The Verdict

The Official Publication of the Kansas Municipal Judges Association

Issue 38 Winter 2007

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

President's Page

Courage. Courage? Isn't that the way Dan Rather signed off the CBS evening news many years ago? Yes it is, but it's more than that. It's what we, as judges, need from time to time to do our jobs.

To perform our duties competently and impartially, we have to make unpopular decisions. At times, our actions are unpopular with defendants, defense attorneys, prosecutors, victims, witnesses, police officers, the public, and even city hall. To make those decisions takes courage.

I didn't realize how difficult it was being a judge until I became one. It's much more than wearing a robe, having people stand up when you enter the courtroom, and having attorneys and defendants genuflect in front of the bench. There are times that we must make decisions, based upon the facts and the law, which disappoint, anger and inconvenience others.

We might convict a likeable defendant, who has our sympathy and has taken a half-day off work for his or her day in court, because the evidence demands it.

We may have to deny a defense lawyer's request to recall a bench warrant, and his client

(Continued on page 23)

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.

HEARSAY STATEMENTS THAT ARE NOT ADMITTED FOR TRUTH OF MATTER ASSERTED ARE NOT VIOLATIVE OF THE RULE IN *CRAWFORD*

Wichita police officers were dispatched to James Lewis's residence in response to a 911 call. The caller's purpose was unclear. Upon arriving, they spoke to Lewis who identified himself as the one who made the call. He stated he was concerned about his safety because a black male who he knew as "PJ" was threatening him. He told the officers that PJ threatened to "kick his butt" over some gold rings. One of the officers started examining the surroundings. He saw a picture of

(Continued on page 4)

MARK YOUR CALENDAR FOR APRIL 23-24 AND JOIN US IN HUTCHINSON!

SPOTLIGHT ON: Beverly Batt

Beverly Rankin was born in Enid, Oklahoma, but moved to Wichita at the tender age of 6 months. She was an only child. Her mother worked in retail for 36 years and her father retired after many years at Boeing. She attended Wichita High School East, graduating in 1946. She recently helped plan her 60th high school reunion which was attended by over 200 classmates. In 2008 she is already planning to be involved in "the 80th birthday" of the class of 1946.

Bev developed an interest in theater and dance during those early years in Wichita. While her mother worked, she and the other children of employees in downtown Wichita were often left after school under the charge of the doorman at the Miller Theater. She was able to sit on the back row and watch hundreds of live performances, including such greats as Fred Astaire and Ginger Rogers. She describes herself as a "closet tap dancer" and still volunteers for a local Wichita theater group, Stage 1. She ushers at their shows and helps with mailings.

(Continued on page 2)

Spotlight on: Beverly Batt

(Continued from page 1)

Bev went on to attend Wichita State University for one year and worked for a construction company for 12 years. In 1963, she married Lee Batt. Jobs took them to Pennsylvania and to Huntsville, Alabama where Bev worked for the space program. They had no children and Lee passed away in 1981. She and Lee returned to Kansas over 30 years ago and although she started out in the Purchasing Department with the City of Wichita, it only took her one year to find her niche in the municipal court. She worked as an administrative aide for the judges. One day, Judge Theissen called her into his office and asked her to help Fred Benson with arrangements for the Kansas Municipal Judges Association meeting which was to be held in Wichita that year. A friendship was born and she has been working with the KMJA in a volunteer capacity ever since.

In addition, Bev was instrumental (with Fred Benson) in developing an award winning Law Day program in Wichita. Eighth grade students from all over the city were brought to Wichita State University to learn about the law from lawyers and participate in mock trials at the state, federal and municipal level. For her efforts, the Wichita Bar Association developed the Benson/Batt award for non-lawyers in the educational arena (principals, school officials, teachers) who promote legal education. In 1997, Bev was presented with the Cooper/McKee Volunteer of the Year Award by the Wichita Police Department. In the write up for the award, the department pointed out that coordinating the Law Day program involved planning for two days of workshops, 900 students, 130 volunteer judges, attorneys, police officers, court reporters and witnesses, and over 15 law-related workshops. Yet she did it every year without a hitch.

Although Bev retired from the paid work force in 1993, she has not slowed down one bit. She continues to volunteer with the Wichita Bar Association (which has also awarded her its Jonna Lou Pinnel Award for her volunteer service), Via Christie St. Joseph Hospital (where she works in the gift shop), Beta Sigma Phi (a charitable sorority), and of course, she still volunteers every year at the KMJA conference. As the Wichita Police Department concluded in its award ceremony, *"Beverly Batt is an inspiration to us all!"*

The old Miller Theater in downtown Wichita as it appeared in the 1940's when Bev watched many performances from the back row

Updates from O.J.A.

ANNOUNCING NEW JUDGES!!

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

-Moran	Patricia Miklos
-Halstead	Randy Pankratz
-Weir	Meradith Frederick
-Almena	Deb Anderson
-Woodbine	Jocelyn Randle

▲▲▲▲

2006-2007 CONFERENCE REMINDERS

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

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

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

▲▲▲▲

SUPREME COURT JUSTICE NAMED

Governor Sebelius has named Lee A. Johnson as the new Supreme Court Justice, to replace Donald Allegrucci. Judge Johnson has been serving on the Kansas Court of Appeals since 2001.

Lee A. Johnson received a B.S. in Business Administration from the University of Kansas in 1969. After serving two years on active duty with the U.S. Army, Corps of Engineers, he became a licensed, multi-line insurance agent. In 1977, he entered Washburn University School of Law and graduated Summa Cum Laude with the class of 1980. Upon graduation, he practiced law in Caldwell, Kansas; first in partnership with Don B. Stallings and later as a sole practitioner.

Judge Johnson was active in numerous community organizations, including serving on the Sumner Mental Health board for 16 years. He served as Mayor of Caldwell in 1975-1976, and as Caldwell City Attorney from 1987 to 1997. He is a member of the Kansas and Sumner County Bar Associations, serving as the local bar association president in 1992.

▲▲▲▲

UPCOMING CONFERENCE

The 2007 Municipal Court Judges Conference will be held April 23-24 at the Grand Prairie Hotel in Hutchinson. A night-out at the Kansas Cosmosphere will be held on Monday evening, April 23. If you have questions about the conference arrangements, please call Denise Kilwein at 785-296-2256.

Judicial Ethics Opinions

JUDICIAL ETHICS OPINION JE 147
DECEMBER 7, 2006

The judge has been nominated as one of five persons to be inducted into a hall of fame. The induction is to occur at a dinner. The proceeds raised from the dinner will help fund the business and economic education of youth through innovative programs offered by a charity. The judge requested our opinion as to whether the judge's attendance at the dinner violated Canon 4C(4)(b), (2006 Kan. Cr.R.Annot. 581).

Canon 4C(4)(b) provides in pertinent part that a judge should not be "the guest of honor at an organization's fund-raising events." The event involved is a fund raiser and, since the judge would be attending for induction into the organization's hall of fame, we believe the judge would be the guest of honor.

We therefore conclude that attendance of the judge at this dinner as the inductee into the hall of fame would violate Canon 4C(4)(b). We further conclude the judge should decline the honor.

We believe this opinion is consistent with the commentary in Judicial Ethics Opinion JE 1.

JUDICIAL ETHICS OPINION JE 148
DECEMBER 7, 2006

The judge has received a request from Martindale-Hubbell for an opinion as to a local lawyer's legal ability and general ethical standards. Martindale-Hubbell assures the judge that his response would be confidential. The judge believes he has sufficient knowledge of the lawyer's skill and general ethical conduct to respond and he also believes that his opinion would be helpful to Martindale-Hubbell in ranking the lawyer.

The judge asks whether a response to this request would violate Canon 2B.

Canon 2B (2006 Kan.Ct.R.Annot. 570) provides, in part, that "a judge shall not lend the prestige of judicial office to advance the private interests of...others." The commentaries and this Canon provide that a judge may, based on the judge's personal knowledge, serve as a reference or provide a letter or recommendation. We, therefore, believe that a response by the judge to the Martindale-Hubbell request would not violate Canon 2B.

JUDICIAL ETHICS OPINION JE 149
DECEMBER 18, 2006

The judge has been asked to serve as a commissioner of the Kansas Wildlife and Parks Commission and is asking us whether service on this Commission is permissible under the Code of Judicial Conduct.

We have examined K.S.A. 32-805(d) which contains the powers of the Kansas Wildlife and Parks and have found this Commission is a governmental commission that is concerned with issues of policy on matters other than the improvement of the law, the legal system or the administration of justice. Therefore, service on this Commission by a judge would violate Canon 4C(2) of the Code of Judicial Conduct. 2006 Kan.Ct.R.Annot. 580.

We believe this is consistent with commentary in Judicial Ethics Opinion JE 38.

STOP UNDERAGE DRINKING ACT

The STOP (Sober Truth on Preventing) Underage Drinking Act, called the most significant piece of underage-drinking legislation passed by Congress in years, was signed into law by President Bush on December 20, 2006. It establishes a national media campaign aimed at underage drinking, funds underage drinking prevention programs in communities and requires the Department of Health and Human Services to report annually on progress against youth drinking. For a full copy of the legislation go to:

http://www.theorator.com/bills108/hr4888.html

Court Watch

(Continued from page 1)

a black male on the wall and asked Lewis if that was PJ. He responded that it was. He told the officers that PJ usually carried weapons. He told them that PJ was the boyfriend of person who lived at Lewis's house. Shortly thereafter, a vehicle pulled up in the driveway. It was PJ's girlfriend who lived with Lewis. She started walking toward the residence, but when she saw the police she turned to get back in her car. The police ordered her to stop. When she turned around, the officer noticed a black male in the car with her. As he shined his flashlight on the passenger, the man placed his hands in his pockets. The officer focused on him and started walking toward the car. As he got closer, he realized that the passenger was PJ. He ordered PJ to show his hands, due to Lewis's earlier statement about PJ carrying weapons. When help arrived, the officer asked PJ to step from the vehicle. He was patted down for weapons. The officer looked inside the car and saw a plastic bag of marijuana in plain view. He arrested PJ for possession of marijuana. When he reached under the passenger's seat to look for a weapon, he discovered crack cocaine. PJ's real name was Previn J. Araujo. He also had felony warrants out for his arrest.

Lewis was not present for the trial, despite being under subpoena. The defense objected to introduction of any statements made by Lewis since he was not subject to cross-examination. The introduction of any statements would violate Araujo's Sixth Amendment confrontation rights as most recently spelled out in *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* held that where testimonial evidence is at issue, the Sixth Amendment requires that if the declarant is unavailable, the defendant must have had a chance to properly cross-examine him at some point about the statement, or the statement is not admissible. The State argued that Lewis's statements were not testimonial. They were not offered to prove the truth of the matter asserted, but merely to explain why the officers detained Araujo in the vehicle. Even the Supreme Court in *Crawford* said that the Sixth Amendment does not bar the use of testimonial statements for the purposes other than establishing the truth of the matter asserted.

In *State v. Araujo*, ___Kan.App.2d ___ (October 20, 2006), the Kansas Court of Appeals held that Lewis's statements were not testimonial in nature. He communicated only a threat of violence and possible possession of weapons. He did not suggest drug possession at all. The Court referred to *Davis v. Washington*, 547 U.S. ___ (2006), in which the U.S. Supreme Court further defined what it meant by "testimonial" in *Crawford*. The Court discusses the *Davis* case in detail and finds it dispositive of the case before it. It quoted *Davis*:

"Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicated that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

The Court of Appeals found that even if the statements were offered to prove the truth of the matter asserted, they were still admissible as non-testimonial under the Supreme Court's definition.

SUPREME COURT FURTHER DEFINES "TESTIMONIAL" EVIDENCE FOR PURPOSES OF *CRAWFORD*

Since *Davis v. Washington*, 547 U.S. ___, 126 S.Ct. 2266 (2006) does such an excellent job of further defining "testimonial" v. "nontestimonial" evidence and thereby significantly mitigating the negative impact that many commentators believed would result from *Crawford*, it is important to further examine the *Davis* case.

Davis actually dealt with two cases, both involving domestic violence situations. In the first case, the victim called the 911 operator and reported that she was presently being assaulted by her former boyfriend and as the call continued, he was leaving the scene. The police arrived and viewed her injuries. At the trial of the defendant for violation of a no-contact order, the victim did not testify. The police officers could only testify as to the victim's injuries, not how they were inflicted. The prosecution sought to introduce the 911 dispatch tape to show that it was the defendant who was at the victim's home. The defendant objected as being in violation of the defendant's rights under the Confrontation Clause as set out in *Crawford v. Washington*, 541 U.S. 36 (2004).

The U.S. Supreme Court held that the victims plea for help from the 911 operator was not "testimonial" therefore it was not prohibited by *Crawford*. The victim was not acting as a witness, or testifying. She was frantically answering questions over the phone regarding an ongoing emergency. What she said could not be classified as "a weaker substitute for live testimony."

Clearly, the Court recognized that a conversation that begins as a nontestimonial call for assistance can evolve into testimonial statements. The Court suggests that once the dispatcher got the information relative to the immediate emergency and the perpetrator had left the scene, further questioning about what had happened would be testimonial and barred.

The second case again involved police being dispatched to the victim's residence regarding a domestic disturbance. Upon arrival both the victim and the defendant claimed everything was all right and there was no problem. The police separated the two in different rooms, and the victim

(Continued on page 5)

Court Watch

(Continued from page 4)

completed a battery affidavit, indicating that she was the victim of a battery at the hands of the defendant. At the defendant's trial for domestic battery, the victim did not appear and the prosecution sought to introduce the affidavit.

The U.S. Supreme Court held that the affidavit was testimonial evidence barred by *Crawford*. There was no argument in progress. There was no immediate threat. When the officer decided to separate the victim and defendant into separate rooms and further elicit the challenged affidavit, he was not seeking to determine "what is happening" but rather "what happened."

The Court cautioned prosecutors that although many times those first initial inquiries into what is going on and what current threat exists are nontestimonial, that may not always be the case. The fact that the statements are given at the crime scene is immaterial. The issue is whether the information was given to enable officers to immediately end threatening situation or were they given simply to report what had happened after the immediate threat had passed.

Although the Court recognized the argument put forward by the prosecution that a defendant may forfeit a claim of a constitutional right by his own wrongdoing (to wit, intimidating the witness into not showing up for trial), it remanded the case for the state court to determine whether such a claim was meritorious. This is the doctrine known as "forfeiture by wrongdoing." The Court pointed out that the federal standard to prove forfeiture by wrongdoing was a preponderance of the evidence and the unavailable witnesses out-of-court statements may be considered.

NONTESTIMONIAL HEARSAY

Danny Yoke, a drug dealer, introduced Bobby Siegler to Arturo Garcia. Siegler got ecstasy from Yoke to sell at rave parties. On July 27, Siegler, Garcia and Yoke were at such a party selling drugs. Garcia and Siegler went to the basement of the building in which the party was being held. Garcia shot Clint Jones in Siegler's presence. When Siegler returned upstairs, Danny Yoke kissed him on the forehead and told him he was "part of the family now." Yoke was not available to testify during Garcia's murder trial. The prosecutors sought to introduce, through Siegler, Yoke's statement welcoming him to the family to show that Garcia was a member of an organized crime family. The defense objected that it was hearsay, offered to prove the truth of the matter asserted, and was not admissible under *Crawford v. Washington*, 541 U.S. 36 (2004) since there had been no opportunity to cross-examine Yoke.

In *State v. Garcia*, ___Kan. ___(October 27, 2006), the Kansas Supreme Court held that Siegler's testimony about Yoke's statement was admissible because it was nontestimonial. It held that Yoke's statement to Seigler was made by one Garcia associate to another in the absence of any government or law enforcement authority in a nonofficial setting. The statement therefore was nontestimonial and admissible hearsay based on Yoke's unavailability at trail.

CRIMINAL CONDUCT WHICH OCCURS PRIOR TO THE GRANTING OF PROBATION, BUT IS NOT DISCLOSED BY THE DEFENDANT, CANNOT BE THE BASIS FOR A REVOCATION OF PROBATION

Lorenzo Gary entered a plea agreement and pled guilty to two counts of forgery. The pre-sentence investigation listed him with a criminal history that put him in a presumptive probation category. Accordingly, he was sentenced to 11 months in jail, but granted probation. What Gray did not reveal was that three days before sentencing he had been arrested and charged with attempted robbery. When the prosecution discovered this, it filed a motion to revoke his probation. The Court subsequently revoked his probation.

In *State v. Gary*, ___Kan.___ (October 27, 2006), the Kansas Supreme Court sided with the Court of Appeals and found that criminal conduct that occurs prior to sentencing cannot be the basis for revoking probation. The Court recognized its prior rulings in *State v. Dunham*, 213 Kan. 469 (1972) and *Andrews v. State*, 11 Kan. App.2d 322 (1986) finding that a defendant's affirmative misrepresentation at sentencing, and the sentencing court's reliance on that misrepresentation in granting probation is a basis to revoke probation. In *Dunham*, the defendant had misrepresented to the court that he was ill and in need of treatment when he was not. In *Andrews* the defendant stated that he had "never been in any trouble before" when he in fact had several prior felony convictions in other jurisdictions. However, in this case, Gary had made no representations at sentencing. This case does not involve misrepresenting anything to the court, but failure to disclose pertinent information.

The Court points out that there are no Kansas cases involving the issue of "fraudulent concealment." The Court in *Gary* reiterated its position that defendants have a Fifth Amendment privilege against self-incrimination at the time of sentencing. If Gary had an affirmative obligation to inform the district court at his sentencing of his attempted robbery, then his concealment of the fact would be fraudulent, providing a basis for revocation. However, the Court opined that the State cannot make waiver of the privilege against self-incrimination regarding a separate crime a condition of probation. Gary's silence was not fraudulent. He had no independent, affirmative obligation to incriminate himself. Therefore, the Court had no basis to revoke his probation.

JUDGE IS NOT REQUIRED TO GRANT REQUEST FOR SEQUESTRATION OF WITNESSES DURING TRIAL

(Continued on page 6)

Court Watch

(Continued from page 5)

Often prior to trial either the prosecutor or defense attorney indicates that he or she would like to "invoke the rule." This means that the attorney wants all witnesses outside the courtroom during trial so that witnesses cannot mold their testimony to conform with the testimony of other witnesses. It is formally called the "sequestration of witnesses rule." Judges routinely grant this request. But what if there is an objection? According to the Kansas Supreme Court in *State v. Francis*, ___Kan.___ (October 27, 2006), at trial sequestration is not a right. It is only mandatory at preliminary hearings pursuant to K.S.A. §22-2903. At trial, sequestration is within the sound discretion of the trial court and can be granted or denied by the judge. In the absence of a showing that the presence of the witness in the courtroom prejudiced the defendant, the Court's denial of such a request will not be disturbed on appeal.

EXPERT'S OPINION BASED ON HEARSAY IS INADMISSIBLE IN KANSAS

Jorge Gonzales was on trial for murder. An issue developed concerning his competency. The State had Dr. Robert Huerter examine the defendant. He found him to be competent to stand trial based on his clinical observations and interview with the defendant. The defendant received a psychological "second" opinion from Dr. Carolyn Huddleston. She found, based solely on her review of the defendant's California medical records, that the defendant was incompetent to stand trial. She stated that had she not had the California records to review, based solely on her interview with Gonzales, she would have found him competent. Dr. Huerter did not examine any California medical records. The district court excluded Dr. Huddleston's testimony on the basis that is was supported by unauthenticated hearsay. In *State v. Gonzales*, ___Kan. ___ (October 27, 2006) the Kansas Supreme Court agreed.

K.S.A. §60-456 provides that expert testimony "is limited to such opinions as the judge finds are (1) based on facts or data perceived by or personally known or made known to the witness at the hearing and (2) within the scope of the special knowledge, skill, experience or training possessed by the witness." Dr. Huddleston's opinion was not based on personal knowledge, but on hearsay information from California. The Court points out that it is significant that the defense never attempted to place the actual California records into evidence. Nor did he make any attempt to qualify the reports as business or official records. Therefore the California information was nothing more than inadmissible hearsay. The result would be different under the federal rule, which allows such evidence if it is customary practice in the expert's specialty to consider reports from nontestifying third parties. Kansas only allows consideration if the third party reports upon which the expert opinion is based are admitted into evidence as some exception to the hearsay rule. The Court specifically overrules *State v. Kaiser*, 260 Kan. 235 (1996) to the contrary.

COURT RETURNS TO "SENSIBLE APPROACH" WHEN IT COMES TO THE ADMISSION OF PAST CRIMES OR CIVIL WRONGS IN CRIMINAL PROCEEDINGS AND PROHIBITS THEIR ADMISSION THROUGH ANY OTHER AVENUE OTHER THAN K.S.A. §60-455

Pursuant to the rules of evidence, evidence that a person committed a crime or civil wrong on one occasion cannot be used to prove that the person committed a crime or civil wrong on another occasion. See, K.S.A. §60-455. The reason for the rule is clear. A jury might conclude that just because a defendant has committed similar crimes in the past, he must have committed the current one. Or, the jury might conclude that the defendant deserves punishment because he is a general wrongdoer. Or finally, the jury might conclude that because the defendant is a criminal, the evidence put in on his behalf cannot be believed. However, like all rules of evidence there are exceptions. Evidence of past crimes or bad acts can be admitted if it is relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. The court must find that the evidence is necessary to prove one of the material facts listed, that the fact is disputed and that the probative value of the evidence outweighs its potential for producing undue prejudice. In addition, in jury trials, the court must give a limiting instruction to the jury explaining the purpose for which the evidence can be considered.

In *State v. Gunby*, ___Kan. ___ (October 27, 2006), the Kansas Supreme Court found that the history of jurisprudence on this topic developed erroneously over the years into interpreting the list of material facts listed in the statute as exclusive instead of inclusive. In other words, unless the past bad acts were used to prove one of the listed facts, it was not admissible. However, the statute is actually inclusive, not exclusive. The eight material facts listed in the statute are starting points for analysis rather than ending points. In addition, a growing number of cases have developed where the courts have concluded that evidence of prior crimes or wrongs could be admitted independent of K.S.A. §60-455 for purposes such as establishing a continuing course of conduct or corroborating the testimony of another witness.

"Our increasingly elastic approach to the admission of other crimes and civil wrongs is overdue for correction.." In addition, an unnecessarily harsh automatic reversal rule came into practice whenever the judge failed to give a limiting instruction. The Court opines that it is time to return to a "sensible approach."

In *Gunby*, the Court *"recognizes that the list in the statute*

(Continued on page 7)

Court Watch

(Continued from page 6)

has always been inclusive rather than exclusive, and that the several ways around application of and safeguards attendant to K.S.A. §60-455 must be abandoned, not only because they lack reliable precedent but because they were never necessary in the first place. Other crimes and civil wrongs evidence that passes the relevance and prejudice tests we have set up and is accompanied by appropriate limiting instruction should always have been admissible, even if the particular material fact of which it was probative was not explicitly set forth in the statute. It never actually required a specially designed rule to admit it independent of the statute Rather, such evidence, if permitted to do so, would have fallen squarely within it. We disapprove any language to the contrary in our previous opinion. Henceforth, admissibility of any and all other crimes and civil wrongs evidence will be governed by K.S.A. §60-455" and only K.S.A. §60-455.

"Under this reinvigorated reading to K.S.A. §60-455, should a district judge neglect to apply the safeguards we have outlined to any other crimes or civil wrongs evidence, we will find error. But we also hereby unequivocally resolve the second problem that has plagued our cases in this area. We explicitly recognize that the admission of K.S.A. 60-455 evidence without the explicit relevance inquires, particularized weighing of probative value and prejudicial effect, or prophylactic limiting instruction is not inevitably so prejudicial as to require automatic reversal. On the contrary it may be harmless. And we disapprove any language to the contrary in our previous opinions." In other words, a limiting instruction should be given, failure to do so is error, but it may be harmless.

RES GESTAE IS NO LONGER AN INDEPENDENT BASIS FOR ADMISSION OF EVIDENCE IN KANSAS

Res gestae has been employed in many cases as a way to get evidence of other crimes and civil wrongs admitted outside of K.S.A. §60-455. A *res gestae* situation is defined as a situation where the events of other crimes and wrongs are so closely linked with the crime charged that facts cannot be understood without inclusion of the prior events. In *State v. Gunby*, ___Kan. ___ (October 27, 2006), the Kansas Supreme Court conducted a thorough analysis of the history of the use of *res gestae* in Kansas caselaw. Based on its discussion regarding the proper interpretation of K.S.A. §60-455, the Court found that *"the concept of* res gestae *is dead as an independent basis for admissibility of evidence in Kansas. That evidence may be part of the res gestae of a crime demonstrates relevance. But that relevance must still be measured against any applicable exclusionary rules."*

FAILURE TO REDACT EVIDENCE OF PRIOR CRIMES FROM AUDIO RECORDING

While his felony burglary charges were pending in Kansas, defendant was incarcerated in Missouri on unrelated charges. He called his bail bondsman from jail. The phone call was automatically recorded by the jail. The defendant told the bondsman that he could not be identified in the Kansas burglaries for which he was charged because he did not remove his mask or gloves until after he and his accomplices had left the parking lots of the various business he robbed. There were also several references in the conversation to the defendant being "in jail again," having a bunch of warrants in Kansas and being sentenced to 22 months in Missouri. Although the district court judge gave a limiting instruction, he did not require that the references be redacted from the recording.

The Kansas Supreme Court found this to be error. *See, State v. Snow*, ___Kan. ___(October 27, 2006). The evidence of prior and current jail time and warrants was not required to prove any material fact in issue in the case. Therefore, the references should have been redacted and failure to do so was error. However, the Supreme Court found it to be harmless given the other facts of the case and the judge's use of a limiting instruction.

WHAT CONSTITUTES A CRIME OR CIVIL WRONG UNDER K.S.A. §60-455

David Carrington's wife, Yelena, discovered her husband's body on the ground outside their house. Carrington owned rental property. His wife gave detectives the name of a George Anthony, as one of his renters that had a "beef" with her husband. Carrington had evicted Anthony more than once. One eviction occurred the month before Carrington's death. Carrington had even obtained a restraining order against Anthony. The eviction, the existence of the restraining order and a certified copy of the order were admitted into evidence at Anthony's murder trial. The district court found that they tended to show deterioration in the relationship between Carrington and Anthony. No limiting instruction was given. The issue in *State v. Anthony*, ___Kan.___(October 27,2006), was whether or not this was §60-455 evidence admitted in error without a limiting instruction. The Kansas Supreme Court found the eviction and the restraining order information were not evidence of "other crimes or civil wrongs." *"They did not involve violation of a criminal statute. And although they were effected through civil court procedures, the "wrongs" giving rise to them, if any, were not the types of behavior that would demonstrate propensity to commit the crime at issue."* Their admission "*offended neither the statute nor the policy behind it."* Therefore, K.S.A. §60-455 does not apply and no limiting instruction was necessary.

DUI-DISPARITY BETWEEN CHARGE AND SENTENCE

Gwendolyn Moody was charged in the district court with DUI, "having been convicted of DUI two or more times to

(Continued on page 8)

Court Watch

(Continued from page 7)

wit: on the 4th of April 1989 in Wichita Municipal Court Case No. TB92126 and on the 3rd day of February 1998 in Wichita Municipal Court Case No. 97TM13602." This was alleged to be in violation of K.S.A. 8-1567, but no specific subsection was listed. She entered a plea agreement whereby the State would recommend 1 year in jail and a fine of $1,500. The recommendation was that she serve 48 hours in jail followed by 88 days house arrest. Prior to entering her plea, the judge advised her that she could face up to one year in jail and a $2,500 fine for the DUI. He also advised her that the plea agreement was simply a recommendation as to sentencing and the Court did not have to follow the plea agreement. Moody pled guilty.

At sentencing the judge observed that Moody had three prior DUI convictions, not two. Moody agreed that she did in fact have three prior convictions. The judge asked Moody if she concurred that she had three prior convictions. She said she did. He then asked if she knew any reason why sentence should not be imposed under K.S.A. 8-1567(g) (which is the fourth time offender section). Her attorney announced that the defense had no objection. She was then sentenced as a fourth time offender. She was sentenced to 6 months in jail, to serve 3 and then be released on house arrest for 177. Her fine was set at $2,500. She was also sentenced to one year of post-release supervision by the Department of Corrections. It is important to note that the maximum penalties for a third (K.S.A. 8-1567(f)) and fourth offense (K.S.A. 8-1567(g)) are identical under the statute with the exception of the mandatory post-release supervision. Said supervision is only required for fourth time offenders, not third.

On appeal, Moody argues that the district court lacked jurisdiction to sentence her as a 4th time offender, because the complaint only alleged two prior convictions. In *State v. Moody*, ___ Kan. ___ (October 27, 2006), the Supreme Court conducted an analysis of the numerous Court of Appeals decisions, sometimes inconsistent, that deal with discrepancies between charging and sentencing. It comes to the conclusion that in this case the issue is not disparity between crime of conviction and sentence (because the maximum sentence is the same), but rather lack of notice that the mandatory post-release supervision was included in the sentence for a fourth time offense. It is a due process issue, not a jurisdiction issue. Justice Allegrucci, writing for the majority, analyzes whether post-release supervision is a direct or an indirect consequence of defendant's plea. In Kansas, a court is only required to advise the defendant of the direct consequences of his or her plea. Although the Court seems at first to hold that post-release supervision is "inexorably" a direct consequence of a plea to a fourth time DUI, it backs away from finding that failure to so advise requires vacating the sentence. The Court held:

"Because prior DUI convictions are not elements of the offense of DUI, prosecution of a complaint which fails to indicate each prior offense is not jurisdictionally barred, however, a defendant is entitled under due process to notice in the information or of the severity level of the DUI offense being charged.

Where a defendant with three prior DUI convictions receives notice in the complaint of the severity level of the DUI offense charged, and later at the plea hearing is informed of the maximum penalty for a fourth DUI offense, the defendant is appropriately sentenced as a fourth-time offender, although the complaint alleged only "two or more" prior offenses. We conclude under the circumstances of this case that the defendant received due process and the judge had jurisdiction to sentence Moody as a fourth-time DUI offender and impose the mandatory post-release supervision required by statute."

COMMENTING ON THE DEFENDANT'S INVOCATION OF THE RIGHT TO REMAIN SILENT

Defendant Rosa Sanchez was on trial for murdering her 3 year-old son. Her attorney called one of the investigating detectives during the defense's case in chief. The following colloquy took place:

> *Q: And you told us that you had interviewed Rosa Sanchez?*
>
> *A: That is correct.*
>
> *Q: What date did that interview take place?*
>
> *A: The 8th, and then we tried to again interview her on the 12th, but then she invoked her right not to be interviewed.*

In her appeal, Sanchez argued that this constituted a *Doyle* violation. Her argument is based on *Doyle v. Ohio*, 426 U.S. 610 (1976). A *Doyle* violation occurs when the State attempts to impeach a defendant's credibility at trial by arguing or by introducing evidence that the defendant did not avail himself or herself of the first opportunity to clear his or her name when confronted by police officers but instead invoked his or her constitutional right to remain silent.

In *State v. Sanchez*, ___Kan. ___(October 27, 2006) the Kansas Supreme Court found that no *Doyle* violation took place. Unlike in *Doyle*, in Sanchez' trial defense counsel elicited the testimony, not the prosecution. The State did not cross-examine the detective about the statement or use the testimony in closing argument. Furthermore, unlike in *Doyle*, the prosecution did not need nor did it use Sanchez' silence to support the theory that she had fabricated her story after her arrest.

(Continued on page 9)

Court Watch

(Continued from page 8)

JUDICIAL RECUSAL-JUDGE'S DAUGHTER AND MURDER VICTIM'S DAUGHTER ARE BEST FRIENDS

Richard Reed was charged with first degree premeditated murder of his wife and attempted second degree murder of his daughter. Prior to trial, Reed moved to recuse the judge assigned to the case. After the judge refused, Reed filed an affidavit alleging that the judge was personally acquainted with Reed's family, that the judge was a member of the victim's church, that the judge's daughter was a best friend of one of Reed's daughters, and that Reed's wife had been the school nurse at the school attended by the judge's children. Another judge reviewed the affidavit and found that the defendant had not presented sufficient grounds to require recusal. The defendant was subsequently convicted of both charges.

In *State v. Reed*, ___Kan. ___ (October 27, 2006) Reed argues that his due process rights were violated by the judge's failure to recuse himself from the case. The Supreme Court found that in order to prevail the defendant must show that the judge had a duty to recuse himself from the case because he was biased, prejudiced or partial and there is a showing of actual bias or prejudice to warrant setting aside the verdict. A judge has a duty to recuse himself or herself if there is a reasonable doubt concerning the judge's impartiality, not in the mind of the judge or the defendant, but in the mind of a reasonable person with knowledge of all the circumstances. In *Reed*, the Court did not decide whether or not the judge should have recused himself in this case. Instead it assumes that he should have and goes on to examine whether or not actual bias was shown. Bias and prejudice exist if a judge harbors a hostile feeling or spirit of ill will against one of the litigants, or undue friendship or favoritism toward one. It found that the record did not show that the judge actually exhibited bias or prejudice at Reed's trial. Therefore, defendant's due process claim fails and the verdict stands.

SUPPRESSION ORDER IN CRIMINAL CASE DOES NOT IMPACT FORFEITURE ACTION

A Kansas Highway Patrol trooper stopped David Smith for an expired tag. Smith was also unable to show proof of insurance. The trooper observed some suspicious activity, but nothing to justify a further detention. He gave Smith a warning and stepped away from the car. However, in what the Court has previously described as the "Columbo" approach, the trooper immediately returned and asked Smith if he had any weapons, large sums of money or drugs in the car. Smith answered in the negative. The trooper asked if he could search Smith's car. Smith refused. The trooper requested a canine unit. The canine alerted and the trooper eventually found $3,497, a jar with 5,209 marijuana seeds (someone actually counted them?), two firearms, and a small bag of marijuana. Criminal charges were filed as well as an action to forfeit the car.

A motion to suppress was filed in the criminal proceeding. The motion was granted based on the unlawfulness of the defendant's continued detention and the State dismissed the criminal case. The civil forfeiture case was still pending. The forfeiture was granted. Smith appealed. In *State of Kansas Drug Task Force v. 1990 Lincoln Town Car*, ___Kan.App.2d ___(November 9, 2006) the issue was whether or not the suppression order in the criminal case prohibited the state from relying on the evidence found in the vehicle in the forfeiture action. Smith argued that collateral estoppel applied to the suppression order.

The Kansas Court of Appeals held that a suppression order in a criminal case is not a final judgment. When the charges are then dismissed, it is as if no suit has ever been brought. As such, collateral estoppel does not come into play. In addition, the actions are different (civil v. criminal), the burden of proof is different (beyond a reasonable doubt v. preponderance of the evidence) and the purposes are different (punishment v. remedial). Therefore, a forfeiture action can proceed regardless of the result of the criminal prosecution.

SENTENCE PRONOUNCED FROM BENCH IS CONTROLLING, NOT SUBSEQUENT JOURNAL ENTRY

In *Abasolo v. State*, ___Kan.App.2d ___(November 9, 2006), the district judge entered a sentence from the bench for a probation violation of 36 months. However, after sentencing the judge realized he had made an error. He meant to impose the total original underlying sentence of 52 months. The judge issued a journal entry setting out his intended 52 month sentence.

The Kansas Court of Appeals found that a journal entry which imposes a sentence different from one pronounced from the bench is erroneous and must be corrected. In this case, the judge had the authority to issue a 36 month sentence on a probation violation, even though the underlying sentence was 52 months. Upon revocation of probation, the sentencing court may impose the underlying sentence or any lesser sentence. A sentence is effective when pronounced from the bench and does not derive its effectiveness from the journal entry.

IT IS COURT'S RESPONSIBILITY TO KEEP TABS ON SPEEDY TRIAL ISSUES

Todd Clemence's prosecution for assorted drug charges had a long and "tortured path." He was arrested in November 2001. The trial was not held until over 2 years later. The defendant had never absented himself from the jurisdiction or missed any court dates. Numerous motions were filed by

(Continued on page 10)

Court Watch

(Continued from page 9)

both the defense and prosecution. At own point the State dismissed and refiled the charges in a clear attempt to avoid statutory speedy trial limitations.

In *State v. Clemence*, ___Kan.App.2d___(November 9, 2006), the Court found that where the State dismissed and refiled criminal charges to gain tactical advantage, prejudicial delay must not be allowed. However, more importantly the Court stated that although the responsibility of seeing that an accused is given a speedy trial rests with the prosecution *"The better practice dictates that the district court keep close tabs on this issue as proceedings run their course"* and not allow this type of maneuvering which resulted in prejudicial delay.

IMPLIED CONSENT ADVISORY FOR COMMERCIAL DRIVER'S IS NOT REQUIRED WHEN COMMERCIAL DRIVER'S LICENSEE IS DRIVING NON-COMMERCIAL VEHICLE AT TIME OF DUI STOP

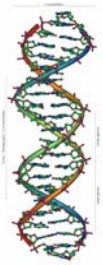
David Becker was arrested for DUI. Although he had a commercial driver's license, he was driving a non-commercial personal vehicle. At the station, the officer read Becker the implied consent advisory and provided him with a copy. Provisions applicable to commercial drivers were printed on the back of the advisory, but were not read by the officer. The notice the officer read to Becker advised him that a test failure would result in a 30 day driver's license suspension. He did not read him the commercial section on the back of the page which stated that upon a test failure his commercial driver's license would be suspended for one year (even though he was not driving a commercial vehicle). *See*, K.S.A. 2005 Supp. §8-2,142. Becker blew a .169, thereby failing the breath test.

In appealing his conviction for DUI, Becker argued the implied consent notice misinformed him of the law, thereby violating his due process rights and warranting suppression of the breath test. The State argued that the officer was not required to read the commercial driver advisory because Becker was not driving a commercial vehicle at the time he was stopped.

In *State v. Becker*, ___Kan.App.2d ___ (November 9, 2006), the Court pointed out that prior to 2003, a person's commercial driver's license could not be suspended for a DUI received in a non-commercial vehicle. Likewise, K.S.A. §8-1001(g) only requires an officer to provide the notice concerning commercial driver's licenses when the person is driving a commercial vehicle. Although in 2003 he legislature amended K.S.A. §8-2,142 to provide for suspension of a commercial license for a test failure while driving a non-commercial vehicle, it did not amend the notice provisions of K.S.A. §8-1001(g). Therefore, statutorily Becker's notice was proper.

The Court further found that Becker had failed to provide any authority to support his argument that he has a substantive due process right involving an implied consent notice. The right to drive a vehicle is a privilege not a right, subject to reasonable regulation by the state. Likewise, notice is a procedural right rather than a substantive right. The breath test comes in.

WHAT TO DO WITH POST-CONVICTION DNA EVIDENCE



In *Haddock v. State*, ___Kan. ___, 146 P.3d 187 (November 9, 2006), Justice Davis presents a very thorough analysis interpreting K.S.A. 2005 Supp. §21-2512 concerning how a court is to handle post-conviction DNA evidence. This involved Haddock's conviction for murdering his wife in Johnson County. The scope of this case is generally beyond anything that would be confronted by municipal courts, but for those of you interested in the issue of exoneration based on DNA that has come to light after the trial, this is very interesting reading. It highlights the safeguards in place in Kansas law to prevent or rectify wrongful convictions.

REVOCATION PROCEEDINGS OR PROBATION EXTENSION AGREEMENTS MUST BE FILED DURING THE PERIOD OF PROBATION OR THE COURT LOOSES JURISDICTION

By the last day of Angelo Cisneros' probation period, August 25, 2005, he had still not completed the recommended substance abuse counseling. He agreed to extend his probation (apparently in lieu of a revocation motion being filed), but the voluntary probation extension agreement was not approved and filed until 4 days after the expiration of his probation. One month later, he tested positive for alcohol in violation of his probation. The State filed a motion to revoke his probation, which was granted.

In *State v. Cisneros*, ___Kan.App. 2d ___ (December 8, 2006), the Kansas Court of Appeals held that the Court lost jurisdiction to modify or extend Cisneros' probation when it ended on August 25, 2005. Although a voluntary extension would have been acceptable, it had to be on file on or before August 25, 2005 to prevent the court from loosing jurisdiction. Even though in this case it was entered by both parties and signed by the close of business August 25, it was not on file with and approved by the Court on that day. The Court had no jurisdiction to revoke Cisneros' probation based on a motion filed after the probation terminated.

(Continued on page 12)

2006 ABA TRAFFIC PROGRAM- CHARLESTON, S.C.

By Ken Lamoreaux, Waterville

In mid-October of this year, I had the good fortune to attend the 2006 ABA Judicial Division Traffic Court Seminar in Charleston, South Carolina. KDOT was kind enough to provide funding for several Kansas municipal judges to experience the seminar.

There were many interesting topics presented and discussed during the three days at the Embassy Suites in the Historic District of Charleston. I will not try to review all of them in this article, but I will pass along some highlights of the event.

Our very own Honorable Karen Arnold-Burger (City of Overland Park) was the chairperson of the ABA Judicial Division Committee on Traffic Court Program as well as a presenter on this year's program. Judge Arnold-Burger handled her duties very well and was a credit to the state of Kansas. Her part of the program (in addition to her role as Chair) dealt with the *"Admissibility of Speed Check Evidence"*. She provided a thorough coverage of the topic, ranging from the type of speed check devices being used and the three steps for admissibility (1. establish the scientific principle of the measuring device being used 2. establish that the operator was trained properly and experienced in the use of the device 3. the instrument was checked and functioning properly) to other issues that may arise at trial (identifying the driver, hearsay in the case of airplane enforcement and chase cars, valid and invalid defenses).

The Honorable Grace Sease of Atlanta Immigration visited with the group concerning *"The Impact of Traffic Court Decisions on Immigration and Naturalization"*. While Ms. Sease's program was not the best part of the seminar, all those I talked with agreed that she had the "court from hell" to deal with. The immigration and naturalization laws, rules and regulations made her job almost impossible to deal with in our eyes. Leave it to the federal government to create a convoluted, twisted mess for others to unscramble!

One presentation that led to a much spirited discussion was *"Legal Issues Concerning Photo Enforcement of Traffic Laws"*. Photo enforcement is generally defined as using cameras to record the license plates of vehicles committing traffic offenses and issuing summonses to the registered owners. I do not know if we resolved anything, but some of the issues that arose were: 1. the question of dual ownership of a vehicle 2. owner vs. driver 3. presumption of innocence/guilt. One topic of particular interest dealt with a concern that citizens were being coerced to plead guilty to an offense they did not commit. In other words, by decriminalizing the offenses or offering reduced fines, are we making it easier to "plead guilty" than to take the matter to court? *"You be the judge."*

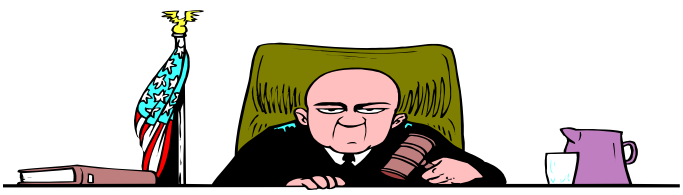
Of particular interest to those of us who know him (which would be most Kansas municipal judges since he has been at our annual conference) was Judge Fred Rodgers of Colorado. We know him as "The Singing Judge" and, true to form, Judge Rodgers entertained us with relevant lyrics to many well known tunes during his "Defendants Rights" presentation. Many of you may not know, however, that Fred was a member of that famous(?) group, The Three Clicks, who recorded the unforgettable(?) hit – "38 Slug" back in 1960 something. The folks responsible for this year's seminar actually found a copy of the recording and played it, much to the delight of all (except, perhaps, for Fred).

An area touched on by the Honorable Peter Schoon, also from Colorado, concerned *"Treatment Options That Judges Can Use"*. This was a topic that I found interesting as Judge Schoon suggested substance abuse treatment options such as anabuse (requires doctor approval and could possibly cause liver damage), Campral (curbs craving, should be used with other support/counseling mechanisms) and SCRAM – Secure Continuous Remote Alcohol Monitor (measures sweat, supposedly infallible). Naturally all of these have financial costs/impacts on the defendant in addition to fees, court costs, fines, etc. resulting from prosecution, conviction and sentencing/treatment.

Judge Schoon also offered alternatives to straight jail time sentences. These included work release or "warehousing" (in jail overnight, out 12 hours for job), "work-enders" (out to work on weekends), "mid-week" (same as work-enders only out Tuesday through Thursday), combinations of these and Electronic Home Monitoring.

All in all, this was a great conference. Charleston is a beautiful "southern" town, rich in history with many sights to see and excellent restaurants. Karen arranged an "after hours" tour of the Citadel Military Academy for us complete with our own cadet guides. One of the South Carolina judges I met also took several of us on a short tour of the Charleston area.

If you have an opportunity to attend this conference in the future, do not pass it up. You will meet many interesting and friendly people who do the same things and face the same challenges as you. It is a fantastic opportunity to learn from one another. Next year's seminar is in Seattle, maybe a good time to see some of the Northwest and make some new friends!



Court Watch

(Continued from page 10)

NONTESTIMONIAL HEARSAY AND THE CONTEMPORANEOUS STATEMENT EXCEPTION TO THE HEARSAY RULE

Latasha Kines was having sex with her boyfriend, John Dickerson, when he received a phone call. Kines heard the person on the other end say that he "had this nigger in the house and wanted to kill him." Dickerson told her "It is my cousin, Breland." Dickerson then left the house and returned later with Breland Davis and others. Kines then drove them all to the home of Maurice Williams. While Kines waited in the car, Davis and Dickerson killed Maurice. During the trial of Davis, Dickerson exercised his Fifth Amendment right against self incrimination and did not testify. During trial, there was significant physical evidence linking Davis to the crime, but the prosecutor was trying to establish that the murder was premeditated. To do this, the prosecutor asked Kines who Dickerson had told her was on the phone. The defense objected arguing that this was hearsay, offered to prove the truth of the matter asserted, by a person (Dickerson) who was not available to testify and therefore not available for cross-examination, all in violation of his right of confrontation outlined in *Crawford v. Washington*, 541 U.S. 36 (2004).

In *State v. Davis*, ___Kan. ___ (December 8, 2006), the Court found that

1. Dickerson could be classified as "unavailable" due to his invocation of his Fifth Amendment right to remain silent and not incriminate himself;
2. There is no *Crawford* issue because the statement sought to be admitted was nontestimonial;
3. The statement falls under the "contemporaneous statements" exception to the hearsay rule under K.S.A. 60-460(d)(3) (although the Court does say that this is not a "firmly rooted" hearsay exception under Kansas law for confrontation purposes);
4. The statement bears an adequate indicia of reliability. It was a spontaneous response to the telephone call and an expected statement given that the Kines and Dickerson were involved in sexual intercourse at the time. It was contemporaneous with Dickerson being on the phone. The statement was made to Kines, not the government. There was no crime that had been committed at the time for which Dickerson may have been attempting to shift the blame. There was no indication that Dickerson knew of Davis's desire for help in a plan to murder the victim. There was no evidence that Kines was involved in the murder or its planning. She was not present at the time of the killing (she was in the car).

Although the Court finds that the statement was properly admitted, it seems troubled that this was a "close call." Therefore, Justice Davis goes on to write that even if it was error to admit the statement it was harmless given the overwhelming physical evidence linking Davis to the crime and his statements to others describing his participation.

STANDARD OF REVIEW FOR SEARCH WARRANTS

In determining whether probable cause exists to support a search warrant, the task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit, including the veracity and basis of knowledge of any person supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

When an affidavit in support of an application for search warrant is challenged, the task of the reviewing court is to ensure that the issuing magistrate had a substantial basis for concluding probable cause existed. This standard is inherently deferential. It does not demand that the reviewing court determine whether, as a matter of law, probable cause existed; rather, the standard translates to whether the affidavit provided a substantial basis for the magistrate's determination that there is a fair probability that evidence will be found in the place to be searched. Because the reviewing court is able to evaluate the necessarily undisputed content of an affidavit as well as the issuing magistrate, the reviewing court may perform its own evaluation of the affidavit's sufficiency under this deferential standard. *See, State v. Hicks*, ___Kan. ___(December 8, 2006).

In *Hicks*, the Court examines the affidavit used to support a search warrant and finds it to be insufficient. It failed to even minimally identify the "concerned citizens" who had reported activity to the police and whether they were worthy of trust and whether their complaints were accurate and corroborated. It failed to provide details regarding the recent drug history of the visitors to the house, only stale history was provided. There were no details regarding how the police came to the conclusion that the trash bags they confiscated in back of the house belonged to the defendant. It consisted of numerous assertions, with little back up. The district judge's suppression of the evidence seized in the search was upheld.

STRONG ODOR OF ETHER ALONE DOES NOT CONSTITUTE PROBABLE CAUSE TO SEARCH A VEHICLE

Ibarra was stopped for lack of a light on his license plate. Officers smelled a strong odor of ether coming from the car. They asked Ibarra about it. He told them he couldn't smell it but it could be coming from his work clothes. The officers asked him to get his work clothes. Ibarra gave them his jacket from the vehicle. The jacket did smell like ether, but the strong odor of ether con-

(Continued on page 13)

Court Watch

(Continued from page 12)

tinued after the clothing was removed from the car. Knowing that the smell of ether is often associated with the manufacture of methamphetamine, the officer's believed they had probable cause to search the car. They searched the car. Lots of contraband was discovered. The defendant was convicted of several drug charges and sentenced to serve 10 years in prison.

In *State v. Ibarra*, ___Kan. ___(December 8, 2006), the Kansas Supreme Court held that the strong odor of ether emanating from a house or a vehicle is as consistent with lawful activity as it is with unlawful activity. It may be justification for further investigation, but not for a search. The Court distinguishes this from *State v. McDonald*, 253 Kan. 320 (1993) where the court held that the detection of the odor of fresh marijuana or marijuana smoke *standing alone* is enough to establish probable cause for a search on the basis that marijuana is an illegal substance. Ether is not. It also distinguished *State v. Bickerstaff*, 26 Kan.App.2d 423, *rev. denied* 268 Kan. 889 (1999) which held that the odor of alcohol on the driver and inside the car coupled with the defendant's denial of drinking and a PBT showing alcohol in her system was enough to establish probable cause to search the vehicle for an open container. *Bickerstaff* was not an alcohol smell only case, it was an alcohol smell plus other factors. All evidence seized in the search must be suppressed.

CONSENSUAL ENCOUNTER TURNS INTO INVESTIGATORY DETENTION

Wichita officers go to an apartment complex to "check out" a report that there were three guys hanging out in an apartment complex garage. No illegal activity was alleged. One officer was curious to find out who they were and if they lived at the complex. He arrived on the scene and pulled into the driveway, blocking the exit of cars in the driveway. He saw three men, did not recognize any of them and had no reason to believe they were involved in gang activity. One man exited the area. Two remained and approached the officer. He asked the two men, who identified themselves. The officer asked them to lift their shirts to see if they had any weapons. They did not.

The officer asked one of the two, Hoover, if he had anything illegal. He stated that he had a marijuana cigarette. He was arrested for possession of marijuana. His friend, the defendant in this case, was standing nearby while the arrest took place. The police officers refused Parker's request to leave while they investigated items they found in the garage and checked for warrants. Parker was acting nervous, fidgeting and putting his hands in his pockets. The officers asked if Parker had anything on him. He said no. They asked if they could check. He agreed. He took cask out of his right pocket and brought his hand out of his left pocket with a clenched fist. The officers saw a plastic bag in his fist and announced that he had "dope." Parker immediately started running, the officers pursued and tackled him. He threw the baggie into the grass as he was being tackled. The baggie contained rock cocaine.

In *State v. Parker*, ___Kan.___ (December 8, 2006), the Kansas Supreme Court held that the police encounter with Parker began voluntarily. The two consented to their search by lifting their shirts immediately upon the officer's request. This was still consistent with a voluntary encounter. Once the officers arrested Hoover however, and the officers made a "show of authority" it was reasonable for Parker to believe that he was not free to leave. In fact, he asked to leave and was told he could not leave. The detention of Parker became investigatory. However, at this point the officers had no reason to believe Parker had committed or was about to commit a crime. From this point forward his detention was unlawful.

The Court next examined whether Parker purged the taint of the illegal detention by consenting to a search of his pockets. It found he did not. When he consented he was surrounded by police officers and his friend had just been arrested. He had not been advised of his *Miranda* rights. His consent was merely a submission to the officer's authority rather than a voluntary, knowing, and intelligent waiver of his rights. The evidence must be suppressed.

FAILURE TO PROTEST OR REPORT A CRIME AND THEN WILLINGLY ACCEPTING THE FRUITS OF THE CRIME DOES NOT MAKE ONE AN ACCOMPLICE TO THE CRIME, ALTHOUGH IT MAY MAKE ONE AN ACCESSORY AFTER THE FACT

Defendant Don Simmons committed an aggravated robbery and aggravated kidnapping, alone. Prior to the crime, he discussed the robbery with four other individuals when they were all with him at his home. They did not help him plan it, and in fact one of them actively tried to discourage him. After the crime, he gave two of the individuals money to share with the other two to buy their silence. All four individuals testified against Simmons at trial.

K.S.A. §21-3205 states that a person is criminally responsible for the crimes of another if the person intentionally aids, abets, advises, hires, counsels or procures the other to commit the crime. If such a person agrees to testify in the trial of the person who committed the crime, the defendant is entitled to a "cautionary" instruction. Defendant Simmons requested that a cautionary "accomplice" instruction be given, based on PIK Crim. 3d 52.18, which states*: "An accomplice witness is one who testifies that he was involved in the commission of the crime with which the defendant is charged. You should consider with caution the testimony of an accomplice."* The district court refused, opining that there was insufficient evidence that the four individuals met the definition of "accomplices." The Court of Appeals disagreed and reversed. In *State v. Simmons*, ___Kan. ___ (December 15,

(Continued on page 14)

Court Watch

(Continued from page 13)

2006) the Kansas Supreme Court agreed with the district court and found that an accomplice instruction was not warranted.

The Court specifically rejected the Court of Appeals analysis that a person can be an "accomplice" if one does not protest or does not report the plan but willingly accepts a share of the fruits of the crime. As defined by statute, an accomplice is someone who has the intent to promote or facilitate a crime and solicits, requests or commands the other person to commit it, or aids the other person in planning or committing it. Likewise, the Supreme Court opined that failing to stop or report a crime is also not the basis for liability under an aider and abettor theory. Mere association with the principal who actually commits the crime or mere presence in the vicinity of the crime is itself insufficient to establish guilt as an aider and abettor. To be an aider and abettor the person must knowingly associate with the unlawful venture and participate in way which indicates he is willfully furthering the success of the venture. In addition, mere presence during planning or commission of a crime is not enough to establish that someone is an accomplice.

Finally, the Court stated that although some other jurisdictions have found that receipt of the ill-gotten gain can turn a person into an accomplice, there is nothing in Kansas law to suggest that one can be held liable as an accomplice solely for receiving stolen cash, especially where there is no evidence of a prearranged plan.

Originally, one who was charged as an accessory after the fact was punished as a principal. Today, by statute, most jurisdictions define the crime of accessory after the fact as a separate, distinct crime carrying a lesser punishment. For example, in Kansas. K.S.A. §21-3812, aiding a felon or a misdemeanant, would be comparable to the common law "accessory after the fact" crime. The mere fact that one may be an accessory after the fact is not enough to warrant an accomplice instruction. If one did not participate in the crime one cannot be an "accomplice" warranting an "accomplice witness" instruction.

PROCEDURE REQUIRED FOR FILING AN APPEAL OF AN ADMINISTRATIVE DRIVER'S LICENSE SUSPENSION

Jeremy Bruch was stopped for speeding and crossing the center line. Although he denied drinking and passed the dexterity tests, the officer did smell the odor of consumed alcohol on his breath. The defendant admitted drinking 5 hours earlier. His passenger was clearly intoxicated. He consented to take a PBT and registered a .146. He refused to take the Intoxilyzer at the station. Following an administrative hearing, Bruch's driving privileges were suspended.

K.S.A. §8-259 provides that when one appeals an alcohol test refusal suspension, it results in a *de novo* review in front of the district court. However, the statute also provides that the appeal will be in accordance with *"the act for judicial review and civil enforcement agency actions."* K.S.A. §77-614(b) of the Kansas Judicial Review Act requires that the appeal petition contain very specific things, including a recitation of the facts that demonstrate that the petitioner is entitled to review and the reasons for believing the review should be granted.

In *Brush v. Kansas Dept. of Revenue*, ___Kan. ___ (December 22, 2006), the petitioner argued that it was not necessary to recite facts and reasons, since the appeal was *de novo*. The Supreme Court of Kansas disagreed and found that there must be strict compliance with the provisions of K.S.A. §77-614. In addition, only issues considered by the administrative hearing officer can be considered on appeal, even though it is a *de novo* appeal. It is still an appellate action. Brush's petition stated that the order of suspension should be vacated because the officer lacked reasonable suspicion to begin a DUI investigation, lacked probable cause to arrest the defendant for DUI and all other issues raised before the administrative hearing officer. The Supreme Court found that this was too broad and not sufficiently detailed to preserve his real argument regarding administration of and consent to the PBT. Failure to comply with the statute deprives the court of subject matter jurisdiction. Therefore, the district court correctly dismissed his petition for lack of subject matter jurisdiction.

COMING TO A BAR NEAR YOU—
COIN OPERATED BREATHALYZERS

Check out these coin-operated alco-sensors. Put money in the machine and a sterile straw mouthpiece is delivered. Follow the instructions, insert the mouthpiece, blow into the machine and voila, a BAC reading. Also provides a warning not to drive if you have consumed any alcohol. Cost: Range between $1,100 to $3,000. Some use regular straws, some specially made straws, some have oral directions, some just written. Several models available for sale or rental.

TICKET-FIXING

By Cynthia Gray, *Reprinted with permission from the Judicial Conduct Reporter, a publication of the American Judicature Society Center for Judicial Ethics, Vol. 28, No. 2, Summer 2006*

The urge to do a favor for friends and family is understandable and usually laudable. However, when judges fail to resist that temptation and "fix" tickets for friends, family friends of friends, constituents, and others, they clearly violate the code of judicial conduct even if no money changed hands.

Ticket-fixing includes a variety of conduct in which a judge dismissed charges or otherwise gives preferential treatment to a defendant without a hearing or the consent of the prosecuting authorities, usually following an *ex parte* communication with the defendant or a third party. For example, in *Commission on Judicial Performance v. Chinn*, 611 So.2d 849 (Mississippi 1992), the Mississippi Supreme Court removed a judge from office for, in addition to other misconduct, engaging in ticket-fixing by dismissing 18 cases placed on a consideration docket. After a citation was issued, an offender could call the justice court office and give an excuse for getting the ticket or present proof to the clerk that the violation (such as expired inspection stickers or license tags) was corrected. If the clerk or Judge Chinn, felt that the case deserved consideration, it would be put on the consideration docket, and the charge would be dismissed. No trials were ever conducted before the charges were dropped, but "not guilty" was written on the ticket, giving the appearance that there had been a hearing. The dismissals caused problems with highway patrolmen, who appear in court unaware that the charges had been dismissed.

Ticket-fixing is a chronic problem in Mississippi's justice court system, resulting in discipline for at least 10 judges in the past 15 years. In some of the cases, the violation was based on the judge's acquiescence in the practice of ticket-fixing by clerks or others. *See also*, *Judicial Performance Commission v. Cowart*, 566 So.2d 1251 (Mississippi 1990) (allowed clerks, arresting officers, and other court personnel to dismiss 92 traffic tickets without an adjudication but with the entry of "not guilty" on the docket); *Judicial Performance Commission v. Hopkins*, 590 So.2d 857 (Mississippi 1991) (allowed clerks and other officials to dismiss tickets without adjudication); *In re Inquiry Concerning Seal*, 585 So.2d 741 (Mississippi 1991) (at the request of third parties, found 13 defendants not guilty without a trial, hearing, or notice to the arresting officers; allowed clerical personnel to dismiss non-moving violations at the request of or with the agreement of the issuing officer; knowingly allowed clerks and officers to dismiss 109 tickets pursuant to a standing policy absent any trial or hearing; dismissed 14 cases, both moving and non-moving violations, by marking not guilty on the court records without any trial or hearing but merely upon *ex parte* proceedings or without any appearance of the defendant at all); *Judicial Performance Commission v. A Justice Court Judge*, 580 So.2d 1259 (Mississippi 1991) (finding defendants not guilty based upon *ex parte* communications with defendants without hearing or trial and without hearing the state's side of the case) *Commission on Judicial Performance v. Gunn*, 614 So. 2d 387 (Mississippi 1993) (dismissed 8 tickets without conducting a hearing or notifying officers who issued the citations); *Commission on Judicial Performance v. Bowen*, 662 So.2d 551 (Mississippi 1995) (dismissed 31 speeding tickets after holding *ex parte* communications with the defendants); *Commission on Judicial Performance v. Dodds*, 680 So.2d 180 (Mississippi 1996) (had *ex parte* communications about tickets and dismissed cases without a hearing); *Commission on Judicial Performance v. Boykin*, 763 So.2d 872 (Mississippi 2000) (dismissed tickets based on *ex parte* communications with defendants); *Commission on Judicial Performance v. Warren*, 791 So.2d 194 (Mississippi 2001) (had *ex parte* communications and dismissed speeding tickets without conducting any hearing or notifying officers).

The real world

Pursuant to the recommendation of the Judiciary Commission, the Louisiana Supreme Court sanctioned a judge for accepting requests to "fix" traffic tickets and other offenses and having an employee of his court contact the prosecutor's office to relay the messages. *In re Fuselier*, 837 So.2d 1257 (Louisiana 2003). Files indicated calls from a sheriff, the office of a member of the state house of representatives, and a police chief, for example. The judge explained:

> *You know, there are…some that are in writing, some that are long distance phone calls that come from various people…and then the Mayor of Alexandria or Lake Charles calls and says, "By the way, my next door neighbor or my daughter is going to school at McNeese in Lake Charles and got arrested…can you help me?" Well, it would be not only bad manners, but unrealistic to say "I'm sorry, Mayor, I've known you since we were in law school together at Tulane, but I can't speak to you about this at all."…I'm not gonna tell him, "No, I'm not going call." You know, I would call [the prosecutor] and say, "Look, the Mayor called," or something like that, "you have to take action. But out of courtesy, just out of respect, he called, I'm telling you he called, would you please call him back and y'all take care of your business." That's how I would handle it. If that's misconduct or improper* ex parte *communications…I think that's the real world.*

The court noted that the prosecuting attorney may have felt pressured to do what the judge suggested, knowing that the judge would be presiding in many cases he prosecuted. The court also rejected the judge's defense that it was his clerk,

(Continued on page 16)

and not him, who actually contacted the prosecutor about the requests for help, noting *"everyone knew the information was coming from Judge Fuselier."*

The court held:

> *We acknowledge that requests for "help" may be submitted to judges in both rural and urban areas and the judges may have a difficult time avoiding them. However, a judge is forbidden from accepting requests for help, and from passing these requests along to the prosecutor. By accepting these requests fro help and passing them along, Judge Fuselier cultivated an atmosphere where people believed Judge Fuselier was open to such requests and they could gain an advantage by contacting the judge privately.*

The California Commission on Judicial Performance also rejected a judge's attempt to justify his conduct based on the sparse population of the county in which he sat and in which he lived his entire life, making it inevitable that he *"regularly sees individuals that he is familiar with on some level before him in court on traffic matters." Inquiry Concerning Wasilenko*, Decision and Order (California Commission on Judicial Performance March 2, 2005) (cjp.ca.gov/ pubdisc.htm). The Commission responded:

> *By their terms, the canons impose uniform statewide standards. Whenever an assigned case involves a party the judge "knows," the judge must be particularly vigilant to ensure the appearance and reality of independence and impartiality. The situation may arise more frequently in a small town than a major metropolitan area, but the judge's ethical duties are the same irrespective of population statistics.*

The judge had disposed of 10 cases in which the defendants were relatives, friends, and friends-of-friends. The cases had not been pending before him and otherwise would not have been assigned to him. He afforded the defendants expedited, convenient, favored procedures and in some instance substantively lenient dispositions. (The Commission censured the judge and barred him from ever serving as a judge again, which was the harshest sanction available because he retired the day before the final oral argument.) The Commission found that "*the gravamen of Judge Wasilenko's wrongdoing is that he set up a two-track system of justice, with special handling available for relatives, friends and others with special connections."* A court clerk who had brought one of the files to the judge's chambers and knew of his relationship to the defendant testified that she *"was mad after it happened"* because she had just paid her own daughter's ticket and she *"just didn't like it."* The Commission stated that "*the evil inherent in a two-track system of justice is so apparent; people 'just don't like it' because it is so clearly wrong—yet these simple points obviously elude Judge Wasilenko."*

Favors for sharks

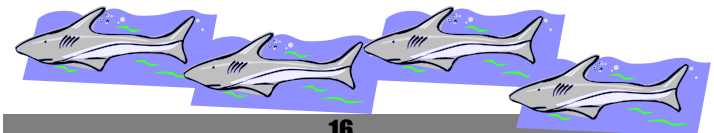
The California Commission publicly censured a second former judge and barred him from assignments from any state court for, in addition to other misconduct, ticket-fixing in 24 cases. *Inquiry Concerning Danser*, Decision and Order (California Commission on Judicial Performance June 2, 2005) (cjp.ca.gov/pubdisc.htm). The judge had retired the day that the hearing before the masters began. He was also convicted of criminal charges related to the ticket-fixing scheme.

The defendants in the cases were members of or closely connected to an inner circle of the judge's friends, acquaintances, and court staff. Many of the defendants were friends of or had connections with Randy Bishop, who was a friend of the judge, had been a detective with the local police department, and handled law enforcement affairs for the San Jose Sharks professional hockey team. Judge Danser was been a Sharks fan since about 1990. The defendants whose traffic cases the judge dismissed included five players or employees of the Sharks, the girlfriend of a player, an employee of the home arena, two employees of the San Jose Earthquakes soccer team (which was run by the Sharks or their marketing arm), the girlfriend of the Earthquakes' equipment manager, and the owner of a restaurant frequented by Sharks players.

Danser dismissed the charges, and none of the defendants appeared in court nor did any retained counsel appear on behalf of any of them. In most of the cases, the minute orders stated that the dismissal was in the "interests of justice," but the judge admits that the actual reasons for the dismissals was to do a favor for Bishop.

The judge asserted that the vehicle code authorized the dismissals. However, the Commission found that the vehicle code allowed a judge to dismiss a case only after an arresting officer determined that a citation should be dismissed "in that interest of justice" and only if the judge entered findings on the record. The Commission concluded that "the statute cannot be twisted to cover these situations."

See also *Inquiry Concerning Platt*, Decision and Order (California Commission on Judicial Performance August 5, 2002), *review denied*, (California Supreme Court February 2003) (cjp.ca.gov/pubdisc.htm) (fixed 4 tickets and attempted to influence other jurists in three cases); *In re Zupsic*, Opinion (December 30, 2005) and Order (Pennsylvania Court of Judicial Discipline March 15, 2006) (www.cjdpa.org/decisions/index.html) (attempted to interfere in 5 cases by attempting to persuade the prosecuting witness to reduce the charge and failing to disqualify from 2 of those cases); *In the Matter of O'Kelly*, 603 S.E.2d 410 (South Carolina 2004) (dismissed parking tickets outside of court); *In the Matter of Singleton* , 605 S.E.2d 518 (South Carolina 2004) (adjudicated 14 traffic tickets issued to close family members and three traffic tickets issued to friend.)



A STEP BACK IN TIME

The year 2006 brought us one of the most notorious "false confessions" in history when John Mark Karr confessed to "being with" Jon Benet Ramsey on the night of her murder, a statement contrary to all of the physical evidence in the case. According to the Innocence Project at the Benjamin Cadozo School of Law, false confessions are the second leading cause of wrongful convictions in the United States (mistaken identity is number one). Surely people don't give false confessions in Kansas do they?

The issue came up as early as 1900 in Kansas in *State v. Kornstett*, 62 Kan. 221 (1900). Kornstett was attempting to "ravish his cousin" and in the process brutally beat her, killed her and threw her into a well. When confronted by the sheriff of Harper County, the sheriff told Kornstett that he thought he was involved in the crime. The sheriff told him that he better tell all he knew about the offense and that if he was guilty it would be better for him to admit the truth. There was some evidence that prior to confessing, Kornstadt was in fear of his life due to the existence of an angry mob outside the door. The Court found that *"an extrajudicial confession will not be received in evidence unless it has been freely and voluntarily made. If it has been extorted by fear, or induced by hope of profit, benefit, or amelioration, it will be excluded as involuntary. However, mere advise or admonition to the defendant to speak the truth, which does not import either a threat or benefit, will not make a following confession incompetent."* The Court found Kornstett's confession to be voluntary and therefore admissible.

THE INNOCENCE PROJECT

The Innocence Project at the Benjamin N. Cardozo School of Law was created by Barry Scheck and Peter Neufeld. It studies the reasons for wrongful convictions in cases in which the defendant has been exonerated by DNA evidence. Studies conducted by the Project cite many factors arising from interrogation that may lead to a false confession, including: duress, coercion, intoxication, diminished capacity, ignorance of the law, mental impairment. Fear of violence (threatened or performed) and threats of extreme sentences have also led innocent people to confess to crimes they did not perpetrate.

In the area of false confessions, the Project recommends that all police departments video tape confessions. The Supreme Courts of Alaska and Minnesota have recently declared that, under their state constitutions, defendants are entitled as a matter of due process to have their custodial interrogations recorded. In Spring 2003, the Illinois General Assembly overwhelmingly passed landmark legislation requiring the electronic recording of police interrogations of suspects in homicide cases, making it the first state to legislate the practice. Many police departments nationwide now require their officers to videotape confessions as a matter of departmental policy.

For more information see:

http://www.innocenceproject.org

In 1908 Charles Wortman was charged with stealing a harness in the night time. Apparently, the mere fact that a theft occurred at night made it a felony at the turn of the century. In *State v. Wortman*, 78 Kan. 847 (1908) the Supreme Court recognized the issues surrounding confessions and quoted from 1 Wigmore on Evidence §866:

"There exists a decided conflict of opinion, at first sight inexplicable, as to the evidential value of confessions. On the one hand, we find writers and judges of wide experience affirming the slender value of confessions and urging the greatest caution in their use...On the other hand, we find persons of equal authority offering (affirming) in equally positive and unqualified language that confessions are the highest kind of evidence. There must be some key to this conflict…

... The confession of a crime is usually as much against a man's permanent interests as anything well can be, and, in Mr. Starkie's phrase, no innocent man can be supposed ordinarily to be willing to risk life, liberty, or property by a false confession. Assuming the confession as an undoubted fact, it carries a persuasion which nothing else does, because a fundamental instinct of human nature teaches each one of us its significance... But how do we get to believe in the fact of a confession having been made? Always and necessarily by somebody's testimony. And what is our experience of that sort of testimony on which we are asked to believe that a confession was made? A varying and sometimes discouraging experience. Paid informers, treacherous associates, angry victims, and overzealous officers of the law-these are the persons through whom an alleged confession is often, perhaps oftenest, presented. And it is at this stage that our suspicions are aroused and our caution stimulated…We are ready enough to trust the confession if there really was one, but we are going to doubt and suspect for a long time before we accept it as a fact…"

In *State v. Demain*, 137 Kan. 716 (1929), the deputy sheriff of a neighboring county told the defendant to "come clean" about his theft of wheat. He urged him to plead guilty saying it would be "better" for him. The deputy sheriff told the defendant that to stand trial would cost him a lot of money and he would be found guilty anyway. He told him that if he pled guilty and returned the wheat, the victim probably wouldn't even pursue it and even if he did, the deputy sheriff would recommend parole.

The Court found that the district court had conducted an appropriate hearing on the voluntariness of the confession and found it to be admissible. The jury could still disregard it if they liked after hearing all the evidence. In addition, the crime happened in Ford County. The Edwards county deputy

(Continued on page 18)

Step Back in Time

(Continued from page 17)

sheriff's promises were worthless and not likely to induce the defendant to make a false confession. In addition, the whole case did not rest on the confession. There was significant circumstantial evidence to incriminate the defendant absent the confession.

In *State v. McCarther*, 197 Kan. 279 (1966), the Court found that a confession was not voluntary which was elicited while the defendant was handcuffed, face down on the ground with a police officer on top of him pointing a gun to his head saying "I should blow this punk's brains out."

Currently, the Court has made it clear that to be admissible a confession must have been freely and voluntarily given without compulsion or duress. *State v. McVeigh*, 213 Kan. 432 (1973). The Supreme Court has stated that coercion in obtaining a confession can be both physical and mental. *State v. Jones*, 218 Kan. 720 (1976). The voluntariness of a confession is a question in the first instance for the determination of the trial court, and if there is substantial competent evidence to support the trial court's findings it will not be disturbed on appeal. *State v. Soverns*, 215 Kan. 775 (1974). The trial court's determination is to be based upon a consideration of the totality of the circumstances, and where there is genuine conflict in the evidence great reliance should be placed upon the finder of fact. *State v. Harden*, 206 Kan. 365 (1971).

Given the attention in the last few years on false confessions, more recent Kansas cases revolve around whether the defense can present psychiatric testimony concerning the likelihood that the defendant's confession is false. Should psychiatric testimony be presented to explain why the defendant may have confessed to a crime he did not commit?

In *State v. Oliver*, 280 Kan. 681 (2005) the defendant had given several very different accounts of what happened the night of the murder for which he was charged. The defense proffered that the defendant had been diagnosed with post-traumatic stress disorder and dependent personality disorder. These disorders made it highly probable that he would have lied during his interrogation by police simply to remove himself from the stressful situation.

The Court stated that it must tread very lightly when one witness is seeking to comment on the credibility of another witness. In fact, to do so is error as a matter of law. Credibility judgments are within the sole province of the jury. The truth or falsity of a confession need not be considered in determining its voluntariness. Therefore, the district judge was correct in refusing to admit the psychiatrist's testimony that the defendant's psychological conditions meant that there was a "high probability" that he lied in his confessions. In fact, the judge would have erred if he had allowed the testimony to be admitted.

However, the Court followed the majority of courts around the country in finding that a criminal defendant may be permitted to introduce expert psychological or psychiatric testimony bearing on his or her ability to respond reliably to interrogation. But, he or she must stop short of expressing the expert's judgment on the whether or not the defendant's confession in the particular case before the court is credible.

There you have it. The issue of false confessions is not a new one in Kansas. The Court has recognized for over 100 years that defendants can be subjected to enough duress to confess to a crime they did not commit. It is the trial court's responsibility to be the front line gatekeeper and do a thorough analysis of the voluntariness of the confession given the totality of the circumstances including physical and mental coercion as well as the general psychiatric condition of the defendant.

AND THE GENERAL SAYS:

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

AG OPINION NO. 2006-26
October 16, 2006

AGENCY CAN MARKET ITS SERVICES TO PERSONS IN ITS DATA BASE WITHOUT VIOLATING THE PROHIBITIONS IN THE OPEN RECORDS ACT

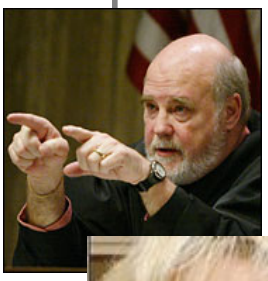
Although K.S.A. 2005 Supp. §45-230 prohibits public agencies from knowingly selling, giving or receiving, for the purpose of selling or offering for sale any property or service to persons listed therein, any list of names and addresses contained in public records, it dos not prohibit public agencies from using its own records for a purpose related to that agency's service or programs. In the case before the Attorney General, he opined that it was acceptable for the Kansas Department of Wildlife and Parks to use its licensing system data base to market other agency services (to wit: current or past license status, different available license, programs or services related to the Kansas Department of Wildlife and Parks) to the people in the data base.

LESSONS LEARNED FROM FULTON COUNTY'S COURT SECURITY CRISIS

By Judy Cramer, Court Administrator, Fulton County Superior Court, Reprinted with permission from "Court Communique" *a publication of the National Association for Court Management.*

First Lesson Learned—
Security Manuals May Not Help in a Crisis

This article is the first in a series about managing court resources in a very grave court security crisis. Just when you think previous security planning and written manuals will help during a major incident, be prepared for many transforming surprises and "aftershocks." The incident itself has ripple effects like a rock thrown into a pond. Like water, it is a very difficult thing to get your arms around or contain.



During the entire episode that occurred in our court and the days thereafter, no one ever looked in our security manual for advice. We all seemed to know that it didn't have the information we needed. Even if it would have had information pertaining to this incident, we had never practiced our own procedures. Those of us who were civilians simply relied on instinct to manage our own special "ripples and water damage."

From June to December of 2005, representatives from 14 jurisdictions and offices located in Fulton County Justice center, including the superior court, state court, magistrate court, probate court, district attorney, solicitor general, and clerks of courts, state probation, the Fulton County sheriff, county general services, and emergency management worked relentlessly to create a security operations manual. Led by the sheriff's office, county officials, and court officials, this team wrote a plan for emergency off-site courtrooms, should they be needed. Should the entire Justice Center Complex be compromised, an emergency command room was selected in a nearby courthouse where lead members of the emergency committee could congregate and make decisions. Floor leaders had been assigned to every hook and cranny. Emergency evacuation drills had been practiced. None of this careful planning was relevant when the unthinkable occurred.

On March 11, 2006, a seemingly crazed defendant went on a rampage, escaping from his jailer, killing a judge, court reporter, and sheriff's deputy, and later another member of federal law enforcement. This defendant had been on trial for six weeks on a rape case that had ended in a hung jury. He was back for a retrial, armed with six weeks of intelligence gained from his personal observations of every move from jail cell to courtroom.

Second Lesson Learned—
In the Crisis, Some Must Cry Later

Between 9:00 and 9:15 a.m. on Friday, March 11, 1006, about 16 of us in the court administrator's office, including the reception center on the 6th floor of the Fulton County Courthouse, had been at work for an hour. We were located directly beneath the chambers of Judge Rowland Barnes, separated by two floors. As several of us gathered in my office for a meeting, we heard gunshots. We ran to the window in the business office. In the next few minutes, we watched as officers, some who were armed and others who were putting on protective clothing and gun belts, ran from the building toward the parking garage outside our window. More shots and shouting were heard.

Staff began to run to my office to report that calls were coming into the front desk about a female sitting judge and her staff who had been shot, a story we later learned was not true. Then our case manager told us that a senior male judge and his staff were killed. Again, we thankfully later learned that report was not true. Finally, we were told by staff that Judge Barnes and Julie Brandau, his court reporter were dead—a report verified by eyewitnesses in the courtroom. News from rumors was that a defendant had broken free from the basement holding cell, found guns, and somehow freed other prisoners who were loose in the hallways shooting whomever they could find. There was frozen silence; then everyone began to react. Some were in shock and just sat down staring. Some were frightened. Some were grieving openly for all of their friends who had reportedly been killed.

Knowing we were in the eye of a storm, when all was still for a moment, I asked everyone who needed to cry to go into the conference room and assigned someone to stay with them. I needed to figure out who could remain calm and do the work we knew was coming. So I asked for everyone who was willing to "cry tomorrow" and remain composed s they could help as best they could. Most came forward. I was extremely proud of them. They were the ones you could always rely on, and they would be needed this day and during the next few weeks. They each wanted a job to do, and they vowed to cry later, even though they knew that at least two friends were dead.

(Continued on page 20)

(Continued from page 19)

Third Lesson Learned—
In Crisis, Not Everyone Will Be There

Our manual of operations forgot about doctor's appointments, vacations, illness, and various arrival times. Finding people, just to give and receive information, was problematic. The phones were ringing off the hook. Everyone wanted answers. I appointed three of us to call the sheriff, the chief of staff, and the court security major at regular intervals. No one had answers. Officers in the command post were dealing with a fallen deputy and giving and shouting directions.

Most of the leadership within the courthouse was unavailable—on planned vacations, family or personal errands, or caught in the traffic building up downtown, with no way to get to the courthouse. None of the original planning team was in the Judicial Center. Operating in a vacuum, I called around the courthouse to see which judges were in trial. There were two murder trials going on, so I set up an emergency plan with the two judges and we agreed to lock down the building. I sent the lock down message over email and voice mail to all superior court staff. There was no way to communicate with the other building occupants, jurors, lawyers, or civilians.

By 10:00 a.m. we knew from television and family calls that a shooter was on the loose and all law enforcement was looking for him. We knew he may be trying to find the witnesses in the rape case, so we hid them in our family division. Finally, I reached a major who was off-site. He said to make a run for it. I talked with the judges, and we refused. We asked for a sweep of all the floors. Finally, after no response, I spoke with the two judges. They suggested that all jurors, lawyers, and public go to one courtroom until a sweep was confirmed. After the jurors were secured and there was confirmation from the off-site major that a sweep had taken place, I asked staff, who were willing, to help me work the building to let everyone know it was okay to leave. Everyone took a floor or wing. Although there was a working public address system, no information was forthcoming inside the three buildings of the Justice Center. After our staff went door to door, we left the building. It was 11:20 a.m. I headed to a nearby coffee shop to over next steps with the chief judge, who had been unable to reach the courthouse.

Other Lessons Learned

In the next days, weeks, and months, we would learn how to set up a closed media Web site for all information on motions and charges against the defendant and a closed media phone number with recorded answers for all questions, how to help manage six different memorial services, how to grieve and counsel the grieving, how to begin repairing staff confidence so they could work and live in the court environment, how to really become a partnership with law enforcement by developing a triage team that learned to practice, practice, practice, how to get clout for the security committee, how to write gun policies and procedures, how to analyze and repair every security weakness in the facility—equipment or personnel—and how to develop electronic communication to include everyone.

Most importantly, we learned that coordinated security planning and response is the responsibility of the courts and law enforcement. Court staff and judge s need to help, not by arresting the perpetrator, not by wrestling with defendants, but by managing the ripple effects before (prevention) and after (response) the rock hits the water. IN addition, we can't get by with funds from grants or leftovers from some other project. These functions must be funded by federal, state and local governments.

We don't want to take the sheriff's role. We want to be included and carve out our own role. This is NACM's *[National Association of Court Management]* 11th Core Competency. Chief and administrative judges and administrators must not only know about case management, jury management, personnel, and financial management—they must be proficient in security management. Citizens expect it. Litigants expect it. They don't divide things using our bureaucratic rules. They expect that if they have a case in our court, the judges and the judges' staff believe it is a safe place, and if it isn't, they expect the judges to do something about it.

TIME STANDARDS IN DISTRICT COURTS

The Kansas Supreme Court has adopted time standards for case dispositions in the district courts of the state. Time disposition requirements for all misdemeanor cases (excluding traffic) require that a case be tried or pled within 60 days of first appearance. For traffic cases, the standard requires that a case be tried or pled within a median time of 30 days from the date of filing. The term "median" as used in these time standards means that at least 50% of the cases subject to judicial determination are tried or disposed of within the established time standards. *See*, Report of Supreme Court Standards Committee—General Principles and Guidelines for the District Courts, 2006 SC 65; last modified September 8, 2006. (http://www.kscourts.org/ctruls/2006SC65.pdf). Although municipal courts are free to adopt their own standards, a review of the Committee report may prove helpful in creation of those standards.

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.

CARROLL DOCTRINE HAS NOT BEEN OVERRULED BY STATUTE
Unpublished Opinion

Trooper stops Diggs after observing his vehicle fail to signal when making a u-turn. The trooper approached the passenger side of the vehicle. He sees the occupants appearing to put their hands underneath and in between their seats. He shined his flashlight into the passenger side of the vehicle. He claims to have observed small particles of marijuana on the passenger's shirt. He then reached in through the window, handcuffed the passenger, got him out of the vehicle and patted him down. During this encounter, the trooper observed Diggs reaching between the center console and the seat. The trooper asked Diggs to exit the vehicle. Something on his shirt fell to the ground. He eyes were bloodshot and he had a moderate odor of alcohol on his breath.

The trooper conducted a search of the vehicle and found marijuana. He was arrested for failure to signal a turn, DUI, possession of marijuana, and minor in consumption of alcohol. It was clear from the transcript that the district judge had serious questions regarding the credibility of the officer. He sustained the motion to suppress. He held that the doctrine expressed in *Carroll v. United States*, 267 U.S. 132 (1925) had been overruled by statute. The State appealed.

The *Carroll* doctrine refers to the finding that warrantless searches of automobiles are permitted when officers have probably cause to believe that evidence of a crime is present in the vehicle. This is different from a search incident to arrest, which has been codified in K.S.A. §22-2501. *"Accordingly, to the extent that the district court found that the automobile exception stated in* Carroll *was somehow overruled by the search incident to arrest statute, it misconstrued the law." See, State v. Diggs*, 144 P.3d 782 (Kan.App.) *unpublished*, October 27, 2006. The district court made no findings and conclusions in the case, so the Court of Appeals found that it was precluded from meaningful appellate review. Since the *Carroll* doctrine is critical to a determination of whether the trooper had probable cause to search the vehicle and since the decision may turn on the trooper's credibility, the Court of Appeals remanded the case to either conduct a new hearing or enter findings and conclusions based on the record of the prior hearing.

REGARDLESS WHAT THE DIRECTIONS IN THE KBI BLOOD KIT SAY, AS LONG AS THERE IS AT LEAST ONE INTACT SEAL BETWEEN THE OUTSIDE ENVIRONMENT AND THE BLOOD SAMPLE IT IS SUBSTANTIALLY COMPLIANT WITH PROTOCOL AND THEREFORE ADMISSIBLE
Unpublished Opinion

Jerry Dix was involved in a motor vehicle collision. Officer Rupert read him his implied consent warnings at the hospital. Dix consented to a blood test. The nurse drew blood using the blood test kit provided by the KBI. The blood was collected, retrieved and mailed to the KBI in compliance with the instructions in the kit with the exception of sealing the tube with tape after collection. When received by the KBI, the lab technician noted that the tube containing the blood was not sealed with tamper-resistant evidence tape. This did not prevent her from testing the blood. She stated that department policy requires that there be one intact seal between the outside environment and the sample. In this case there were three. The tube was in a Ziploc bag sealed with evidence tape, inside a cardboard container sealed with evidence tape, and finally, inside a manila envelope sealed with evidence tape.

Defendant was convicted in Salina Municipal Court of DUI. On appeal, he filed a motion to suppress the blood test results in district court. The district court granted the motion and the City of Salina appealed. In *City of Salina v. Dix*, Slip Copy, 2006 WL 3257474 (Kan. App.) unpublished, November 9, 2006, the Kansas Court of Appeals agreed with the city. It found that the district court *"erroneously disregarded evidence that the challenged blood sample had three seals between the sample and the outside world and satisfactorily identified the body fluid taken from the person whose intoxication is in question*." The Court found that there was *"no reasonable doubt the defendant's blood sample was taken and sufficiently sealed in* "substantial compliance" *with KBI laboratory protocol."*

(Continued on page 22)

Unpublished Opinions

(Continued from page 21)

EXPANSION OF LEGAL NON-CONFORMING USE

Unpublished Opinion

The Railsbacks owned a large residence in Manhattan until 1999. They were the sole occupants until Mrs. Railsback died. It was in an R-2 zoned area, which allowed for two-family dwellings. In 2001 the City amended its zoning ordinance to state that if the residence was to be used as a two-family dwelling, the owners would have to get a conditional use permit. In 2002 the Fattaeys bought the property. Soon after purchase, the Fattaeys turned the home into a two-family dwelling by completing unfinished areas, constructing walls, and installing additional wiring. In 2003 the City amended the zoning ordinance to change the zoning in the area to R-1, single family.

In 2004, the City sought a permanent injunction against the Fattaeys' use of their property as a two-family dwelling. The Fattaeys argued that theirs was a legal non-conforming use. They were, in effect, "grandfathered" under the zoning ordinance. The City argued that for them to be a legal non-conforming use they would have to show that the property was used as a two family dwelling prior to May 2001 and until present without intensifying the use. If the property was not used as a two-family dwelling until after May 2001, the owner would have needed a conditional use permit and the property must have been used as a two family dwelling under the permit until the present time without intensifying the use. The Fattaeys counter that the property was legally non-conforming regardless of whether it had been *used* as a two-family dwelling because it had always been *designed* as a two-story building.

The district court agreed in part with the City. It found that the property was a legal non-conforming use as a two family dwelling, however the Fattaeys' use of the property had been intensified or expanded such that it no longer met the zoning requirements. The court granted the injunction, ordering the Fattaeys to *"take all steps necessary to restore the Property's physical configuration to a status in conformity with all currently applicable zoning regulations."*

The Fattaeys appealed to the Kansas Court of Appeals. They argue that they did not intensify the use, they simply updated and modernized the property with no structural changes. Their work was simply "normal maintenance and incidental repair."

The Kansas Court of Appeals agreed with the district court and the city in *City of Manhattan v. Fattaey*, Slip Copy, 2006 WL 3257466 (Kan. App.), unpublished, November 9, 2006. It found that the Fattaeys had intensified or expanded their use. The injunction was properly granted. The Court did not reach the issue of whether or not the property even qualified for non-conforming use status.

American Judicature Society Applauds Defeat of South Dakota "Jail 4 Judges" Judicial Initiative

Des Moines, Iowa—November 8, 2006—Statement of Neal R. Sonnett, President, American Judicature Society

The American Judicature Society commends South Dakota citizens for their willingness to stand up for their courts by decisively defeating Amendment E, the so-called "Jail 4 Judges" initiative which would have, among other things, ended judicial immunity and subjected judges to civil suit and criminal prosecution through a radical and dangerous new "Special Grand Jury" whose decisions would be unreviewable by any state court.

As an organization dedicated to preserving independent, fair and impartial courts, the American Judicature Society opposes any political manipulation of the court system. The "Jail 4 Judges" initiative would have allowed politicians and political interests groups to threaten and attack judges for unpopular decisions, even if those decisions were clearly consistent with state and federal law. Amendment E would have degraded the integrity of South Dakota's judiciary and would have discouraged exceptional legal minds from seeking a seat on the bench for fear of unwarranted political attacks.

Amendment E posed a serious threat to judicial independence. Judges have a responsibility to adhere to the law, even if the resulting decision is politically unpopular. The founders of this country recognized the importance of a judiciary that would be independent of political pressure and therefore free to follow the law in all cases. Americans value fair and independent courts that remain above the fray of politics.

Americans deserve a high quality judiciary. Political attempts to manipulate the courts undermine the vital function they serve in a democratic government. We are heartened that South Dakota voters have overwhelmingly reaffirmed their commitment to maintaining the independence and impartiality of their judges.

President's Page

(Continued from page 1)

goes into custody summarily (talk about an inconvenience which our actions might cause), even though that lawyer is a personal friend whom we may have had dinner with recently.

We may announce our decision from the bench, acquitting the defendant, when the police officers who testified at trial are sitting on the front row, taking it as a personal affront (although the good officers who understand the legal system will understand, although be disappointed.)

We may deny certain sentencing requests, motions, and cases presented by the prosecutors, although we see them on a daily basis and consider them friends. Their offices are quite often down the hall from ours, and we share greetings every day by the coffee pot.

We may acquit the defendant, much to the chagrin of the alleged victim, who was wanting his pound of flesh.

We may grant a motion to suppress evidence, on the grounds that the evidence seized was violative of the 4th or 5th Amendment, and this ruling may be dispositive of the case. The defendant walks because there is no admissible evidence to convict the defendant.

We do these things because we must. We are not special prosecutors for the city nor are we part of the defense team.

Canon 3 of the Code of Judicial Conduct says that a judge shall perform the duties of judicial office impartially and diligently. "A judge shall not be swayed by partisan interests, public clamor, or fear of criticism." [B.(2)]. Note that it does not say make your decisions based upon popular vote of the citizenry.

We must be fair, independent, and "faithful to the law." [Canon 3, B. (2)]. As long as we do that, we should not be concerned with what others may think about us. Perform with courage and impartiality (legal competence and judicial temperament is assumed for the purpose of this article), and let the chips fall where they may. So, if in your judicial career, you have angered, upset, irritated or otherwise ruled contrary to public opinion, police officers, defendants, defense attorneys, prosecutors, victims, witnesses, or city hall, then welcome to the club. Do not feel bad. You're probably just doing your job.

SB 31 Introduced to Address *Elliott* Issues

SB 31 has been introduced in an attempt to address some of the issues that have arisen regarding municipal court subject matter jurisdiction after *State v. Elliott*, 281 Kan. 583, 133 P.3d 1253 (2006). The bill states as follows:

AN ACT concerning municipal courts; relating to jurisdiction; amending K.S.A. 12-4104 and 22-2601 and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 12-4104 is hereby amended to read as follows: 12-4104. (a) The municipal court of each city shall h~~ave jurisdiction to hear and determine cases involving violations of the ordinances of the city. Search warrants shall not issue out of municipal court~~ *not issue search warrants*.

(b) The municipal court of each city shall have jurisdiction to hear and determine cases involving violations of the ordinances of the city. Such violations may include violations of ordinances that prohibit acts prohibited by state statutes, except for sentencing provisions, in the following circumstances:

(1)(A) A violation that may be charged as a felony in the district court, due solely to an enhancement based upon the number of prior convictions. In order to have jurisdiction of such violation in municipal court, at least one of the following circumstances must be present:

(i) The prior convictions used to determine enhancement ot the felony level were without assistance of counsel and the prosecution is unable to establish that the right to counsel was knowingly and voluntarily waived;

(ii) the city prosecutor or the county or district attorney is unable to obtain certified copies of the record of conviction of the necessary number of prior convictions for the felony enhancement and the defendant has not stipulated, in writing, to the number of prior convictions necessary for the felony enhancement; or

(iii) due to any other facts or circumstances, the defendant may be sentenced for only a misdemeanor in district court.

(B) Charging of the case as an ordinance violation shall not be done to avoid the enhanced penalty.

2) (A) A violation that, due to a statutory enhancement provision, could have been charged as a felony in the district court due solely to an enhancement based upon the dollar amount of damage or loss if the county or district attorney has declined felony prosecution.

(B) Charging of the case as an ordinance violation shall not be done in an effort to avoid the enhanced penalty. The municipal court shall have jurisdiction to hear such case as an ordinance violation if a dollar amount of damage or loss exists.

Sec. 2.. K.S.A. 22-2601 is hereby amended to read as follows: 22-2601. The district court shall have exclusive jurisdiction to try all cases of felony and other criminal cases under the laws of the state of Kansas, *except that the district court shall have concurrent jurisdiction with municipal courts as provided in K.S.A. 12-4104, and amendments thereto.*

Sec. 3.. K.S.A. 12-4104 and 22-2601 are hereby repealed.

Sec. 4.. This act shall take effect and be in force from and after its publication in the statute book.

The Verdict

Winter 2007 Issue 38

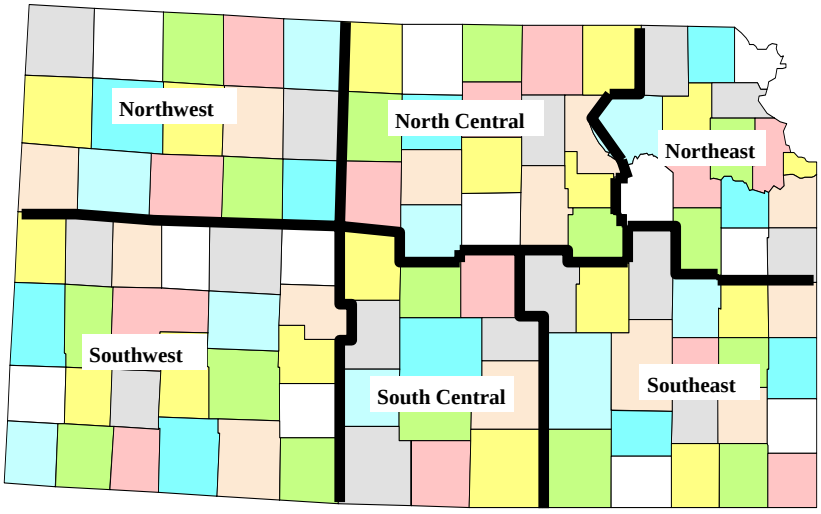
C/O Overland Park Municipal Court
12400 Foster
Overland Park, KS 66213
(913) 327-6852 ► Fax-(913) 327-5701
karen.arnold-burger@opkansas.org

All KMJA dues should be sent to:

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

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

KMJA MEMBERSHIP REGIONS



Interested in serving on the KMJA Board of Directors? At the April 2007 meeting the following positions will be up for election:

President-Elect
Secretary
Treasurer
South Central Director
Northeast Director

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

President
Randy McGrath
(785) 832-6190

BOARD OF EDITORS

THE VERDICT

Editor.....Karen Arnold-Burger (OP)
Correspondents...
.....John McLoughlin (Cimarron)
.....Bryce Abbott (Wichita)
.....Pat Caffey (Manhattan)
....William Thompson (Belleville)
.....Bob Nicholson (Paola)
.....Cathy Lucas (Sublette)

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

KMJA BOARD OF DIRECTORS

President.....Randy McGrath (Lawrence)
President-Elect.....Ken Lamoreaux (Waterville)
Secretary.....John McLaughlin (Cimarron)
Treasurer.....Kay Ross (Plainville)
Past-President.....Phil Durr (Sterling)

Directors:

Northwest District.....Dorothy Reinert(Atwood).....2009
Southeast District.....Timothy Fielder (Gerard).....2009
North Central District.....Scott Condroy (Concordia).....2008
Southwest District.....Charles Hull (Rolla).....2008
South Central District.....Anna L. Bell (Medicine Lodge).....2007
Northeast District.....Jill Michaux (Rossville).....2007

MUNICIPAL JUDGES' TESTING AND EDUCATION COMMITTEE

Tom Buffington.....Marquette
Jay Emler.....Lindsborg
Karen Arnold-Burger.....Overland Park
James Wells.....Topeka
Lee Parker.....Andale

MUNICIPAL COURT MANUAL ADVISORY COMMITTEE

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