to appear to be issued, except that, if requested by the city attorney, a warrant for the accused shall be issued if the municipal judge finds from the complaint, or from an affidavit or affidavits filed with the complaint or from other evidence that there is probable cause to believe both that a crime has been committed and that the defendant has committed such crime...

(d) Affidavits or sworn testimony in support of the probable cause requirements of this section shall not be made available for examination without written order of the judge..."

This seems to point to an "arrest warrant" rather than a bench warrant and must be supported by probable cause and sworn affidavits or complaints. *See also*, K.S.A. §22-3202 for discussion of arrest warrants issued in district court cases.

On the other hand, K.S.A. 2007 Supp. §12-4209(c) states:

"If a defendant fails to appear in response to a notice to appear , a warrant ***shall*** *be issued."*

It should be noted that K.S.A. §12-4209 used to say that *"No warrant shall issue unless the complaint giving rise to its issuance is supported by oath or affirmation."* That language was removed in 2004 and the current language, seemingly making a distinction between an arrest warrant and a bench warrant, was inserted.

See also, K.S.A. 22-2302(1) *("If a defendant fails to appear in response to the summons, a warrant shall issue.")*; Fed. Rules Cr. Proc. Rule 9, 18 U.S.C.A., FRCRP Rule 9. *("If a defendant fails to appear in response to a summons, the court may, and upon request of an attorney for the government must, issue a warrant.")*. There is no discussion of any necessary probable cause or sworn affidavits in these circumstance and they seem to refer to a bench warrant.

K.S.A. §12-4406(e) states:

"If the accused person fails to appear, the court shall declare the appearance bond to be forfeited and ***may*** *issue a warrant for the arrest of the accused person."*

See also, K.S.A. §8-2113. Again, there is no discussion of any oath or affirmation or probable cause necessary to support such a warrant and the statute appears to be referring to a bench warrant.

K.S.A. 12-4306(a) states in part:

If a person who is a resident of this state is charged with a violation of a traffic ordinance of a city in this state and such person fails to appear after service of notice to appear, any law enforcement officer of any county or city of the state may serve the ***bench warrant*** *issued for the per-*

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Nuts and Bolts

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son...

See also, K.S.A. §22-2818(a) (2007). These statutes specifically refer to a "bench warrant" for failure to appear in court, with no discussion of any probable cause or oath or affirmation requirement.

Although this issue has never been directly addressed in Kansas, it has been addressed around the country. Several courts and legal treatises have made a distinction between bench warrants and arrest warrants and held that a judge has sufficient "personal knowledge" to support issuance of a bench warrant without a sworn written statement of probable cause based upon the judge's review of information in the possession of the court maintained in the regular course of its business. *See*, *State v. Pinela*, 113 N.M. 627, 830 P.2d 179 (N.M. App. 1992) (issuance of bench warrant for failure to pay a fine); *State v. Mohs* 743 N.W.2d 607 (Minn. 2008) (defendant failed to appear after receiving notice and the court did not have to examine the reason for the defendant's failure to appear before issuing the warrant); *People v. Allibalogun*, 312 Ill.App.3d 515, 727 N.E.2d 633, 245 Ill.Dec. 186 (2000) *("[W]hen an accused person or a subpoenaed witness fails to appear in court, the judge will issue a bench warrant ordering that person arrested and brought before the court. Such warrants are clearly valid and based on probable cause.")*; *U.S. v. Evans*, 574 F.2d 352, 355 (6th Cir. 1978); *U.S. v. Wingert*, 55 F.2d 960, 963 (D.C. Pa. 1932); 22 C.J.S. Criminal Law §476. Such action is considered part of the inherent authority of courts to order the arrest and punishment for offenses that are "committed in the court's presence." Some authors report that no oath is necessary because the constitutional requirement of an oath is met by the fact that the judge acted on his or her oath of office. *See*, 5 Am.Jur.2d Arrest §17 (2008).

Finally, the Kansas Supreme Court has held that bench warrants that have been issued for a person's failure to appear **in limited civil actions** were not based on probable cause and, thus, did not give officers the authority to enter the person's residence to execute the warrant. *See*, *State v. Ruden*, 245 Kan. 95 (1989). *See also, Milner v. Duncklee*, 460 F.Supp.2d 360 (D. Connecticut 2006). Although the Kansas Supreme Court has not addressed the issue regarding a bench warrant for failure to appear in a criminal case, the Kansas Supreme Court cited *Ruden* with approval in *State v. Thomas*, 280 Kan. 526 (2005) distinguishing a felony arrest warrant for a probation violation from a civil contempt bench warrant. However, *see, McTigue v. State, unpublished*, 92 P.3rd 613, 2004 WL 1488999 (Kan. App. 2004), where the Court of Appeals held that officers had the right to enter the defendant's home to serve a bench warrant for failure to appear .

Question: What is meant by "oath or affirmation?" Is this the same as "sworn" and does it require a notary, court clerk, or judge to actually administer an oath and complete the certification of the oath?

Answer: The U.S. Constitution does not set out the form of an oath or affirmation. The majority case law holds that an oath or affirmation is sufficient if the maker of the statement is alerted to the criminal consequences of knowingly providing false information and then voluntarily acknowledges his or her acceptance of these consequences, even in the absence of a formal swearing before an officer authorized to administer oaths. In addition, documents incorporated by reference in an affidavit generally need not be sworn to separately. Since 1989, declarations under penalty of perjury have been sufficient to satisfy the "oath or affirmation" and "swearing" requirement.

K.S.A. 53-601 states:

"...whenever a law of this state or any rules or regulations, order or requirement adopted or issued thereunder requires or permits a matter to be supported, evidenced, established or proved by the sworn written declaration, verification, certificate, statement, oath or affidavit of a person, such matter may be supported, evidenced, established or proved with the same force and effect by the unsworn written declaration, verification, certificate or statement dated and subscribed by the person as true, under penalty of perjury, in substantially the following form:

If executed outside this state: "I declare (or verify, certify or state) under penalty of perjury under the laws of the state of Kansas that the foregoing is true and correct. Executed on (date). (Signature)

If executed in this state: "I declare (or verify, certify or state) under penalty of that the foregoing is true and correct. Executed on (date). (Signature)

This provision does not apply to oaths of office, oaths required to be taken before specified officials other than a notary public, or oaths related to wills and codicils. *See*, K.S.A. §53-601(b). Federal law is virtually identical. *See*, 28 U.S.C.A. §1746. Recently, the Kansas Attorney General opined that none of these exceptions include a criminal complaint or probable cause affidavit. Therefore, according to the Attorney General, criminal complaints and probable cause affidavits may be supported by an unsworn declaration made under penalty of perjury pursuant to K.S.A. §53-601. *See*, AG Opinion 2008-4.

Question: Is a city prosecutor allowed to put a DL suspension requirement in a diversion agreement?

Answer: No. Only the motor vehicle division or the judge can place a suspension order on a person's record and then only as provided by state law or regulation.

THEM'S FIGHTIN' WORDS!

By Hon. Randy McGrath, Lawrence

Fellow judges, please be aware (since often we are the last safety net and also being cognizant of Judge Fairchild's speech on wrongful convictions from the KMJA conference) of two circumstances where a pro se defendant may try to plead to disorderly conduct where there is no factual basis for the conviction, at least if the law is followed, and the plea should not be accepted. This is one of my pet peeves in court, when a complaint is filed which shouldn't have been filed and when the defendant, pro se, tries to plead to it. (The other one is when the defendant is guilty of the charge and pleads to it, then sugar-coats the facts when asked for the factual basis and you have to drag it out of him and then he finally admits that yes, he did steal the item from Wal Mart and it wasn't an accident). Concerning the disorderly charge, our Lawrence disorderly conduct ordinance mirrors K.S.A. §21-4101, which defines it as

> *"with knowledge or probable cause to believe that such acts will alarm, anger, or disturb others or provoke an assault or other breach of the peace:*
>
> > *engaging in brawling or fighting; or... using offensive, obscene or abusive language or engaging in noisy or offensive or other conduct tending to reasonably to arouse alarm, anger or resentment in others."*

Here are two situations which I see on a weekly basis, (saw one this morning as a matter of fact) where the complaint should not have been filed, and there should not be a conviction. I am surprised at how often I see these two issues which vitiate a valid charge of disorderly conduct.

Self-defense: Often a police officer will come upon a fight, get the situation under control and then pass out disorderly citations to everyone involved. The problem here is that often one of the combatants is actually defending himself from an attack. Remember use of force in defense of person (K.S.A. §21-3211) can be a defense. It seems that police officers, and sometimes prosecutors, forget that concept. So, when the accused and all the independent witnesses tell the officer that the accused was walking down Massachusetts Street when a drunk came up and hit him, and the accused fought back, he shouldn't be charged. But, in the complainant's eyes, he's "fighting or brawling" and therefore they both should be charged with disorderly conduct. Such logic defies common sense and the law.

Words alone which are not "fighting words." If it is words alone which form the basis for the complaint, remember that the Kansas Supreme Court (following the U.S. Supreme Court) has said that the words must be "fighting words" or words which by their very utterance inflict injury or tend to incite the listener to an immediate breach of the peace. (*State v. Huffman*, 228 Kan. 186 (1980)). So, for instance, the disgruntled customer may swear when his laundry isn't ready at the cleaners, and those words may anger the clerk, but unless the words arise to the level of "fighting words", then that customer should not be charged.

While being aware that many defendants may just want to "get it over with" and go ahead and plead guilty in these situations described above, we really can't let them do it if there is no factual basis for the plea. The best case scenario would be that the plea is not accepted, and then the prosecutor will review it and then dismiss the charge. Education of the police officers by the prosecutors on these legal nuances would also be helpful, as when each time a bogus complaint is filed, it wastes time of the accused, the clerk, the court, and the prosecutor.

So, remember that we are not potted plants sitting on the bench, just going with the flow and accepting any plea that comes before us without any thought or discernment.

OK folks, this is my last turn at the keyboard for *Verdict* articles. However, I would love to hear from any of you who have encountered these same problems with your disorderly conduct charges, or anything else for that matter. If so, e-mail me at rmcgrath@ci.lawrence.ks.us.

Position of Judge Against Whom a Docketed Complaint Was Filed in 2007*

Chief Judge	3
District Judge	14
District Magistrate Judge	1 (non-lawyer)
Municipal Judge	7 (6 lawyers)
Judge Pro Tempore	1 (lawyer)
Retired, Taking Assignments	1

**In some instances, more than one complaint was filed against the same judge.*

Source: *2007 Annual Report, Kansas Commission on Judicial Qualifications*

STOP OR SLOW DOWN?

A lawyer runs a stop sign and gets pulled over by a sheriff's deputy in a remote Kansas county. He thinks he is smarter than the deputy because he is a lawyer from New York and is certain that he has a better education than any cop from Kansas. He decides to prove this to himself and have some fun at the deputy's expense.

Deputy: License and registration, please.

Lawyer: What for?

Deputy: You didn't come to a complete stop at the stop sign.

Lawyer: I slowed down, and no one was coming.

Deputy: You still didn't come to a complete stop. License and registration, please.

Lawyer: What's the difference?

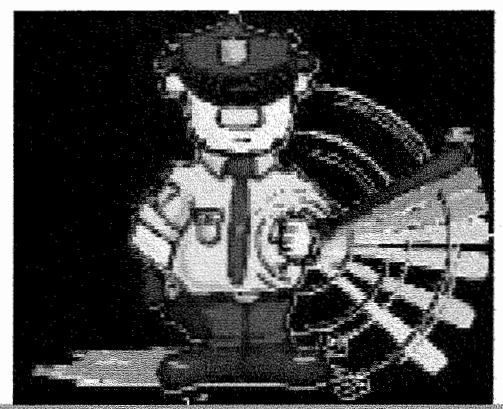
Deputy: The difference is, you have to come to a complete stop; that's the law. License and registration, please!

Lawyer: If you can show me the legal difference between slow down and stop, I'll give you my license and registration, and you give me the ticket. If not, you let me go and don't give me the ticket.

Deputy: Sounds fair. Exit your vehicle, sir.

At this point, the deputy takes out his nightstick and starts beating the lawyer and says:

"Do you want me to stop or just slow down?"



NEW INDIGENT TABLES ADOPTED

Effective July 1, 2008 the State Board of Indigent Defense Services adopted the 2008 Federal Poverty Guidelines. The new income guidelines for appointment of counsel are:

Size of Family Unit	Amount Allowed
1	$10,400
2	14,000
3	17,600
4	21,200
5	24,800

Add $3,600 for each additional family member

(1) Total Liquid Assets*
(2) Amount from Table Above
(3) Cost of Legal Representation

Add lines 2 and 3. If amount is greater than line 1, defendant should be appointed counsel.

DETERMINATION OF ELIGIBILITY-K.A.R. 105-4-1(B): "An eligible indigent defendant is a person whose combined household income* and liquid assets** equal less than the sum of the defendant's reasonable and necessary living expenses plus the anticipated cost of private legal representation."

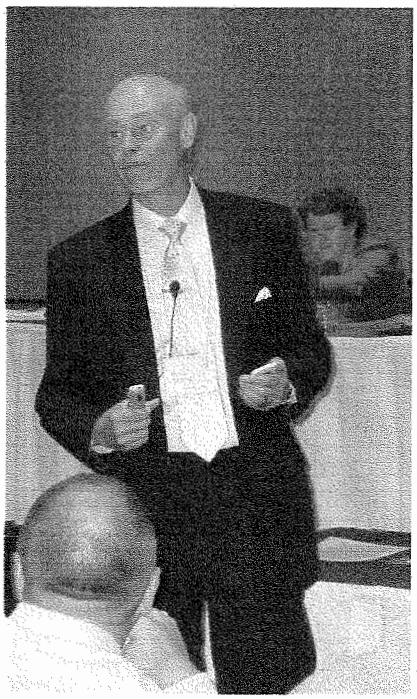
*Household income is defined as: Defendant's income and the income of all other persons related by birth, marriage or adoption who reside with the defendant. Income shall be calculated **before** taxes and shall include income from all sources.

**Liquid assets are defined as :
- -Cash in hand
- -Stocks and bonds
- -Accounts at financial institutions
- -Real property or homestead with net value greater than $50,000
- -Any property readily converted to cash except:
  - -car, clothing and household furnishings
  - -jewelry having net value less than $500
  - -burial plot or crypt
  - -books or tools of trade less than $500
  - -federal pensions

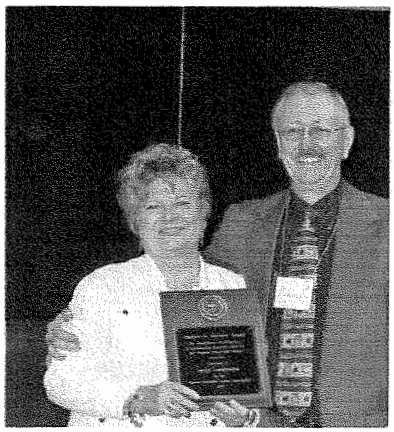
All tables and regulations can now be found on the web at www.ksbids.state.ks.us

Federal Poverty Guidelines can be found at: http://aspe.hhs.gov/poverty/08poverty.shtml

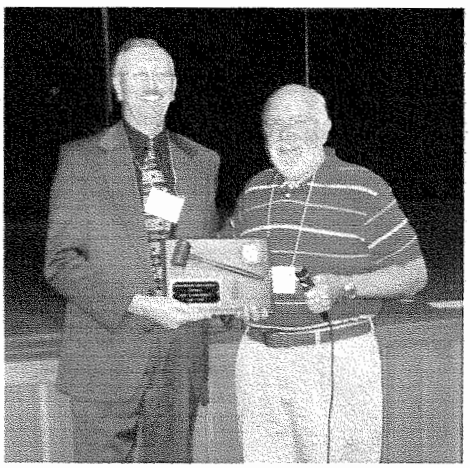
2008 KMJA Conference Highlights



Florida judge, Karl Grube, reviews the finer points of DUI law during a lively mock trial.



KMJA President Ken Lamoreaux presents the Michael Barbara Award to retired judge Bette Lammerding for her service to the association and the Municipal Judges Manual Committee



Incoming KMJA President John McLoughlin presents an appreciation plaque to outgoing President Ken Lamoreaux

Above: Karen Arnold-Burger, Brenda Stoss and Tom Buffington share their thoughts. **Top Right:** Monday night entertainment **Right:** The Johnson County contingent enjoys the steak.

Above: Ken Lamoreaux joins the band.

Below: KMJA members listen carefully to the latest developments in municipal court law.

UPDATES FROM THE DMV

Following are the questions and answers received from Marcy Ralston, Chief, Driver Control, Department of Revenue, Division of Vehicles at our Annual Conference as well as those she addressed at the Municipal Court Clerks Conference. Ms. Ralston indicated that the department's backlog is now caught up, although they are still down ten employees. She stated that it is their hope to have certified driving records available on line in the near future. Also, check out their new website designed specifically for courts for lots of useful information: http://www.ksrevenue.org/courts/index.html

Question: Since we are only reporting diversions for DUI's, what is to keep someone from getting multiple diversions for minor traffic offenses?

Answer: Unfortunately, nothing.

Question: Please explain: *"Ignition interlock is the responsibility of the court, not DMV."*

Answer: The Court-ordered interlock which was just made a part of K.S.A. §8-1567 (l) in 2007 is separate from the ignition interlock restriction Driver Control imposes against a person's driving privileges pursuant to K.S.A. §8-1014. The requirement in K.S.A. §8-1567 (l) is the court's responsibility.

Question: When will electronic suspensions be completed for all courts?

Answer: Our goal is to be completed by July 1, 2008. After that date, paper will not be accepted. Currently:

71 courts are in full production
75 courts are in development or controlled testing
152 courts have not started
66 courts are served by their county
49 courts have not even contacted DMV

Question: Please explain the exact procedure for renewal of a license.

Answer: An applicant for renewal, who has their current driver's license in possession and still resides at the address on the fact of the driver's license should only have to show the license and their renewal card to renew. The applicant must also provide their Social Security Number if it is not on file.

If the applicant has moved from the address on their license, they will have to provide proof of residence, e.g...utility bill, bank statement, etc. The Chief Driver's Licensing Examiner's Bureau provides an "Acceptable Documentation" list that you can view or print at: http://www.ksrevenue.org/dmvproof.htm

Question: What is the best way to correct an abstract submitted in error?

Answer: An amended abstract for a minor conviction (i.e. speeding) can be amended by submitting a paper abstract of conviction marked "AMENDED."

An amended abstract for a major conviction (i.e. DWS) can be submitted electronically with "YES" in the field "FOUND GUILTY, AMENDED" and a description of the amended charge in the field "AMENDED." The "OTHER ORDERS" field may also be used to further describe the required amendment.

If necessary, an amended abstract for a major conviction may be submitted by paper.

Question: How do you enter unusual names such as people with 4 names, people with hyphenated names, names that begin with Mc or La or De (do you use a apace, or all together)?

Answer: When submitting electronically the driver's name must be submitted as it appears on the DMV record or the driver's license. If you receive an error on the unusual name, you may contact DMV for verification of the proper spelling or

(Continued on page 28)

Top Six Most Common Complaints Filed with the Kansas Commission on Judicial Qualifications in 2007

1. *Prejudice/Bias (39)*
2. *Denied Fair Hearing (26)*
3. *Conflict of Interest (21)*
4. *Injudicious Temperament (15)*
5. *Delay in Decision Making (13)*
6. *Ex Parte Communication (11)*

Source: 2007 Annual Report, Kansas Commission on Judicial Qualifications

Updates from the DMV

(Continued from page 27)

format.

Question: Is "expired tag" (STO §198(a)) a minor reportable offense?

Answer: Yes. The conviction is not a moving violation, but it still must be reported to Driver Control.

Question: Is a temporary license limited to one year?

Answer: Yes. A person who is in Kansas legally for a temporary time period may be issued a driver's license. The license will be valid until the specific departure date or up to one year.

Question: How does a young person, or a spouse or girlfriend/boyfriend with no bills in their name obtain a driver's license?

Answer: If a teenager still lives at home when obtaining their license, their parent/guardian should be able to provide the proof of residency from their own driver's license, or other acceptable documentation. If a spouse or partner is applying they have to prove residency. If they cannot, a driver's license will not be issued.

Question: Defendant has an out-of-state driver's license and is charged with driving while revoked. Upon receipt of the records from the other state, we discovered that the person's driver's license had been surrendered to yet another state. We requested records for the third state and it also showed suspended privileges. Do we file notice of failure to comply in both states or does it have to be in the state the defendant presented at the time of the original ticket?

Answer: According to the Non-resident Violator Compact (NRVC) Article II, the report of the failure to comply must be made to the licensing authority in the home jurisdiction of the motorist. See, K.S.A. §8-1219.

Question: Please explain K.S.A. §8-253(c). If a person fails to appear for an arraignment on a DWS or DUI and I forfeit bail, are we to report this action to you and you would then enter a conviction for this charge even though they have not had a trial or finding of guilt by the court? Would this failure to appear and conviction be used to enhance a new charge even though there has never been a hearing on the first charge?

Answer: See, K.S.A. §8-2115. Bond forfeitures are treated as convictions and will be used for enhancement purposes ***with regards to the person's driving privileges.***

Question: How long from the date of the citation does the court have to request administrative DL suspension for failure to appear/failure to pay?

Answer: If you submit by paper, one year. If you submit electronically, there is no time limit.

Question: When can a person with a suspended license get a moped license?

Answer: If the driving privileges are suspended for anything other than a DUI conviction (not a breath test failure or refusal, but a DUI conviction) the person may get a moped license. If the person's license is revoked or canceled, for any reason, he or she is not eligible for a moped license. *See*, K.S.A. 2007 Supp. §8-235(d).

Question: The current DUI law includes any prior DUI committed during the person's lifetime for purposes of severity level/sentencing. Do DMV driving records include all prior DUIs committed in Kansas during the person's lifetime, or do they "drop off" of the driving record after a few years.

Answer: The Kansas driving record does not contain a record of all prior convictions in a person's lifetime. Any convictions obtained before 1996 were purged from the system when the state used to have the five year decay in effect. Therefore, there are generally no DUI convictions on a Kansas record older than 1996.

Question: Should convictions be sent to the DMV even if a Notice of Appeal is filed?

Answer: According to discussions between the DMV and OJA, it has been made clear that the district court clerk will send in conviction information on appeals. If the appeal is dismissed and the case remanded to the city, it would be the city's responsibility to send in the conviction information. If a conviction was obtained in municipal court from which an appeal is taken, it is within the court's discretion whether to send the conviction in. The municipal court has no responsibility to notify the DMV that the case has been appealed.

Question: Why does DMV apply the reckless driving suspension to convictions for careless driving in Missouri? These charges are not the same.

Answer: The American Association of Motor Vehicles developed a traffic code dictionary. Each state has had to "map" to that "ACD" code. That way there is no confusion when convictions are reported to other states. Missouri "mapped" their careless driving charge as "N84" which is the reckless driving code. Missouri makes that decision, not Kansas. On a non-CDL, Kansas DMV will correct the entry to careless on proof that it was actually a careless driving charge. However, Kansas will not make any modifications if it is a CDL. See: http://www.aamva.org for more information about ACD codes.

(Continued on page 29)

Updates from the DMV

(Continued from page 28)

Question: It has been a long standing policy by the Chief Judge in our district to impose a $50 reinstatement fee for each case rather than each charge. Could you advise municipal court judges how they should handle reinstatement fees? Also, do you see other courts assessing just one $50 reinstatement fee per case?

Answer: It is our legal interpretation that K.S.A. §8-2110(c) requires a $50 reinstatement fee be paid for each charge. We don't know if any courts are only assessing it per case because we don't audit courts for compliance.

Question: If a person's privileges are restricted to an interlock, but they don't own a car and aren't driving, can they get full driving privileges back at the end of the restriction period?

Answer: No. Whenever a person is restricted by the DMV to interlock, the person's driving privileges cannot be reinstated until the person submits proof that he or she did in fact have the interlock for the required time period. *See*, K.S.A. 2007 Supp. §8-1015(c). So the person would have to obtain a car and have interlock installed on it for the required time period before ever getting full privileges back.

Question: As gasoline becomes prohibitively expensive and more of us drive electric golf cards around town, will the same rules of the road apply?

Answer: A golf cart is a "work-site utility vehicle." This legislative session, HB 2119, eliminated restrictions on work-site utility vehicles that previously appeared in K.S.A. 2007 Supp. §8-15,105 by repealing that provision. However, they are classified as non-highway vehicles under K.SA. 2007 Supp. §8-197, although they are motor vehicles. Therefore, they cannot be operated on publicly owned streets or highways. HB 2119 originally had language in it regulating golf carts, but it was removed before passage.

Question: Do yon have a comparison chart for DL and CDL suspensions?

Answer: Not at this time.

Question: Defendant advises the court or prosecutor that he has obtained a false Kansas ID card or driver's license from the Kansas DMV. What is the proper procedure for informing DMV of this information?

Answer: Obtain as much information as possible and send it to the DMV. An investigator will look into it further and "flag" and even amend the record if necessary.

Question: DC-66 returns and insurance was out of force at time of ticket. Is it proper procedure to summon the defendant to court for a plea or trial on the no proof of insurance charge? What paperwork should be sent to the DMV?

Answer: Yes, it is proper to summon the defendant back to court to answer to the charge. The charge should still be pending, because it is not to be dismissed until 60 days have passed from the date the DC-66 was sent in. A conviction would be handled just like any other conviction for no proof of insurance and sent in accordingly. If the charge was already dismissed by the court, the police or prosecutor would have to re-file the charges (issue another ticket).

Question: What changes are you proposing this year for driver's license administrative hearings?

Answer: None.

Question: How do you cancel a driver's license when the holder dies?

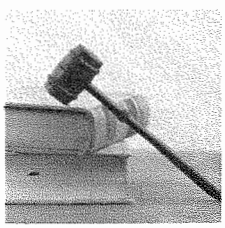
Answer: Anyone can send in a copy of the death certificate or

MORE POETIC JUSTICE

U.S. District Judge Ronald Leighton, Western District of Washington, Tacoma, found himself presented with a 465 page pleading in a racketeering lawsuit. Just the title took up 8 pages. The first allegation in the pleading did not appear until page 30. Relying on Rule 8 (a)* of the Federal Rules of Civil Procedure he issued the following order:

Plaintiff has a great deal to say,
But it seems he skipped Rule 8(a)
His Complaint is too long
Which renders it wrong
Please re-write and re-file today.

**"A pleading which sets forth a claim for relief...shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends... (2) a short and plain statement of the claim showing that the pleader is entitled to relief..."*



Unpublished Opinions

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

SEARCH OF OCCUPANT'S PURSE WHEN CONTRABAND DISCOVERED IN DIFFERENT PART OF CAR UNRELATED TO OCCUPANT

Unpublished Decision

Sheriff's deputies stopped a car with an expired tag. Kevin Nelson owned the car and was a "person of interest" in a pending drug investigation. However, Nelson was not in the car. The car was being driven by Billy Harrington with April Miller as an occupant. The officers discovered that Herrington was operating on a suspended license and had an outstanding warrant, so they arrested him and transported him away from the scene. The officers arranged to have the car towed (since it could not be driven with an expired tag). They asked April to step out of the car. They asked her if there were any illegal items in the car and she responded that she didn't think so. She gave her consent for the officers to search the car.

The officers found Miller's purse on the floorboard on the front passenger side. The officers asked if they could search her purse, and she declined. As the search of the car continued they found a duffle bag in the back seat containing men's clothing and a shaving kit. It also contained cocaine and a pipe. April was arrested and her purse searched incident to the arrest. They found methamphetamine. The issue in *State v. Miller*, Slip Copy, unpublished, 2008 WL 1722266 (Kan. App. April 11, 2008), was whether the officer's properly searched April's purse.

The Court found that search was not proper and the items found in April's purse had to be suppressed. April had no ownership interest in the car, she was a mere passenger. The duffle bag clearly did not belong to her given its location in the car and the men's items inside. There was no probable cause to arrest her for the contents of the duffle bag and therefore the "search incident to the unlawful arrest" must fail.

SOVEREIGN CITIZEN DUI

Unpublished Decision

Michael Banks was stopped for improper turn and subsequently arrested for DUI. He waived his right to counsel and proceeded to trial. He admitted he had been drinking and made a wide turn, but he argued that he had "reserve[d] [his] rights under common law" by noting a reservation pursuant to UCC 1-207" under the signature on his license and therefore the State was require to come forth with a "damaged party." He argued that only the jurisdiction of the common law can be recognized over him as a "Freeman," and since penal offenses such as DUI (in which there is no victim) are creatures of statute and not the common law he cannot be punished under the statute. The Court of Appeals methodically rejected each of defendant's arguments in *State v. Banks*, Slip Copy, *unpublished*, 2008 WL 1847707 (Kan. App. April 18, 2008).

The Court *recognized* that the defendants arguments were a variation of the arguments offered in "tax protestor" cases. In those cases, the defendants being prosecuted for various tax offenses argue that they have removed themselves from the jurisdiction of the IRS or the courts. The Court cites *United States v. Simkanin*, 420 F.3d 397, 400 (5th Cir. 2005) (the defendant made notation "UCC 1-207" on income tax returns, apparently to show that they filed under protest); *United States v. Sloan*, 939 F.2d 499, 500-501 (7th Cir. 1991) (pro se appellant argued that he was not subject to income tax because he is a "freeborn, natural individual," and is a 'master-not servant'-of his government") and a DUI case, *State v. Fox*, No. C5-01-90, 2001 WL 1085177 (Minn.App. September 18, 2001).

The Court found that there are no common law crimes in Kansas. They are all statutory. It further found that the UCC had no applicability in the context of a DUI arrest. The UCC solely governs commercial transactions and practices and has no application to Kansas criminal law.

Editor's Note: *See Verdict, Spring 2006, page 38, for a more in-depth discussion of the sovereign citizen movement and its interplay with the courts.*

FAILURE TO REPORT DUE TO DEPORTATION

Unpublished Decision

Marcelino Grave-Perez was placed on probation for attempted aggravated battery. At the time of sentencing he was subject to an INS hold. The Court advised him that in the event he was deported and then returned to this country, he was required to contact court services immediately to begin his period of probation. Shortly thereafter, the State filed a Motion to Revoke Grave-Perez's probation for failing to report to community corrections due to deportation. The motion was not heard until 2006. He had been deported, returned illegally and was then placed in federal prison for 27 months for the illegal entry. He argued that he had no control over his ability to report due to his deportation. However,

(Continued on page 31)

Unpublished Decisions

(Continued from page 30)

because he had not notified the Court upon his re-entry into the United States, the Court revoked his probation.

In *State v. Grave-Perez*, Slip Copy, *unpublished*, 2008 WL 1946842 (May 2, 2008), the Kansas Court of Appeals found that the district court had been clear in its order to report upon re-entry into the country. The Court pointed out that the re-entry itself was illegal. Failure to report due to deportation can properly result in revocation of probation.

SECOND BREATH TEST REQUIRES NEW 20-MINUTE OBSERVATION PERIOD

Unpublished Decision

Defendant was stopped for DUI. After the on-scene investigation, he was taken to the police station for an intoxilyzer test. For his first test, the defendant produced a "deficient sample." The officer told the defendant he would give him another chance rather than turn it in as a refusal. The second test resulted in a sufficient sample, however the officer did not re-start the 20 minute observation period. In *State v. Davis*, Slip Copy, *unpublished*, 2008 WL 1722284 (Kan. App. April 11, 2008), Court held that based on KDHE protocol, the second test result must be suppressed because the officer did not start a new 20-minute observation period. The protocol requires a 20-minute observation period immediately preceding the breath test. There was no evidence presented that there was any exception to this rule (to wit: 20 minute observation period already effectuated by previous breath test).

JUST LIKE THE SMELL OF BURNT MARIJUANA, THE SMELL OF RAW MARIJUANA BY AN EXPERIENCED OFFICER PROVIDES PROBABLE CAUSE TO SEARCH A VEHICLE

Unpublished Decision

Officer stopped car for inoperational tag light Upon talking to the driver, the officer testified that he smelled a "pretty strong, pretty pungent odor" coming from the car that he recognized, based on his extensive training an experience, as raw marijuana. In *State v. McDonald*, 253 Kan. 320 (1993) the Kansas Supreme Court had held that the odor of burnt marijuana detected by an experienced officer creates probable cause to support a warrantless search of the vehicle. The question in *State v. Dixon*, Slip Copy, *unpublished*, 2008 WL 1847882 (Kan. App. April 18, 2008) was whether or not the same rule applied to the odor of raw marijuana. The Court of Appeals held that it does.

WHEN JUDGE IMPROPERLY STATES A MANDATORY SENTENCE FROM THE BENCH, JOURNAL ENTRY *NUNC PRO TUNC* ORDER CAN CORRECT THE ERROR

Unpublished Decision

Defendant committed an attempted theft while on felony bond on another case. He was sentenced on that case on August 8. On September 15 he was sentenced on the attempted theft. At the sentencing hearing the judge did not comment on whether the two sentences would be consecutive or concurrent. However, in the journal entry the judge ordered that the sentences be consecutive. Two rules come into play in this analysis. First, the law is clear that the sentence is effective when pronounced from the bench and can't be changed by subsequent journal entry. In addition, when the record is silent when two or more sentences for separate crimes are entered on the same date, the sentences are concurrent.

In *State v. Proctor*, Slip Copy, *unpublished*, 2008 WL 1847637 (Kan. App. April 18, 2008), the defendant argued that his sentences must be concurrent. The Court of Appeals disagreed. The third rule that trumps the other two is K.S.A. §21-4608(d) which requires that whenever a person is sentenced for a crime that occurred while on release from a felony (as was the case here), the sentences must be consecutive. So even though the general rule is that the journal entry can't conflict with the sentence pronounced from the bench, when the sentence is a mandatory sentence and is improperly stated from the bench, the journal entry can correct the error.

ARGUING AGAINST YOUR CLIENT'S POSITION IS INEFFECTIVE ASSISTANCE OF COUNSEL

Unpublished Decision

Defendant filed a habeas corpus motion alleging ineffective assistance of counsel. He was appointed separate counsel for the hearing. The defendant had pled guilty to possession and manufacture of methamphetamine. In return several other charges were dismissed in the same case and in one other unrelated case. He argued that his attorney had been ineffective for not pursing his alibi defense. The attorney on his habeas motion did not talk to his trial attorney, but did conclude that the defendant may have had an alibi defense, which would be the basis for ineffective assistance of counsel if not adequately investigated by his trial attorney. However, the habeas attorney confounded the problem by telling the Court that he had advised his client it was not in his best interest to proceed with the habeas action because if the plea agreement were vacated, the State could charge him with all the charges they dismissed, and probably be successful prosecuting him on them and he would end up with a longer prison sentence. He told the Court at the habeas hearing that his client had not been returning his phone calls, so he didn't have any authority to withdraw, but he didn't have anything he could go forward

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with either.

In *Stanton v. State*, Slip Copy, *unpublished*, 2008 WL 1847667 (Kan. App. April 18, 2008), the Court of Appeals held that absent the defendant's agreement to withdraw the habeas motion (as recommended by his habeas attorney), counsel must either withdraw or argue in support of the merits of the motion. In this case, instead, the attorney chose to argue against his client's motion, which is itself ineffective assistance of counsel. Secondly, the Court was troubled by the fact that the defendant may have had a valid alibi defense. Although there is no requirement that the habeas attorney talk to trial counsel, in light of the evidence to suggest that there really was an alibi defense, the habeas attorney had a duty to talk to trial counsel about whether or not the defense had been explored. The case was remanded for a full evidentiary hearing with the defendant present. The Court was ordered to appoint new counsel for the defendant.

SENTENCE ENHANCEMENT CAN BE BASED ON UNCOUNSELED MUNICIPAL COURT MISDEMEANOR CONVICTION IF NO JAIL TIME WAS ACTUALLY SERVED

Unpublished Decision

Galen Youngblood was convicted in Newton Municipal Court of possession of marijuana. He subsequently was charged and convicted of possession marijuana in the Harvey District Court. As a second time offender, he received an enhanced sentence as a level 4 felony. The issue in *State v. Youngblood*, Slip Copy, *unpublished*, 2008 WL 1868619 (Kan. App. April 25, 2008) was whether or not Youngblood's sentence could be enhanced based on the municipal court conviction, since there was insufficient proof that he had knowingly and intelligently waived his right to counsel in Newton Municipal Court.

Although the municipal judge testified that it was his practice to inquire about waiver of counsel before the plea, the written waiver in the file was not signed until after the conviction and sentencing. The Court chastised the municipal court for such a process.

"Although municipal courts are not required to record a waiver of counsel, they should obtain a written waiver of counsel from a defendant after he or she has been fully advised of his or her right to counsel and should make a thorough inquiry to ascertain if a defendant knowingly and intelligently desires to waive the right to counsel. Failure of a municipal court to obtain a signed waiver of counsel from the defendant presents a serious problem....Here, the record of the municipal court conviction shows an unmarked box next to the statement, 'Defendant signs waiver of counsel.' Moreover, the sentencing form does not indicate that a waiver of counsel was signed. Although a written waiver of counsel appears in the record, it is dated weeks after Youngblood's conviction and sentencing."

However inadequate the waiver was in municipal court, it did not end the Court's analysis. The Court cites *State v. Delacruz*, 258 Kan. 129 (1995) for the proposition that an uncounseled misdemeanor conviction that does not result in incarceration may be considered for enhancement purposes. Here, Youngblood's uncounseled misdemeanor conviction did not result in any incarceration. Although he was sentenced to 6 months in jail, he was granted probation. No jail time was served. Therefore, his uncounseled conviction in Newton Municipal Court can be used for sentence enhancement purposes.

CONSIDERATION OF FINANCIAL RESOURCES IN ASSESSING FINES

Unpublished Decision

John Fletcher was convicted of DUI and transporting an open container. The district judge assessed a fine of $2,500 on the DUI (a 4th time offense) and $200 on the open container charge. Fletcher argued on appeal that the judge was wrong to impose these fines without first considering his financial resources as required by K.S.A. §21-4607(c) (2007). K.S.A. §21-4607(c) (2007) states that *"[i]n determining the amount and method of payment of a fine, the court shall take into account the financial resources of the defendant and the nature and burden that its payment will impose."*

In *State v. Fletcher*, Slip Copy, *unpublished*, 2008 WL 2081022 (Kan.App. May 16, 2008), the Court of Appeals found that as to the DUI, the Court was not required to consider financial resources because a $2,500 was the statutorily mandated minimum fine for the DUI. Financial resources would only come into play if more than the mandatory minimum was imposed. However, as to the transporting an open container charge, the Court was required to take into account the defendant's financial resources. Since it did not, the case was remanded to the district court for said consideration.

In *State v. Willett*, Slip Copy, *unpublished*, 2008 WL 2717772 (Kan. App. July 11, 2008), a different panel of the Kansas Court of Appeals came to the same conclusion and found that when faced with a statute that sets a mandatory minimum fine, which does not permit waiver, the Court is not required to examine the defendant's financial resources as long as the fine assessed does not exceed the mandatory minimum. This case also involved the application of K.S.A. §21-4607(3) in a DUI case.

Editor's Note: *There is no provision similar to K.S.A. §21-4607(c) (2007) in the municipal court procedures act.*

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K.S.A. 12-4509(f) does require the municipal court to take the defendant's financial circumstances into account when determining the method and amount of court-appointed attorney fees imposed, but that is the only provision that requires determination of financial resources in municipal court assessments. Therefore, these cases would seem to have little application to municipal court fines imposed.

DESTRUCTION OF VIDEO TAPE DOES NOT JUSTIFY DISMISSAL IF NO FINDING OF BAD FAITH

Unpublished Decision

Cavan Beltz was arrested and charged with DUI. Before trial, his attorney requested discovery and inspection of certain documents. The video tape of the stop had been destroyed along with several other videos from the officer's patrol car. Department policy required that all videos be kept for three years, however this one had been destroyed after just two years. The district court found that the tape had been intentionally destroyed, although it found that the destruction was not done in bad faith. It found that the destruction of the tape unfairly limited Beltz' cross-examination of the officer and therefore, dismissed the case. The State appealed.

In *State v. Beltz*, Slip Copy, *unpublished*, 2008 WL 2251236 (Kan. App. May 30, 2008), the Court reversed the district court and reinstated the charges. It conducted a review of existing law concerning destruction of evidence and found that unless the destruction was done in bad faith, there is no due process violation and dismissal of the charges is not warranted. In this case, no one could attest to whether or not the tape was exculpatory, because no one had seen it. The officer did not destroy the tape, his superior did. (Interestingly, when the tape was first requested the defense attorney was misled into believing that the officer's tape recorder had malfunctioned. In addition, the procedure for the Sedgwick County Sheriff's office was to turn the videos into a superior, who then decided whether there was sufficient exculpatory evidence on the tape to keep it. If there is "no evidence" on the videotape, it is destroyed. The superior who destroyed the tape in question, as well as many others, had since resigned.) *See also, The Verdict*, Summer 2000, pg. 7 for further discussion of this topic.

JURY CAN CONVICT OF BOTH ALTERNATIVE CHARGES, BUT DEFENDANT CAN ONLY BE SENTENCED ON THE MORE SERIOUS OF THE TWO

Unpublished Decision

Defendant was charged with, among other things, operating a vehicle when prohibited as a habitual violator and driving while suspended license. Before trial, the State moved to amend the driving while suspended charge to be an alternative to the charge of driving as a habitual violator. From the manner in which the case proceeded, it appears that the Court sustained the State's motion. At trial, the defendant stipulated that his driving privileges had been suspended and that he was aware of his status as a habitual violator. He was convicted of both charges.

In *State v. Ruiz-Cisneros*, Slip Copy, *unpublished*, 2008 WL 2369802 (Kan. App., June 6, 2008), the defendant claimed his convictions for driving while a habitual violator and driving while suspended were multiplicitous. Multiplicity is the charging of a single offense in several counts of a complaint. This can lead to multiple punishments for a single offense, contrary to the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution and contrary to § 10 of the Kansas Constitution Bill of Rights.

K.S.A. §8-262 states, in pertinent part:

> *(a) (1) Any person who drives a motor vehicle on any highway of this state at a time when such person's privilege so to do is canceled, suspended or revoked or while such person's privilege to obtain a driver's license is suspended or revoked pursuant to K.S.A. 8-252a, and amendments thereto, shall be guilty of a class B nonperson misdemeanor on the first conviction and a class A nonperson misdemeanor on the second or subsequent conviction...*
>
> *c) (1) The person found guilty of a class A nonperson misdemeanor on a third or subsequent conviction of this section shall be sentenced to not less than 90 days imprisonment and fined not less than $1,500 if such person's privilege to drive a motor vehicle is canceled, suspended or revoked because such person:...*
>
> > *(D) was convicted of being a habitual violator, K.S.A. 8-287, and amendments thereto.*

K.S.A. §8-262 states, in pertinent part:

> *Operation of a motor vehicle in this state while one's driving privileges are revoked pursuant to K.S.A. 8-286 and amendments thereto is a class A nonperson misdemeanor.*

Since the defendant was charged in the alternative, the Court found that it did not need to do a multiplicity analysis. It found that **when a defendant is charged with alternative counts**, the jury should be free to enter a verdict on each of the alternatives, however, the court may accept only the verdict on the greater charge which, here, was driving while a habitual violator contrary to K.S.A. §8-287. The defendant could only be convicted and sentenced on

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this greater charge, not both as was done here. Therefore, the Court reverse the conviction and vacated Ruiz-Cisneros' sentence for driving while suspended in violation of K.S.A. §8-262. However, the Court left for another day whether a defendant could be charged and convicted individually (NOT in the alternative) with a violation of both driving on a revoked and driving while an habitual violator.

PROVING UP PRIOR CONVICTIONS IN FACE OF DENIALS FROM DEFENDANT

Unpublished Decision

At sentencing on a variety of felony charges, Miguel Vidal-Orantes objected to his criminal history. Specifically, he denied he had pled guilty to a domestic battery in Florida. As proof of the conviction, the prosecution submitted an authenticated and certified copy of a Florida journal entry. There had also been testimony at trial from the victim that the defendant lived in Florida the same year as the conviction. The defendant admitted that the journal entry had his name and birth date on it and that it had a set of fingerprints on it. However, he denied pleading guilty to the crime and argued that he lived in Kansas at the time of the conviction, not Florida. No one ever verified that the fingerprints on the complaint were the defendant's. The prosecution had the burden to prove the person convicted in Florida was the defendant. Therefore, since the prosecution had not presented substantial competent evidence that this was the same person, the prior conviction could not be used in calculating the defendant's sentence in the present case. *See, State v. Vidal-Orantes*, Slip Copy, *unpublished*, 2008 WL 2510153 (Kan.App. June 20, 2008).

COMPLAINT IS SUFFICIENT THAT JUST CHARGES "DWI"

Unpublished Decision

Karen Piper was issued a ticket for "DWI" in violation of §8-1567. She argued that the complaint was defective because it left out the "essential facts constituting the crime charged" as required by K.S.A. §22-3201 and failed to identify which subsection she had specifically violated. In *State v. Piper*, Slip Copy, unpublished, 2008 WL 2510435 (Kan. App. June 20, 2008), the Court of Appeals held that the complaint was sufficient. It followed the Court's prior decision in *State v. Boyle*, 21 Kan.App.2d 944 (1996) where the Court held that K.S.A. §8-2106, which specifically governs the issuance of traffic citations, does not contain the same language as K.S.A. §22-3201 and does not require that the ticket contain a statement of facts constituting the crime. The only issue is whether it gives sufficient notice of the charges. The Court found, as did the Court in *Boyle*, that the abbreviations "DUI" or "DWI" are such a common part of our lexicon that defendants are on notice regarding the charge. In addition, had the defendant wanted more details, she could have requested a bill of particulars. Her failure to do so waives her objection.

PROSECUTOR'S COMMENTS RESULT IN REVERSAL

Unpublished Decision

Christopher Miller was charged with possession of cocaine with intent to sell along with other charges. In closing, the prosecutor stated:

"I have done my job representing the people of the State of Kansas. It's time for you to do your job. What's that job going to be? Are you going to hold the defendant accountable for the actions he committed? The cops took a drug dealer off the street. It's time for you to tell him we're not tolerating it anymore. Hold him accountable for his actions. Do not let him get away with this. Find him guilty of possession with intent, possession of marijuana, and tax stamp. It's time to put an end to this."

In *State v. Miller*, Slip Copy, *unpublished*, 2008 WL 2571795 (Kan.App. June 27, 2008), the Court found that factually the evidence against Miller was close. The prosecutor's comments were clearly outside the wide latitude given to prosecutors in that it conveys an obligation on the part of jurors to keep the community free from narcotics and send a tough message to drug dealers. Since the case was factually close, the Court could not find beyond a reasonable doubt that the prosecutor's comment had little, if any, likelihood of changing the result of the trial. The case was reversed and remanded for a new trial.

COURT SECURITY SEARCHES

Unpublished Decision

The Sedgwick County Courthouse has a sign prominently displayed at the entrance to the building, "**Attention: Entering this building requires passage through a metal detector. Any item considered harmful will be confiscated.**" Torques Brown entered the building. He emptied his pockets. The alarm sounded when he walked through. He was asked to again empty his pockets and try again. He went through a second time, but kept his hand in his left front pocket. The court security officer then used a hand-held metal detector. It did not go off, but the officer noticed a large bulge in Brown's left front pocket. It was obvious that he had not emptied that pocket as requested. When he was asked about it he said it was "nothing" and he refused to remove the item from his pocket. The court security officer reached in Brown's pocket and removed two baggies of crack cocaine.

Brown challenged the search. In *State v. Brown*, Slip Copy, *unpublished*, 2008 WL 2571806 (Kan.App. June 27,

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2008), the Court recognized that many jurisdictions have long permitted routine searches of persons entering airports, courthouses, and other official buildings for the purpose of ensuring security. The Supreme Court has concluded that an entrant consents to these procedures merely by entering the courthouse where the metal detectors are in place. However, even these types of searches must be reasonable and no more intrusive than necessary than to protect against the dangers sought to be avoided,

Brown argued that the sign did not state that persons entering the building would be searched, only that they would have to pass through a metal detector and harmful items would be confiscated. In addition, the metal detector did not indicate there was any metal in his pocket. The Court had little patience for this argument:

"No reasonable person would anticipate an examination by security personnel would be confined to whatever is placed on the x-ray machine conveyor belt or placed in the tray for personal items carried in one's pockets, thereby rendering the entire security protocol a near-useless exercise...The security protocol is designed to prevent persons from bringing harmful or dangerous objects or materials into the courthouse, not merely harmful or dangerous ***metal*** *objects."*

The Court went on to point out that Brown was free to have avoided all of this at any time by simply leaving the courthouse. The motion to suppress was properly denied.

TWO YEAR UNEXPLAINED DELAY BETWEEN PLEA AND SENTENCING

Unpublished Decision

Billy Cody pled guilty on June 23, 2004, pursuant to a plea agreement, to felony DUI. The Court found him guilty and set sentencing "on a later date to be determined by the parties." Sentencing was originally set for September 13, 2004, but for some reason that date was advanced to August 25, 2004. He was not sentenced that day, due to the fact that the presentence investigation had not been completed yet. A new sentencing date was never set and the case "disappeared off the radar screen" for two years. Sentencing was set for August 2, 2006. Cody failed to appear and a bench warrant was issued for his arrest. Finally, at the sentencing hearing on October 5, 2006, Cody appeared and moved to dismiss due to a violation of his speedy trial and due process rights. On December 12, 2006 the Court denied the motion and Cody was finally sentenced on March 2, 2007. He argued that due to the unreasonable delay, the Court no longer had jurisdiction to sentence him.

K.S.A. §22-3424(c) requires that a sentence be "pronounced without unreasonable delay, allowing adequate time for" disposition of motions and a presentence investigation.

In *State v. Cody*, Slip Copy, *unpublished*, 2008 WL 2571832 (Kan. App. June 27, 2008), the Court found that K.S.A. §22-3424 does not implicate speedy trial rights. However, the Court found that it had to determine if the delay in sentencing was (1) inadvertent, (2) whether the defendant suffered any prejudice from the delay and (3) whether the defendant consented to the delay by failing to demand sentencing. The Court answered these questions, yes, no, and yes. The delay was inadvertent and did not result in prejudice. By failing to demand sentencing during the 2 year delay, Cody acquiesced to the delay. The Court had jurisdiction to sentence him.

WHETHER CONVICTION FOR DUI OCCURRED BEFORE OR AFTER CURRENT ARREST IS IRRELEVANT IN SENTENCING

Unpublished Decision

Defendant was arrested in Crawford County for DUI. At the time of his arrest he had a prior DUI diversion and a pending DUI in Missouri. After his arrest, but before the case came on for disposition, defendant was convicted of the Missouri DUI. He was charged in Crawford County as a third time offender, felony. He argued that he could only be charged as a second time offender because at the time of the Crawford County offense he only had one prior conviction.

In *State v. Ford*, Slip Copy, *unpublished*, 2008 WL 2796457 (July 18, 2008) the Court of Appeals relied on the plain language of K.S.A. §8-1567(m)(4). *"When determining whether a conviction is a first, second, third, fourth or subsequent conviction in sentencing under this section...it is irrelevant whether an offense occurred before or after conviction for a previous offense."* It found that the key dates were those of the alleged offense and the dates of any previous offenses. Just as the statute says, the conviction dates are irrelevant to the calculation. The defendant was properly charged as a third-time offender.

The Verdict

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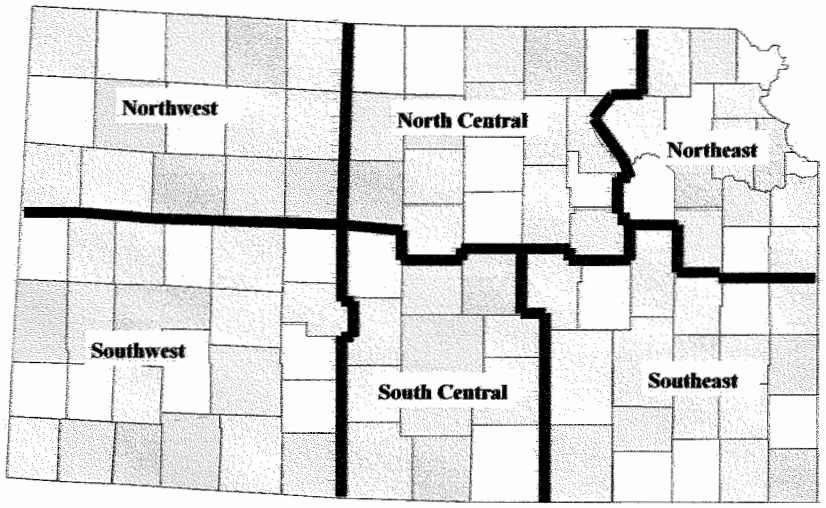

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