The Verdict

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

A Step Back in Time

COWBOYS AND INDIANS ON THE GREAT PLAINS

Greenwood County Kansas, in the heart of the Flint Hills, was organized in 1862 and named after Alfred Greenwood. Greenwood was the U.S. Commissioner of Indian Affairs and had negotiated treaties on behalf of the United States with Indian tribes in the area. There was a ten mile strip in the southern portion of the county that belonged to the Osage Indian Tribe.

On April 1, 1865, William and Jacob Bledsoe were killed in Greenwood County by gunshot wounds. William Brown, John Taylor and Thomas Craig were charged with the murders. John Taylor was never apprehended. Thomas Craig was acquitted. William Brown, who was a local physician, is the subject of *State v. Brown*, 21 Kan. 38 (1878).

The Bledsoe brothers had apparently long been suspected to be horse thieves. They also had a long standing feud with Dr. William Brown, who headed up the town vigilance committee. According to the defendant's version of events this is what happened:

A few days before their deaths, the brothers and a friend, Matthews, stole a large amount of property including horses from the Osage Indians and killed several Indians. They were arrested and held at Brazil's Trading Post. The stolen property was reclaimed by the Indians and Matthews told the Indians where the bodies of their brethren had been

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Court Watch

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

PROBATION CONDITION REQUIRING PROBATIONER TO SUBMIT TO SEARCH OF HIS ROOM WAS ENFORCEABLE

Chris Uhlig was on juvenile probation. A condition of his probation required him to submit to searches *"at home, school, work or elsewhere"* as directed by his court services officer. In March 2005, Uhlig's court services officer, accompanied by an Overland Park Police Officer, randomly arrived at Uhlig's front door. They had no particular suspicion that Uhlig was in violation of his probation, it was simply a random check of a probationer's home. Uhlig answered the door and motioned for the officers to enter. They asked him to get

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SPOTLIGHT ON: WES GRIFFIN

Wes Griffin, the Presiding Judge for the city of Kansas City, Kansas was born in Liberal, but spent several years in Ashland and Goodland before settling down for his high school years in Kansas City. His father was a school superintendent and principal and they moved quite frequently until he finally settled in to Kansas City Kansas Community College. He has one brother and one sister.

After graduating from Washington High School in 1973, Wes went on to Kansas City, Kansas Community College for a year and then on to Washburn for both undergraduate and law school. He graduated in 1980. He immediately went to work as an Assistant District Attorney under Nick Tomasic in Wyandotte County and stayed there until 1989 when he took a position as an Assistant City Attorney in the Kansas City, Kansas Legal Department. He was appointed judge in 1998.

Judge Griffin has been married to Joyce, a C.P.A. and in-

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Spotlight on: Wes Griffin

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structor at Kansas City, Kansas Community College for 30 years. They have three children, two girls and a boy. Their son is the only one left a home, a junior at Piper High School.

Wes is active in the Optimist Club and an avid gardener and fisherman. He also serves on the Mayor's Task Force Against Domestic Violence.

Kansas City Municipal Court meets every day, Monday through Friday. He shares judicial duties with Judge Moe Ryan. He reports that what he likes most about his judicial duties is that you never know from day to day what type of case your are going to hear and that keeps life very interesting. On the other hand, he is continually frustrated by his role as "fine collector" and the difficulty in collecting fines from municipal court defendants.

Judge Griffin really had an interesting day about two years ago. He was about to start the afternoon docket. As he was walking through the clerk's office, he heard a man speaking in a very "animated" manner at the clerk's window. He went over to assist and told the gentleman that the clerk was only trying to help him and he needed to calm down. A few minutes later, he was walking through the hall when the man attacked him from behind and knocked him to the ground. Judge Griffin stated, *"One minute I was walking down the hall and the next thing I knew I was on the ground staring up at a man with a clinched fist."* The man ran from the building with the police in hot pursuit. He was eventually caught and prosecuted, although he has appeared in front of the judge numerous times on other cases since then.

Judge Griffin indicated that he enjoys the KMJA Conferences each year for three reasons. *"First, selfishly, in a relatively short period of time I am able to get my entire year's CLE requirement completed with really good CLE programming. Second, I always learn something from the question and answer sessions, particularly from the presentation by the motor vehicle division. Finally, talking to other judges and seeing how they do things and get ideas from others has been invaluable. I have learned from courts much smaller than ours and those larger. There are so many things that I would have never known if it weren't for the conferences."*

Court Watch

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his father, because it was their practice to get parental consent for admission into the home. Uhlig said is father was upstairs sleeping and went upstairs to get him. While they waited, the officers heard things being moved around upstairs and saw no sign of Uhlig's father. The officers then learned from Uhlig's sister that he was in his own room. The officers called for Uhlig to come back down stairs. When he did not, they went upstairs to the room. They met Uhlig on the way back down the stairs. They asked what had taken him so long and he responded that he was hiding his cigarettes (possession of cigarettes was a violation of his juvenile probation).

The officers proceeded to his room. They found ecstasy pills in his jacket on the bed. He was subsequently convicted of drug possession. He appeals on the grounds that 1) the officers had no right to search his room; and 2) any statements he made are inadmissible because he was not provided *Miranda* warnings.

In *State v. Uhlig*, ___Kan.App.2d ___ (November 3, 2007), the Kansas Court of Appeals found that on a continuum of privacy rights, prisoners have no expectation of privacy and no Fourth Amendment rights, so they can be searched anytime for any reason. Next are parolees, who have a slight expectation of privacy and can therefore be searched in the absence of reasonable suspicion, but no arbitrarily or capriciously. Probationers have a slightly higher expectation of privacy than parolees, but there is no real standard set out in the law.

In this case, the search of Uhlig's bedroom was reasonable and therefore proper. Uhlig admitted to hiding cigarettes in his room, a violation of his probation. The officers had a right to go search the room for the hidden cigarettes. However, the Court specifically stated that it was **not** holding that reasonable suspicion was required in all cases dealing with searches of probationers. Probationers only have conditional liberty.

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"This is not what could be called a close case…To say the evidence of guilt in this case was overwhelming is an understatement; it was more like a massive tsunami."

Chief Justice Kay McFarland in her dissent in *State v. Cosby*, ___Kan. ___ (November 9, 2007) in which the majority reversed and remanded a murder conviction due to prosecutorial misconduct in closing statement. There were seven eyewitnesses to the murder.

Judicial Ethics Opinions

JE-157
October 15, 2007

The judge has been asked to become a member of the "Offender Registration Working Group," hereinafter the "group," and he asks whether he can accept this invitation.

Yes.

The group's most recently issued mission statement provides as follows: "The mission of the Offender Registration Working Group is to bring interested entities and disciplines together in an open forum to address and improve the management of the Registered Offender Program in Kansas by reviewing and making recommendations related to legislation, enforcement and prosecution issues, the supervision of offenders required to register under the Kansas Offender Registration Act, and the overall improvement of administration of justice in this state."

This group is comprised of representatives of various agencies and offices in this state who have a role in Offender Registration laws (primarily K.S.A. §22-4901, et seq.). These participating agencies include the Kansas Bureau of Investigation, the Department of Corrections, various sheriff's offices, the Juvenile Justice Authority, the Attorney General's Office, various district attorney's offices, a public defender, and a retired Supreme Court Justice.

Canon 4C(3) provides "A judge may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice. A judge may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund-raising activities. A judge may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice. (2006 Kan.Ct.R.Annot. 581).

It is very clear that the work of this group consists entirely of matters devoted to the improvement of the law, the legal system, and the administration of justice. The judge may, therefore, accept the invitation and become a member of the group. Also, as a member, the judge may assist the group in raising funds and may participate in their management and investment, but should not personally participate in fund-raising activities.

JE-158
November 29, 2007

A group has been organized to preserve the nonpartisan method for the selection of district judges in the district in which the judge serves. This group was formed because of local efforts to change to the partisan method. We are informed that the purpose of the group is primarily educational and we have been provided with a copy of a brochure the group has prepared. This brochure includes both facts and opinions concerning the issue and it also includes a request for a financial contribution that says:

> *"We need your help to educate the public on the importance of preserving the merit selection of judge and to keep spe4cial interest and partisan politics out of our courts. Please send your check today or visit our website, www.justicenotforsale.org and contribute by credit card."*

The question is whether the judges and the retired judges in the district may participate in the educational efforts that would include speaking at functions during which the brochure will be distributed.

No.

Canon 4C(3) permits a judge to serve as a member of an organization devoted to the improvement of the law, the legal system or the administration of justice but is also provides that a judge should not personally participate in public fund raising activities. (2006 Kan. Ct. R. Annot. 580).

We are of the opinion that judges currently in office and retired judges who accept assignments would be in violation of Canon 4C(3) by speaking at functions during which these brochures will be distributed.

Retired Judges who do not accept assignments would not be in violation of Canon 4C(3) by speaking at functions during which these brochures will be distributed.

JE-159
November 29, 2007

The judge has received a request from the university the judge attended for permission to use a picture of the judge in a newspaper advertisement for the university.

The judge has included a copy of an advertisement previously published by this newspaper which shows an animated picture of an individual who is identified as a graduate of the university who now holds a substantial position with a national company and the comment:

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A Step Back in Time

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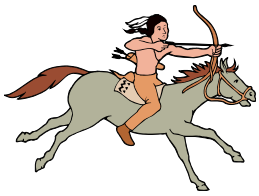
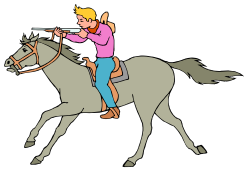
thrown into the river. The Indians and some townsfolk went to the locations described and found the bodies of the Indians. The Bledsoes admitted their guilt as well. The Indians became very hostile, and *"manifested a disposition to wreak vengeance upon the Bledsoes."* None of the story up to this point was in dispute.



To prevent this, the Bledsoes were moved from place to place in hiding. Brown was one of the people that was guarding the Bledsoes and as he attempted to move them to a safer place, the Indians attacked and killed the Bledsoes. Allen Thomson testified that he was one of the guards as well and that the Bledsoes were killed by a party of fifteen or twenty people, all or most of which were Indians.

The State had a slightly different take on the facts.



Mr. Cottingham, the first witness for the State, confirmed that the Bledsoes were under arrest at the trading post. He testified that several hundred Indians had surrounded the post. He heard the defendant, William Brown, enter into a contract with the Indians whereby he would pay them $50 and cattle if they would kill the Bledsoes. Once Matthews turned States evidence and told where the bodies had been dumped, the Bledsoes were certain they would be killed. They requested that Cottingham's father, who was a preacher, pray for them. He did this in front of all the Indians and within their ear shot and the Indians seemed pacified and *"manifested no further disposition to harm the Bledsoes."* He further testified that the Indians said, *"If the whites want such men killed, they might kill them themselves; they would not kill innocent men."* His testimony implied that although the tribe had initially agreed to help Brown kill the Bledsoes, they reneged on the deal.

Mr. Pinney testified that he was at Dr. Brown's house at the time the Bledsoes were killed. Mr. Redmond, who lived 4 miles away, came to the house that evening and "called the defendant out" and told him he wanted him to go see his (Redmond's) sick child. The defendant ran into the house, seemingly excited, put on his hat and coat and left without any medicine. When his wife called it to his attention that he had forgotten the medicine, Dr. Brown replied that that he would not need it. Redmond and Brown road off together. About an hour later, Pinney heard twelve shots in the direction of where the bodies of the Bledsoes were found the next morning. Brown came into the house about an hour thereafter and stated that the Indians had attacked and killed the Bledsoes while he and his group were transporting them from the Baxter's house (Jacob Bledsoe's in-laws). Pinney testified that Brown *"did not even carry water to the wounded and dying men."*

Brown claimed that he was fearful that the Indians would return to scalp the Bledoes and kill him in the process if he went out and rendered aid. He testified that he thought it was inevitable they would be dead in a very short period of time anyway. Nothing would be gained by taking them water, he argued.

Mrs. Loveland (the then-wife of Jacob Bledsoe) and her mother Mrs. Baxter (Jacob Bledsoe's mother-in-law) testified that Jacob Bledsoe (who they found alive but barely hanging on the next morning) gave a dying declaration charging that the defendant, Dr. William Brown, participated in his killing.

Dr. Brown was not charged until 1869 (four years after the murder), but the charges were dropped following preliminary hearing. Eight years later a new county attorney indicted Brown for murder. Following a trial in May 1878, Brown was convicted of first degree murder and the judge imposed the death sentence.

An editorial in the *Eureka Herald* following the verdict read as follows:

"The conviction of Brown had done more to disorganize the vigilante committee than anything that has ever occurred in this county. Justice has not yet completed the score against the bloody deeds of that band of outlaws known as the vigilance committee that went about killing everyone who they thought needed killing. Brown as not the only one composing that band, and it is not without the range of possibility that others of the gang may yet find themselves in an attitude similar to that of Brown. At least we would suggest a little more moderation and a little less boasting on the part of the members of that committee. We have no privileged classes in this country, and all must be held alike amenable to the law."

Brown appealed to the Kansas Supreme Court.

In *State v. Brown*, 21 Kan. 38 (1878), Brown's conviction was reversed due to the fact that the indictment was not sufficient in indicting Brown for murder in the first degree, only in the second degree. The original indictment did not charge that the killing was done by means of poison, or by lying in wait, or in the perpetration of or attempt to perpetrate any felony; nor did it charge that the killing was done deliberately or premeditated.

By May 1879 when the case was re-tried, a new county attorney had taken office. The trial ended in a hung jury. In May 1880, after being confronted with petitions from the citizenry to end the whole affair due to the cost involved in another trial, the prosecutor dismissed the charges. After 2 years and 6 months in jail, Dr. Brown was a free man.

Court Watch

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As to *Miranda* warnings, the Court found that Uhlig was not in custody. The officers were in his home consensually. Although he admitted a probation violation (hiding cigarettes), he did not admit to a crime. He was not threatened or coerced. No weapons were drawn, no handcuffs used. He was never told he was under arrest. He was not in custody.

PROSECUTOR CANNOT DILUTE PLEA AGREEMENT BY PRESENTING CONTRARY RECOMMENDATIONS FROM COMMUNITY CORRECTIONS OFFICER

Michael Chetwood agreed to plead guilty to a felony committed while he was on probation for another felony. In return, the State agreed to recommend probation to a residential community corrections program on both the old and the new felony. At sentencing, the prosecutor made the requisite recommendation. However, he then introduced the community corrections officer who recommended that Chetwood be denied probation and sentenced to prison. The Court denied probation in the new case, revoked probation in the old case and sent the defendant to prison.

In *State v. Chetwood*, ___Kan.App.2d ___(November 2, 2007), the Court of Appeals found that this amounted to a violation of the terms of the plea agreement. Violation of a plea agreement implicates a defendant's due process rights. The Court cited cases from several other jurisdictions which held that plea agreements bind only the prosecutor and probation officer recommendations as part of a pre-sentence investigation are separate. Others have found that a prosecutor's agreement binds all other officers of the state. The Court sided with the latter. It found the prosecutor had violated the plea agreement, reversed the revocation of the defendant's probation, vacated the sentence and remanded the case for rehearing before another judge. The Court pointed out that the Court is not bound by any plea agreement, however in this case the prosecution could not recommend one thing and then have the force of those statements diluted by putting on testimony of the community corrections officer to recommend the opposite.

IF A STATEMENT IS NOT OFFERED FOR THE TRUTH OF THE MATTER ASSERTED, IT IS NOT HEARSAY AND *CRAWFORD* HAS NO APPLICATION

Agreeing with the result in *State v. Araujo*, 36 Kan.App.2d 747 (2006), the Kansas Supreme Court found that if the statements made to a 911 dispatcher are not introduced for the truth of the matter asserted, but merely to show that the officer took certain actions based on the information, then it doesn't matter if the statement was "testimonial" or "non-testimonial" hearsay pursuant to *Crawford v. Washington*, 541 U.S. 36 (2006) because the evidence isn't hearsay at all.

ONCE PROBATION PERIOD HAS LAPSED, PROSECUTION CANNOT USE INDIRECT CONTEMPT TO COLLECT RESTITUTION STILL DUE

In *State v. Vasquez*, ___Kan.App.2d ___(November 21, 2007), the Court of Appeals was faced with a situation in which a defendant owed aver $24,000 in restitution. His probation ended May 15, 2004. Although he was current on all payments, he still had not paid the restitution amount in full. Sometime after May 15, a probation revocation motion was filed. Eventually, the district court found that it had no jurisdiction over the defendant after May 15, therefore their was no jurisdiction to hear the motion. In July 2005, the prosecution filed a motion for a finding of indirect contempt of court, stating that Vasquez still owed $23,000 in restitution.

The Court of Appeals held that "*Once an individual completed his or her period of incarceration or probation, the trial court no longer has jurisdiction in the criminal case over any unpaid restitution. Collection of unpaid restitution must then be pursued in a civil action."* Therefore, the Court had no jurisdiction to hear the indirect contempt motion either.

Editor's Note: *It is unclear what impact this would have on unpaid fines owing as opposed to restitution, since payment of fines is often also a condition of probation. In addition, municipal courts have the benefit of K.S.A. §12-4510 which states that failure to pay any* ***fine*** *due in a municipal court may result in a finding of contempt of court. There is no similar district court provision. K.S.A. §8-2110 also makes failure to comply with a traffic citation a separate misdemeanor offense. See also, STO §201.1*

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All dues should be sent to the following address:

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If you have any questions, you can reach her at :

(785) 434-2018

Court Watch

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NO FOURTH AMENDMENT VIOLATION WHEN DNA EVIDENCE OBTAINED BY SEARCH WARRANT IN ONE CASE IS COMPARED TO DNA EVIDENCE RECOVERED FROM UNSOLVED CRIMES

In 1998 Vincent Scott was served with a search warrant for his DNA as part of an investigation regarding a gun shop burglary. The DNA matched, but the forensic chemist also compared Scott's DNA sample with DNA profiles from other samples recovered from unsolved crimes. It matched DNA recovered from a 1996 unsolved rape case. He was charged and ultimately convicted of both crimes. He lost his appeals. However, he filed a habeas corpus action alleging ineffective assistance of counsel for failure to raise, on appeal, the violation of his Fourth Amendment rights by use of the blood sample taken by search warrant in one case, to connect him to an unsolved case. This was a matter of first impression for the Kansas appellate courts.

In *Vincent v. Werholtz*, ___Kan.App.2d ___ (November 21, 2007), the Court of Appeals followed the other courts in the country that have addressed the issue and held that once law enforcement lawfully obtains an individual's blood sample and DNA profile through a valid search warrant, the evidence may be used in the investigation of other crimes for identification purposes. A defendant does not retain any privacy interest in the blood sample and DNA profile lawfully procured. Therefore, his attorney was not ineffective for failure to raise the issue.

FACT THAT DEFENDANT HAS SMOKED MARIJUANA IN THE PAST WAS NOT RELEVANT TO PROVE THAT HE POSSESSED MARIJUANA IN THIS CASE

Charles Boggs was the passenger in a car stopped for suspicion of drunk driving. A search of the car revealed a pipe with marijuana residue on the floorboard under the passenger seat. Boggs denied it was his. A search of Boggs recovered no evidence of illegal drugs. He was, however, arrested for possession of marijuana and possession of drug paraphernalia. At all stages of the investigation and proceeding Boggs denied the pipe and marijuana was his. The police officer asked Boggs when he had last smoked marijuana and he stated "about a month ago." The issue in *State v. Boggs*, ___Kan. App.2d ___ (November 21, 2007), was whether or not that statement was properly introduced at trial.

The Court found that it was not. Generally, evidence that a person committed a crime on a prior occasion, is inadmissible to prove that he had disposition to commit crime and therefore it could be inferred that he committed this crime. *See*, K.S.A. §60-455. This is often referred to as evidence of "prior bad acts." However, such evidence is admissible when 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 held that Boggs statement that he had smoked marijuana in the past was not sufficiently similar to the charge of possessing marijuana and drug paraphernalia. Therefore it was not "relevant to prove some material fact." Furthermore, the trial court admitted it on the basis that it was relevant to show "intent." However, the Court stated that when a defendant completely denies that any of the charged conduct took place, the defendant's intent is not in issue and evidence may not be admitted to prove it.

"Merely proving that a person has committed a crime separate from the one charged is prejudicial by its very nature. Moreover, it does not logically follow that because a person previously smoked marijuana, the person's later proximity to an area where marijuana is located is for the purpose of possessing the marijuana The fallacy in this form of nondeductive reasoning is termed "hasty generalization." Conway & Munson, the Elements of Reasoning, 138 (1990). Thus, it would not be permissible to infer from a prior act of smoking marijuana that Boggs intended to possess marijuana. Such an inference is too tenuous. Because the jury might have given the prior criminal act of smoking marijuana more weight than it should receive, we conclude the admission of the prior crime evidence unduly prejudiced Boggs. "

SEARCH INCIDENT TO ARREST CAN INCLUDE A SEARCH FOR EVIDENCE OF ANY CRIME

In 2006 the Kansas legislature amended K.S.A. 22-2501(c) as follows:

"When a lawful arrest is effected a law enforcement officer may reasonably search the person arrest and the area with such person's immediate presence for the purpose of
(a) Protecting the officer from attack;
(b) Preventing the person from escaping; or
*(c) Discovering the fruits, instrumentalities, or evidence of the **a** crime."*

The change of this one word was the issue in *State v. Henning*, ___Kan.App.2d ___(November 30, 2007). Does "a" crime mean "any" crime or only "an identified crime for which the officer has probable cause to believe occurred." The Court held that "a" crime means "any" crime and further held that the statutory change was constitutional. The case contains a wonderful in-depth analysis of the case law in this area and the legislative history of the statute.

THE FUGITIVE DISENTITLEMENT DOCTRINE

Steven Raiburn was found guilty of possession of marijuana. While his appeal was pending, he absconded from community corrections and has not been heard from since. In *State*

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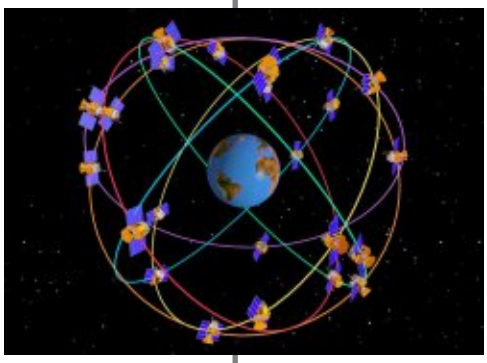
Teen's Ticket Hinges on GPS v. Radar

The Associated Press
By Lisa Leff, October 25, 2007

WINDSOR, Calif. (AP) — Given the option of contesting a traffic ticket, most motorists — 19 out of 20 by some estimates — would rather pay up than pit their word against a police officer's in court.

A retired sheriff's deputy nevertheless hopes to beat the long odds of the law by setting the performance of a police officer's radar gun against the accuracy of the GPS tracking device he installed in his teenage stepson's car.

The retired deputy, Roger Rude, readily admits his 17-year-old stepson, Shaun Malone, enjoys putting the pedal to the metal. That's why he and Shaun's mother insisted on putting a global positioning system that monitors the location and speed of the boy's Toyota Celica.



Shaun complained bitterly about his electronic chaperone until it became his new best friend on July 4, when he was pulled over and cited for going 62 mph in a 45 mph zone.

Rude encouraged him to fight the ticket after the log he downloaded using software provided by the GPS unit's Colorado-based supplier showed Shaun was going the speed limit within 100 feet of where a Petaluma officer clocked him speeding.

"I'm not trying to get a guilty kid off," Rude said. "I've always had faith in our justice system. I would like to see the truth prevail and I would like Shaun to see that the system works."

Though traffic courts do not routinely accept GPS readouts as evidence of a vehicle's speed — and many GPS receivers aren't capable of keeping records anyway — some tech-savvy drivers around the world slowly are starting to use the technology to challenge moving violations, according to anecdotal accounts from defense lawyers and law enforcement officials.

This summer, for instance, an Australian farmer became a hero to speeders everywhere when he got a ticket dismissed after presenting police with data from his tracking device.

While winning a case this way is far from a sure thing, GPS-generated evidence could at least inject an element of doubt into typically one-sided proceedings, said Jim Baxter, president of the National Motorists Association.

A Sonoma County traffic commissioner is expected to rule within the next two weeks whether to dismiss Shaun's ticket based on Rude's written argument that the motorcycle officer's radar gun was either improperly calibrated or thrown off by another speeding car.

"Radar is a pretty good tool, but it's not an infallible tool," said Rude, who spent 31 years in law enforcement. "With the GPS tracker, there is no doubt about it. There is no human interference."

Rude plans to offer scientific data and experts if his challenge doesn't succeed right away.

Petaluma police Lt. John Edwards said he could not discuss Shaun's case but disputed Rude's contention that GPS is more accurate than a speed gun.

"GPS works on satellite signals, so you have a delay of some type," Edwards said. "Is it a couple-second delay? A 30-second delay? Because in that time people can speed up, slow down."

The device in Shaun's car, originally designed for trucking companies, rental car agencies and other businesses with fleets, sends a signal every 30 seconds that records his whereabouts and travel speed.

His parents signed up to be automatically notified by e-mail whenever he exceeded 70 mph, and the one time he did he lost his driving privileges for 10 days.

Rude said he is talking about the ticket — Shaun has tried to stay out of it — to encourage other parents to keep tabs on their teenage drivers using GPS. He said he has told too many parents their child was killed in a wreck.

David W. Brown, a Monterey lawyer and author of "Fight Your Ticket in California," said attacking the reliability of radar guns does not usually get speeders very far, especially if they are unwilling to devote extra time and money to hiring legal experts.

Still, among people who do challenge tickets, the proportion who triumph is relatively large, he said. Their technique? Betting the officer who cited them will be unable to make it to court.

"Statistically, when people do prevail, that is the most common method," he said.

Court Watch

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v. Raiburn, ___Kan.App.2d ___(November 30, 3007), the Kansas Court of Appeals held that where the appellant has absconded, an appellate court will dismiss the appeal. This is commonly referred to as the "fugitive disentitlement doctrine."

"It is obvious in this case that even if we should grant relief to Raiburn assuming there is some basis to remand the matter for anew trial, his absence would prevent that new trial from occurring. A criminal case pending for many more years in district court because the defendant has absconded is no example of judicial economy."

___

TO CONDUCT AN INVENTORY SEARCH, POLICE MUST HAVE A POLICY REGARDING SUCH SEARCHES

Reginald Warren was stopped for speeding. He had a suspended driver's license, no proof of insurance and improper registration. Since he could not drive the car away and it was in a heavily trafficked area, police impounded the car, but did not arrest Warren. Before leaving the scene, he asked to retrieve some items from the car. Unsure of his safety, the officer searched the car first. He searched extensively throughout the interior and trunk. He opened a day planner and noticed that it belonged to someone other than Warren. He then started searching more thoroughly and found stereo equipment in the back seat. This information eventually lead to a warrant from a neighboring city to search the car. Warren was ultimately convicted of burglary, theft and criminal damage to property.

In *State v. Warren*, ___Kan.App.2d ___(November 30, 2007) the Kansas Court of Appeals found, with minimal explanation, that while the law lets the officer search for weapons for officer protection, in this case the officer's search exceeded the scope of the stop and the evidence obtained must be suppressed and Warren must be given a new trial. The more interesting twist however was the Court finding that the "inevitable discovery doctrine" did not come into play because, surprisingly, the Roeland Park Police Department had no policy about inventorying impounded vehicles.

BATTERY NOT LESSER INCLUDED OF CHILD ABUSE

In *State v. Alderete*, ___Kan.___(December 7, 2007), the Kansas Supreme Court held that since neither "physical contact" nor the "rude, insulting, or angry manner" element are required for a child abuse conviction (starvation, lock-up, or parental ostracism, to name a few, are alternative methodologies), battery (both simple and aggravated) is not a lesser included offense of child abuse. All cases that hold to the contrary were expressly overruled.

STATEMENTS OF ONE EMOTIONAL BYSTANDER TO ANOTHER, NOT TESTIMONIAL

Statements made by an unidentified emotional bystander to another bystander within minutes of a shooting, are not testimonial under *Crawford v. Washington*, 541 U.S. 36 (2004), and *Davis v. Washington*, 547 U.S. ___(2006), because they were not made under circumstances which would lead an objective witness to reasonably believe that the statements would be available for use at a later trial. Although the statement may still be hearsay (although it probably falls under the excited utterance exception as to admissibility) it is not subject to the requirement that the unavailable witness have been subject to cross examination prior to its admission. *State v. Brown*, ___Kan. ___ (December 7, 2009).

DEFICIENT SAMPLE ADMISSIBLE IN PROSECUTION UNDER K.S.A. §8-1567(a)(3); NO NEED TO ELECT BETWEEN "OPERATE" AND "ATTEMPT TO OPERATE" IN DUI PROSECUTION; VENUE MAY BE ESTABLISHED BY ANY COMPETENT EVIDENCE

In *State v. Stevens*, ___Kan. ___(December 7, 2007) the Supreme Court upheld the decision by the Court of Appeals in *State v. Stevens*, 36 Kan. App.2d 323 (2006) (*See*, Verdict, Fall 2006, pg. 16), that "other competent evidence" such as a deficient breath sample are admissible in a prosecution for operating a motor vehicle under the influence of alcohol to the degree that the driver could not safely operate the vehicle. K.S.A. §8-1567(a)(3). It quoted, with approval, the Kansas Court of Appeals, *"A **deficient** sample breath test, while not conclusive evidence that an individual was committing the crime of driving under the influence of alcohol, can be used in conjunction with a variety of circumstances to establish a DUI violation under K.S.A. 2005 Supp. 8-1567(a)(3). 36 Kan. App.2d at 329-330."*

In addition, the Court held that neither the prosecution, the judge, nor the jury are required to elect between "operating under the influence of alcohol" or "attempting to operate under the influence of alcohol" when the complaint is charged in the alternative, as long as there is sufficient evidence to support both means of committing the crime.

Finally, the defense argued that the prosecution had not asked whether or not the events occurred in "Crawford County, Kansas" therefore, therefore jurisdiction had not been established to hear the case. The Court found that jurisdiction did not need to be established by a specific question and answer that the offense occurred in a particular county, rather it may be established by any competent evidence. The officer testified that he was employed by the Pittsburg Police Department, that he was dispatched to and went to 118 West Madison for a criminal trespass complaint. He arrived within minutes and after investigation of the defendant attempting to operate the vehicle at

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that location, transported the defendant to the Pittsburg police station for testing. The Court found that this evidence was sufficient for a reasonable fact finder to conclude that the offense occurred in Crawford County.

FOR INVOLUNTARY MANSLAUGHTER CONVICTION, MUST PROVE THAT THAT DEFENDANT'S PERFORMANCE OF A LAWFUL ACT IN AN UNLAWFUL MANNER WAS THE PROXIMATE CAUSE OF THE VICTIM'S DEATH

Billy Scott was the operator of a bar called "The Point." On the evening of her death, Juanita Goodpasture was one of his patrons. Apparently, Scott made and served a very potent drink to Juanita called "The Stoplight." There appears there was some sort of wager or refund offered if Juanita could refrain from using the bathroom and remain upright for 30 minutes after "The Stoplight" slid down her throat. There was conflicting evidence regarding how much she had to drink before "The Stoplight." She won the wager, however on the way home she passed out in the front yard of her house. Her mother and a friend left her there and went back to the bar until closing time. They returned to her house and drug her into her living room, where they again left her alone while they went somewhere else to watch movies. The next day, she was dead from acute alcohol poisoning.

Billy Scott was charged with and convicted of involuntary manslaughter, specifically, K.S.A. 2004 Supp. §21-3404(C) which defines involuntary manslaughter as "the unintentional killing of a human being committed…during the commission of a lawful act in an unlawful manner." The State based its case on the premise that he committed a lawful act (serving alcohol) in an unlawful manner (too much alcohol to an intoxicated person) resulting in Juanita's unintentional death.

In *State v. Scott*, ___Kan. ___(December 7, 2007) the Kansas Supreme Court reversed the defendant's conviction and found that the State must prove that the defendant's behavior was the proximate cause of the victim's death. The defendant argued that Juanita caused her own death by drinking voluntarily to excess or that her death was attributable to a combination of voluntary drinking and her mother's neglect. He also argued that it is illogical to subject him to criminal liability under circumstances that would not subject him to civil liability. Although the Court stated, "These arguments to not convince us," it found that the evidence of proximate causation was insufficient as a matter of law. It found that although the State had put on evidence of the potency of "The Stoplight," it did not prove that it contained poisonous ingredients. Neither the examining physician nor any other

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Judicial Ethics Opinions

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> *"My education experience at (the university) prepared me to keep focused on my goals and to keep a positive attitude towards life and my career."*

The judge states that the advertisement is a copy of how the picture of the judge would be used. We anticipate that in addition to the picture the judge's name would e utilized along with the judicial position the judge now holds.

This issue is covered by Canon 2B which provides in pertinent part that: "A judge shall not lend the prestige of judicial office to advance the private interests of the judge or others;" (2006 Kan. Ct. R. Annot. 570).

We are of the opinion that an affirmative response to the universities request would constitute the lending of the prestige of judicial office to advance the private interests of another and therefore a violation of Canon 2B.

State, DUI Victim Center Plan Court Monitoring Program

BY BECCY TANNER
The Wichita Eagle, December 5, 2007

A Wichita-based DUI victims' group has received enough funding to make Kansans think twice about driving drunk or "buzzed."

The Kansas Department of Transportation announced Tuesday it is joining with the DUI Victim Center of Kansas Inc. It will spend $75,000 a year for three years to help the center develop statewide projects that monitor courts and make Kansans more aware of DUI offenders.

The grant money will be used to recruit and train volunteers to attend driver's license revocation administration hearings in Wichita. The group intends to publish the offenders' names and create public awareness.

Additional funding will go toward developing Court Watch, a project that started in Wichita in October. Volunteers will attend felony DUI hearings and trials, then post sentencing outcomes and other information on the agency's Web site, http://duivictimcenter.com.

Sedgwick County reported 612 alcohol-related crashes in 2006 and Wichita reported 488 alcohol-related crashes -- more than any other city or county in Kansas, according to the Regional Prevention Center.

Dave Corp, law enforcement liaison for KDOT, said the program is expected to make streets and highways safer.

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witness was able to testify that "The Stoplight" in particular had a lethal role.

DISCUSSION OF NECESSITY FOR *MIRANDA* WARNINGS

Police received a dispatch from the owner of a mobile home that there was a suspicious man wearing blue jeans, a black coat, and a black stocking cap "lurking along the fence at the edge of the caller's property" near a storage shed which contained personal property. When police arrived they found the defendant, Anthony Bordeaux, hiding in the open garden shed. They ordered him out at gunpoint and he refused several times before complying. They patted him down for weapons. He was handcuffed. One officer grabbed a black coat from inside the shed and asked Bordeaux whether it was his coat. He said it was. The coat contained drugs. The issue in *State v. Bordeaux*, ___Kan.App.2d ___(December 7, 2007) was whether or not the defendant's statement should be suppressed because it was elicited without the benefit of *Miranda* warnings.

In a 2-1 decision, with a dissent filed, the Court held that Bordeaux should have been given Miranda warnings before he was asked if the coat was his, therefore his statement must be suppressed. The Court found that when they placed the handcuffs on him, the police had Bordeaux in custody. The Court did go on to say that even if he hadn't been handcuffed yet when the question was asked, he was still in custody due to the use of guns to force him to step out of the shed. So, the first prong of the Miranda custodial interrogation test was met.

It then turned to whether or not the question "Is this your coat?" constituted "interrogation" for purposes of *Miranda*. The Court found that since the question was meant to tie Bordeaux to the person described by the caller as wearing a black coat, it was interrogation. The dissent argued that the significance of the question asked wasn't even apparent until drugs were later found in the coat. When the police confronted him they had no probable cause to believe any crime had been committed. The question about the coat, the dissent urges, was simply a general on-the-scene question asked during the fact-finding process and he would have allowed it.

COSTS ASSOCIATED WITH GUARDING IN-CUSTODY DEFENDANT AT HOSPITAL ARE NOT REIMBURSABLE "MEDICAL COSTS OR EXPENSES"

While in custody awaiting sentencing, the defendant swallowed one or two razor blades and was transported from the jail to the hospital. Deputies accompanied him to the hospital and guarded him throughout his stay, incurring overtime salary and lodging expenses. As part of his restitution order, the defendant was ordered to pay $21,319.69 in medical expenses, $1,336.37 for officer overtime expenses, and $296.37 for the officer's lodging expenses.

K.S.A. 2006 Supp. §21-4603d(a)(8) permits the court to order the defendant to "repay the amount of any medical costs and expenses incurred by any law enforcement agency or county." The State does not have to prove causation between the defendant's crime and the medical expenses incurred. Therefore, the $21,319.69 could clearly be made a part of any restitution order.

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IMMUNITY OF POLICE WHEN VIOLATING TRAFFIC RULES

Amy's husband brought a wrongful death action against he city of Wichita, the chief of police and the police officers involved. The district court granted summary judgment to the defendants on the grounds that the officers did not owe a duty of care to Amy. Robbins appealed to the Court of Appeals and then sought transfer to the Kansas Supreme Court, which was granted.

The core of this case revolves around the interpretation of K.S.A. §8-1506, which generally exempts authorized emergency vehicles from traffic laws when they are involved in an emergency situation. It states:

> *(a) the driver of an authorized emergency vehicle, when responding to an emergency call or when in the pursuit of an actual or suspected violator of the law, or when responding to but not upon returning from a fire alarm, may exercise the privileges set forth in this section, but subject to the conditions herein stated.*
>
> *(b) The driver of an authorized emergency vehicle may:*
>
> *(1) Park or stand, irrespective of the provisions of this article;*
> *(2) Proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;*
> *(3) Exceed the maximum speed limits so long as such driver does not endanger life or property;*
> *(4) Disregard regulations governing direction of movement or turning in specified directions; and*
> *(5) Proceed through toll booths o roads or bridges without stopping for payment of tolls, but only after slowing down as may be necessary for safe operation and the picking up or returning of toll cards.*
>
> *(c) The exemptions herein granted to an authorized emergency vehicle shall apply only when such vehicle is making use of an audible signal meeting the requirements of K.S.A. §8-1738 and visual signals meeting the requirements of K.S.A. §8-1720, except that an authorized emergency vehicle operated as a police vehicle need not be equipped with or display a red light visible from the front of the vehicle.*
>
> *(d) The foregoing provisions shall not relieve the driver of an authorized emergency vehicle from the **duty to drive with due regard for the safety of all persons**, nor shall such provisions protect the driver from the consequences of reckless disregard for the safety of others." (Emphasis added).*

The highlighted portion of K.S.A. §8-1506(d) is at the heart of *Robbins v. City of Wichita, et al*, ___Kan. ___(December 14, 2007). *See also*, STO §10.

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To establish a wrongful death claim based on negligence, litigants are required to prove that there was a duty of care, the duty was breached, injury was sustained, and a causal connection between the breach of the duty and the injury suffered. In *Thornton v. Shore*, 233 Kan. 737 (1983) the Court had held that the *"duty to drive with due regard for safety"* language of K.S.A. §8-1506(d) applies only to the police officer's physical operation of his own vehicle and not the decision to chase a law violator. The Court emphasized that the *"officer is not the insurer of the fleeing law violator."* The Court conducts an extensive analysis of *Thornton* and cases pro and con from other jurisdictions. The Court concludes that, as the plaintiff argues, the statute does include the decision to pursue or not to pursue as part of the duty of care to the safety of all persons. To the extent that *Thorton* says otherwise, the Court overrules *Thornton*.

Therefore, when analyzing whether the driver of an emergency vehicle exercised due regard for the safety of all persons, the Court will look not only at the driver's operation of the emergency vehicle, but the decision. given all the circumstances, as to whether or not to pursue a vehicle or continue a pursuit.

However, it goes on to find that the standard of care is more than mere negligence. "Reckless disregard" is held to be the standard. The Court adopts the definition of "reckless" that appears in the PIK instruction for reckless driving, to wit: "driving under circumstances that show a realization of the imminence of danger to another person or the property of another where there is a conscious and unjustifiable disregard of that danger." On a continuum, the Court notes that reckless conduct is less than intentional conduct but more than negligent or careless conduct.

The Court went on to find that the evidence presented did not rise to the level of reckless disregard, therefore the defendant's summary judgment motion was properly granted, although for different reasons than stated by the district court. The Kansas Supreme Court found that there was in fact a duty owed to Amy Robbins, but that in viewing the conduct in light of the reckless disregard standard, the duty had not been breached.

DISTRICT COURT DIVERSION AGREEMENTS MUST CONTAIN A WAIVER OF RIGHT TO PRELIMINARY EXAMINATION OR THEY ARE INVALID

Nathan Moses was placed on diversion by the district attorney's office for forgery misdemeanor possession of marijuana. His diversion agreement indicated that he was **waiving** all rights to a speedy trial and all rights to a trial by jury. He also **acknowledged** in the agreement his right to "a prompt full and complete evidentiary hearing and trial in this matter."

The Court found that Moses violated the terms of his diversion agreement, tried him on the stipulated facts and convicted him on of the charges. He appealed, arguing that the diversion agreement was unenforceable due to its failure to comply with the provisions of K.S.A. §22-2909(a).

K.S.A. §22-2909(a), which applies to district court diversion agreements, states that the *"agreement shall include specifically the waiver of all rights under the law or the constitution of Kansas or of the United States to a speedy arraignment, preliminary examinations and hearings, and a speedy trial."*

In *State v. Moses*, ___Kan.App.2d___(December 21, 2007), the Court of Appeals held that the language in the statute was mandatory. Since it "specifically" requires a waiver of the right to preliminary hearing, simply acknowledging the right to an evidentiary hearing did not suffice and the agreement was therefore invalid and unenforceable as contrary to the statute. The Court reversed his convictions and remanded the case to the district court so that Moses may be placed in the same position he would have been absent the diversion agreement (a full evidentiary preliminary hearing and trial).

Editor's note: *Albeit this did involve a felony, the statutory language is interesting in light of the fact that there is no statutory right to a preliminary hearing in the case of a misdemeanor. Does the decision require that if the diversion is only for a misdemeanor charge, the defendant must still specifically waive a right to a preliminary examination (a right he or she doesn't have to begin with)? It would seem that a defendant would only have to waive rights he or she possesses. But, that will be left for another day.*

Second, there is no similar provision in the municipal court procedures act. K.S.A. §12-4416 provides that the "agreement shall include specifically the waiver of all rights under the law or the constitution of Kansas or of the United States to counsel, a speedy arraignment, a speedy trial and the right to a trial by jury." *The "preliminary examination" language is omitted.*

COMMENTS REGARDING CRIMES AGAINST WOMEN

By Cynthia Gray, Director, Center for Judicial Ethics
Reprinted with permission from The American Judicature Society, Judicial Conduct Reporter, Vol. 29, No. 2, Summer 2007.

One of the changes made by the American Bar Association when it revised the Model Code of Judicial Conduct in February 2007 was to add a new comment providing examples of prohibited manifestations of bias. Rule 2.3(b) of the revised Model Code states:

> *A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall not permit court staff, court officials, or others subject to the judge's direction and control to do so.*

A new comment explains:

Examples of manifestations of bias or prejudice include but are not limited to epithets; slurs; demeaning nicknames; negative stereotyping; attempted humor based upon stereotypes; threatening, intimidating, or hostile acts; suggestions of connections between race, ethnicity, or nationality and crime; and irrelevant references to personal characteristics. Even facial expressions and body language can convey to parties and lawyers in the proceeding, jurors, the media, and others and appearance of bias or prejudice. A judge must avoid conduct that may reasonably be perceived as prejudiced or biased.

During the revision process, the American Judicature Society had proposed that the list of examples also include "insensitive statements about crimes against women," a proposal that was supported by the National Judicial Education Program and the National Association of Women Judges. The ABA Joint Commission to Evaluate Model Code of Conduct did not accept that recommendation. Unfortunately, there is a line of cases that demonstrates the necessity of emphasizing that comments that trivialize crimes such as rape and domestic violence or that disparage the female victims of those crimes violate the code of judicial conduct. For example, at the conclusion of testimony regarding relevant sentencing factors in a case in which a man had been convicted of having sex with a 14-year-old girl, a judge said:

> *When you get a victim like the victim involved in this case, hell, she doesn't want to be protected, she wants to be —you know, there's too many women in this courtroom or I would use the word — she wants to go to bed, she wants to have sex, she wants to screw everybody. That's what she wants to do. And so I can't feel any great compassion for her, that's for sure.*

At the conclusion of testimony on sentencing factors in a second similar case, the judge stated, *"Well, the thing that's unfortunate in this case are the two girls that are putting about four young men in the pen are still running around out on the damned streets, still doing the same thing to more men. That what's unfortunate."* Referring to the composure of the victim, the judge stated, *"She sat there like, you know, nothing ever happened to her. And she had been dicked by three or four different guys."*

Commenting to the mother of one of the defendants, he stated, *"And then I certainly agree with you that, you know, ten days in jail is too much for a blow job from a thirteen year old. Now, if it was coming from a 40-year old, that might be worth ten days, but from a thirteen year old it wouldn't be worth you know a day in jail."*

The senior judge resigned and apologized for his comments. The Kansas Commission on Judicial Qualifications entered an order requiring the judge to cease and desist. *Inquiry Concerning Rohleder*, Order (Kansas Commission on Judicial Qualifications June 12, 1997). *See also In the Matter of Lehman*, 812 P.2d 992 (Arizona 1991) (judge remarked to prosecutors and law enforcement officers in a case involving sex-related crimes that he did not think much of the charges because *"everyone knows that the girls in Duncan are easy*"); *In re Romano*, Determination (New York State Commission on Judicial Conduct August 7, 1998) (www.scjc.state.ny.us), *accepted*, 712 N.E.2d 1216 (1999) (after reading charges from the bench against a woman who was accused of sexually abusing a 12-year-old boy, judge said, "*What I want to know is where were girls like this when I was 12*"); *In re Meyer*, Consent Order of Formal Remand and Suspension from Office (Tennessee Court of the Judiciary October 4, 1994) (during a hearing regarding a defendant found not guilty of rape by reason of insanity, judge said that defendant "needs a girlfriend" and that the public defender should "arrange a dating service or something" for the defendant).

Judges have also been disciplined for making insensitive comments in domestic violence cases. The North Carolina Judicial Standards Commission found that a judge embar-

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Inappropriate Comments

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rassed and humiliated the victim of an assault by telling her in open court she would ruin her children's lives if she did not reconcile with her estranged husband, that she deserved to be hit, and that she had not been hit that much. A support who was seven months pregnant, and the judge referred to the group as a one-sided, man-hating bunch of females and a pack of she-dogs. Finally, the judge polled the courtroom spectators as to how many of them had little spats during their marriages. Based on the Commission's recommendation, the judge was censured for this and other misconduct. *In re Greene*, 403 S.E.2d 257 (North Carolina 1991).

One New York judge asked a police officer during an arraignment whether the alleged assault was *"just a Saturday night brawl where he smacks her around and she wants him back in the morning."* The judge also advised the defendant to *"watch your back"* because *"women can set you up."* The State Commission on Judicial Conduct found that the judge's suggestion understated the seriousness of the conduct, discouraged complaints by the victims of domestic abuse who look to the judicial system for protection, and conveyed the impression that the judge favors the men in such incidents over the women making the accusations. The Commission admonished the judge pursuant to the judge's agreement. *In the Matter of Bender*, Determination (New York Commission on Judicial Conduct February 7, 1992) (www.scjc.state.ny.us).

Comments that trivialize crimes such as rape and domestic violence or that disparage the female victims of those crimes violate the code of judicial conduct.

Pursuant to a stipulation and agreement, the Washington State Commission on Judicial Conduct admonished a judge for inappropriate statements in three domestic abuse cases. *In re Turco*, Stipulation and Admonishment (Washington Commission on Judicial Conduct December 1, 1995) (www.cjc.state.wa. us/). In one case, after finding the defendant guilty of assaulting his wife, the judge stated *"you didn't need to bite her. Maybe you needed to boot her in the rear end, but you didn't need to bite her . . . ."* In the second case, after finding the defendant guilty of assaulting his wife in an apartment where controlled substances were being used, the judge stated *"fifty years ago I suppose they would have given you an award rather than what we're doing now."*

In the third case, after the victim witness had not appeared, in a colloquy with the city attorney about dismissing the case, the judge stated:

> *My opinion is that the police do 95% of the work when they separate the parties, so that takes care of 95% of the problem. You know, all we're doing is slapping someone after the police have remedied the situation. But, so be it. So I mean there's nothing to get excited about in missing these cases.*

During the arraignment of a defendant charged with assault and violation of an order of protection for hitting his wife with a telephone, another New York judge stated *"What was wrong with this? You need to keep these women in line now and again."* Both the judge and the defense attorney laughed. The defense attorney then said, *"Do you know why 200,000 women get abused every year? Because they just don't listen."* The judge and the defense attorney laughed, and the judge did not rebuke the lawyer. The defendant was present.

In addition, the judge made statements off-the-bench to his court clerk and the assistant district attorney indicating that he believed that many domestic assault charges were exaggerated by women and unfair to men and that he was skeptical about the merits of domestic assault cases in which the primary witness was the victim and the complaint was signed by a police officer instead of the victim. He said that he did not favor issuing an order of protection or keeping an alleged abuser out of the home unless the victim had come to court with a turban of bandages on her head. The judge said, *"If a female victim was truly frightened, [she could] leave the home and go to other family or friends or to the shelter."* The judge also told the assistant district attorney several times that he did not like most domestic violence cases because they involve *"he said, she said"* issues. The judge periodically told the court clerk that the police and prosecutors should be *"more discreet"* with domestic abuse cases and that the police should not always arrest the defendant because, *"most likely, the defendant is the father; he's the husband; he's the one who makes the money, and it's not right that they're told that they can't go back into the house."*

The Commission stated that such judicial indifference and gross insensitivity were inappropriate and discouraged complaints from those who look to the judiciary for protection, noting that even isolated remarks cast doubt on a judge's ability to be impartial and fair minded. The judge was removed for these comments and other misconduct. In re Romano, Determination (New York State Commission on Judicial Conduct August 7, 1998) (www.scjc.state. ny.us), accepted, 712 N.E.2d 1216 (New York 1999). See also In the Matter of Barnhart, Order New Mexico Supreme Court September 8, 2005) (judge asked a defendant charged with domestic violence *"did she have it coming?"* and then laughed out loud); *In the Matter of Moore*, Determination (New York State Commission on Judicial Conduct November 19, 2001) (www.scjc.state. ny.us) (referring to a harassment complainant, judge stated he would have *"slapped her around"* himself); In the Matter of Roberts, 689 N.E.2d 911 (New York 1997) statements to clerks and another judge that *"every woman needs a good pounding now and then"* and that orders of protection *"were not worth anything because they are just a piece of paper,"* are *"a foolish and unnecessary thing,"* are *"useless,"* of *"no value,"* and *"a waste of time."*

More Judges Behaving Badly

We never seem to be at a loss for examples of judges behaving badly around the country. Here are a few:

First, for at least the 10th time, the Appellate Division, 1st Department, has rebuked a Manhattan Supreme Court justice for excessively interfering with the examination of witnesses during a criminal trial.

The unanimous panel ruled that Justice Arlene R. Silverman's "almost continuous interference" during both the defense's and the prosecution's questioning constituted reversible error, requiring the panel to throw out a guilty verdict in a felony drug-possession trial.

"*While we recognize that the dynamics of a criminal trial may result in some intervention by the trial judge in the examination of witnesses, the cumulative effect of the court's extraordinarily incessant interference in this case was to obstruct counsel's effort to present a defense for his client,*" the panel held in its unsigned opinion, *People v. Thorpe*, ___ N.Y.S.2d ___ (September 13, 2007). *"This is simply unacceptable."*

Although the 1st Department has previously admonished Silverman **nine** times in varying degrees for her "unduly and extensive" interference, the present decision marks the first instance in which a panel has cited her interference as grounds for reversal.*

Lesson: This points out the dangers of the trial judge becoming too involved in questioning witnesses. It may be proper for a judge to ask a few limited clarifying questions (i.e. "What direction on Main street did you say the car was going?"), but much beyond that will be deemed improper. You must allow the litigants to try their own case. As much as you would like to intercede at times, you must bite your tongue.

Next, do we have to explain to judges that they cannot ethically flip a coin to decide a case? Several just don't get it. Most recently (November 2007) Judge James Michael Shull, Domestic Relations Court Judge Shull of Gates City, Virginia **was removed from the bench** by the Virginia Supreme Court for tossing a coin to determine which parent would have visitation with a child on Christmas. Shull said that he was simply trying to encourage the parents to decide the issue themselves but later acknowledged that he was wrong.

Justice Barbara Milano Keenan, Virginia Supreme Court, wrote:

"Unless our citizens can trust that judges will fairly resolve the disputes brought before our courts, and treat all litigants with dignity, our courts will lose the public's respect and confidence upon which our legal system depends."

In was reported that in prior cases Judge Shull had asked a litigant seeking a protection from abuse order to drop her pants to prove to him that she had a scar from when her husband tried to stab her; called a teenage defendant a "mama's boy" and a "wuss" and advised a woman to marry her abusive boyfriend.

Lesson: Don't even try this as a joke. It makes a mockery of the judicial system. Judges are appointed or elected to make decisions. If you cannot decide without a coin toss, seek alternative employment.

Washington D.C. Administrative Law Judge Roy L. Pearson, Jr. who lost a civil suit claiming $54 million in damages for a lost pair of pants by a local dry cleaners, has now lost his job over the whole thing. Judge Pearson's two year term of office was ending and he was up for a new position which would have come with a $100,000 raise and a 10 year term.

The "pant suit" trial turned out to be very dramatic. Judge Pearson served as his own attorney. During his testimony, while he was questioning himself, he became so tearful and emotional a recess had to be called as he rushed out of the courtroom. Pearson had turned down a pre-trial settlement offer of $12,000 for the missing pants.

According to the re-appointment commission, pursuing such a lawsuit put his judicial temperament and effectiveness in doubt. He has been ordered to vacate his office by November 9, 2007.

This wasn't the first time for Pearson. In 2005, the Virginia Court of Appeals upheld findings in his divorce proceedings that he had created unnecessary litigation" in a relatively simple case and was responsible for "excessive driving up" of legal costs. *See, Pearson v. Vanlowe*, unpublished, 2005 WL 524497 (Court of Appeals Virginia, 2005).

Lesson: As judges we are to uphold the integrity of the judicial process, even in our own personal litigation. Bad judgment as a litigant can translate to the appearance of bad judgment as a judge.

(Continued on page 16)

JUDGES BEHAVING BADLY

(Continued from page 15)

On November 13, 2007, Niagara Falls City Judge Robert Restaino was removed from the bench for jailing 46 people who were in his courtroom when a cell phone call interrupted the proceedings.

It seems a phone rang while he was hearing a case. A sign in the courthouse warns that cell phones and pagers must be turned off. When no one came forward to admit that it was his or her phone that went off, he ordered everyone in the courtroom into custody and then taken to jail. They were all searched and placed in crowded jail cells, Fourteen who could not post bond were shackled and bused to another jail. Restaino ordered them released later that afternoon after the press started calling his office. However, many had been held for up to seven hours and he did not provide transportation back to the courtroom, which was thirty minutes away from the jail.

"It is sad an ironic that even as (Restaino) was scolding the defendants for their behavior...in repeatedly berating the 'selfish' and 'self-absorbed' individual who 'put their interests above everyone else's' and 'doesn't care what happens to anybody' (Restaino) failed to recognize that he was describing himself," the Commission decision said.

Lesson: Restraint, restraint, restraint.

November 1, 2007 four Jersey City municipal court judges pled not guilty to accusations that they were involved in fixing parking tickets.

Wanda Molina, the Chief Judge was accused of fixing five tickets totaling more than $200 for her companion. Judge Pauline Sica (pictured left with her lawyers), was accused of fixing three tickets for a colleague, one for Judge Victor Sison and one for someone with ties to Judge Sison. Judge Irwin Rosen (below with his attorneys) is accused of dismissing his own ticket he received for leaving his car parked in front of a synagogue on Rosh Hashana. The practice had become known as "courtesy dismissals."

The New Jersey Supreme Court stepped in and appointed a district court judge to oversee municipal court operations and the investigation. Hudson County Judge Maurice J. Gallipoli stated *"Our examination continues to be extensive and far-reaching. The shadow that has been case over the integrity of the Jersey City Municipal Court is unacceptable. I intend to be involved personally in every aspect of restoring the integrity of this court and any practice that diminishes its good name."*

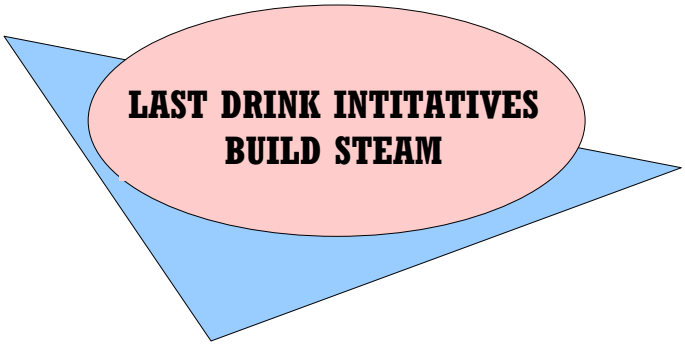
All four have either resigned or are on unpaid leave pending the outcome of the proceedings.

Lesson: NEVER fix any traffic ticket for anyone for any reason.

In April 2007, the police chief and the municipal judge for the town of McBee, South Carolina were convicted of official misconduct for using the police force to raise money with speed traps and automobile seizures. Motorists passing through town would be pulled over for speeding and then searched. If something illegal was found, the driver would be offered a deal dropping the charges in return for payment of fine or turning over their vehicle to the town. The town is apparently just north of Myrtle Beach, and lots of beach traffic passes through the town on the highway in the summer.

They were each sentenced to five years in prison, to serve 90 days, and three years probation. In September 2007, the South Carolina Supreme Court simply reprimanded Judge Fred Stephens. He was also the judge in Bethune and Lynchburg, South Carolina. He resigned from all three positions.

Lesson: Don't extort money from defendants. (The editors really could not make this stuff up!!!)



New Jersey has become one of the most recent states to adopt "last drink" initiatives in an effort to curb drunk driving. When a motorist is questioned on suspicion of drunk driving, state law now requires the officers to ask, "Where did you have your last drink?" The answers must be sent to the State which maintains a data base of the information. It uses this to help it determine which bars or restaurants it may want to look at more closely for possibly serving to intoxicated customers, a violation of New Jersey law. It often highlights patterns that may be otherwise invisible to local police.

According to a report in USA Today, Texas, Boulder, Colorado and Washington State have similar programs. In Washington, the officer records the information on the breath test strip. Most states publish a "Top Ten" list of establishments mentioned most frequently.

NUTS AND BOLTS

Question: *Defendant is charged with being a minor in possession of alcohol. He does not testify at trial. Instead, he calls his father to the stand. Defense counsel, in an attempt to show that Junior told his father immediately after the arrest that he had not possessed any alcohol, asks the father, "What did Junior tell you about the incident?" Prosecutor objects on the basis that the defendant cannot introduce self-serving statements to his father without taking the stand himself. Aren't a defendant's exculpatory statements always admissible?*

Answer: **No.** The prosecutor is correct. Although a defendant's incriminating hearsay statements are admissible as a declaration against interest or confession (a statutory exception to the hearsay rule), a defendant's exculpatory hearsay statements are inadmissible in the absence of the defendant taking the stand to subject himself to cross-examination concerning the statement. There is no statutory exception to the hearsay rule for exculpatory statements. An exception has been carved out when the prosecution admits an incriminating statement made by the defendant to a person. The defendant may present any exculpatory portions **of the same statement** or conversation. However, if the prosecution never admits the incriminating part of the statement, the defense cannot admit the exculpatory part without testifying himself. Or, if the exculpatory statements were made at different time or to a different person, they are not admissible even if prior incriminating statements have been properly admitted. See, *State v. Stano*, 284 Kan. 126 (2007) for an excellent discussion of this issue, involving exculpatory statements made to a police detective which were held inadmissible since the defendant did not testify.

Question: *How are courts enforcing the new provisions relating to impounding, immobilizing, subjecting to interlock, all vehicles a person owns or leases on a second time DUI conviction? How do you determine how many vehicles the person owns or leases? Are the vehicles towed? Do they supervise the case for two years, since the defendant is subject to interlock/impound/immobilize for that long?*

Answer: This question was sent out with the last copy of the Verdict as well as by separate email and here are the responses received. Many stated that the issue hasn't arisen yet because defendants are transferring title to their cars before sentencing.

Newton: We have had the same question, but after failing to receive any useful examples, we crafted the statement below, which is included in the probation order. I did make a phone call to the county tag office to learn about options available for determining how many vehicles a person might own and was told that they cannot easily or accurately provide this info, particularly when one owner may be in their system as both John Smith and Jonathan Smith, for example:

"Defendant shall provide proof to the court within 30 days of signing this document that each motor vehicle that the defendant owns or leases has been impounded, immobilized or equipped with an ignition interlock device in accordance with Kansas statutes (K.S.A. 8-1567). Defendant shall not own or lease any vehicle for a period of two years which are not similarly impounded, immobilized or equipped with an ignition interlock device. Upon request, the defendant shall during the probation term provide proof that such compliance is continuing."

Topeka: Orders interlocks, determines number of vehicles either on their honor or through DMV registration, does not tow vehicles, and supervises case for 2 years.

Osawatomie: I would like an answer to some of those questions as well as I have yet to run into a case that would involved a 2nd DUI. I had a chance earlier this year, but our prosecutor failed to prove his case. Another question is whose burden it is to establish how many cars a defendant owns or lease. I guess we can issue a blanket order. I can tell from the statute that it is the defendant's burden to establish the need of the vehicle for work or work by a family member etc. It is hard for us in the rural areas to enforce the interlock devises as we have no probation department and many of these people will leave our area and never be seen again. I know that we can have the prosecutor issue contempt citations if the person fails to secure the interlock devise, but that is not always effective when the persons takes off. I guess we will have fun with this when the first one comes my way.

Lawrence: We have not had a DUI 2nd under the new law. Our city did not adopt the 2007 STO which incorporated that change until September 8, 2007. So, we should be seeing some of those sentences soon. I'll probably order the interlock device and put that in the sentencing journal entry. As we discussed when the law was first enacted, most defendants will show up at sentencing with no vehicle in his/her name after signing over title to a friend/spouse, etc. With limited resources, we will probably have our only probation officer do random checks of vehicle ownership of certain defendants and then check to see if the ignition interlock is installed. We'll probably do a combination of supervised and unsupervised probation for two years. Enforcement will be very difficult.

Overland Park: We give the defendant the choice of interlock, impoundment, immobilization or sale of the vehicle(s). We verify self-reported vehicles and compliance. We have agreements with an interlock provider and all tow companies in the county. It is part of the sentence and there are provisions regarding duty to report in the probation order. Probations are two years, with the second year non-reporting. Probation officers do random checks for vehicles.

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

AG OPINION NO. 2007-35
November 2, 2007

School Cannot Disclose Disciplinary Information to Law Enforcement Without Parent's Consent

K.S.A. §72-89c02, as amended by L. 2007, Ch. 149, §2, requires that whenever any student 13 or over has been expelled or suspended from school for a school safety violation, the principal must notify the local law enforcement agency. The agency is then required to notify the DMV, which is required to suspend the student's license for one year.

On the other hand, the federal Family Educational Rights and Privacy Act (FERPA), which applies to all schools receiving federal funds, states that school officials are prohibited from disclosing personal identifiable information from student records without the consent of the parent. Disciplinary actions are included in the list of "information" prohibited from disclosure. See, 20 U.S.C. §1232g

The Attorney General has opined, consistent with a prior opinion from General Stovall in 2000, that K.S.A. §72-89c02 conflicts with the FERPA. The school cannot disclose disciplinary information to local law enforcement in the absence of written consent from the parent.

However, the School Safety and Security Act (K.S.A. 72-89b01) requires that any school employee who knows or has reason to believe that a criminal act has been committed at school and that act constitutes a felony or misdemeanor or involves the possession, use or disposal of explosives, firearms or other weapons immediately report the incident to law enforcement. This does not conflict with FERPA since it does not involve disclosing personal information contained in school records. However, the School Safety and Security Act does not contain any requirement for reporting to the DMV and suspension of driving privileges.

AG OPINION NO. 2007-36
November 27, 2007

City Can't Change From "Dry" to "Wet" Without Petition And Election

The City of Hesston cannot change from "dry" to "wet" (with regards to sale of alcoholic beverages) by simply repealing its ordinance designating it as "dry." To change from "dry" to "wet" the city must follow the procedures set out in K.S.A. 2006 Supp. §41-302 which require submission of a petition signed by at least 30% of the total number of votes cast in the last general election for secretary of state. Upon filing of a sufficient petition, the governing body must then call an election on the issue.

AG OPINION NO. 2007-37
November 27, 2007

Park Officers Don't Have Liability for Entering Private Property Without Owner's Consent

Kansas Department of Wildlife and Parks officers do not incur criminal liability for trespass when they enter and remain upon private property without the owner's permission while in the pursuit of their statutory duties. In fact, when the performance of duty requires any law enforcement officer to enter upon private property, that conduct otherwise a trespass, is justifiable.

AG OPINION NO. 2007-39
November 30, 2007

Sheriff Must Take Custody of City Prisoners, But Not Until They Are Delivered to the Jail

Pursuant to K.S.A. §19-1930, a county sheriff must accept custody of prisoners who are taken to the county jail by city law enforcement officers and presented to the jail for incarceration. However, when a prisoner is taken directly to a medical facility by a city law enforcement officer prior to presentation at the county jail, the sheriff is not responsible for the custody of such prisoner until the latter is presented at the jail.

AG OPINION NO. 2007-40
December 4, 2007

Hunters Not Exempt From Conceal and Carry

The criminal use of weapon law and the conceal and carry laws **do not exempt** licensed hunters (who also have conceal and carry permits) from complying with the statue that prohibits spotlighting wildlife while in possession of a pistol nor that statute that limits big game hunting equipment. The AG was also asked whether Kansas certified law enforcement officers could get around these regulations, since they can carry weapon at any time to "protect and serve." The AG declined to opine on the subject, but expressed skepticism that a police officer would be able to get around compliance with the law while engaged in hunting for pleasure, not protecting the public.

(Continued on page 25)

HELICOPTER PARENTS IN THE COURTROOM

By Judge Judith R. Eiler, King County, Washington
Reprinted with permission from ABA Judicial Division Record, Highway to Justice Supplement, Summer 2006

She hovered for just a moment and then lightly touched down with a tiny pirouette landing directly in front of my clerk. She tossed off her request to have the matter heard first with the air of someone used to being obeyed, so it was a surprise to her when she was told that the Judge would be hearing her son's case in the order of the calendar.

A Fuming Helicopter

For me it was another traffic infraction calendar with 75 new faces ready to contest their infractions. As I called through the roll to see who was present she answered. My head went up from the docket and I asked if she was Adam Jones? "No," she replied, "that doesn't matter, I am his mother and I am here for him and I have another appointment so I must be taken first." I demurred that it did matter that her son was not here and that unless it was an emergency she would have to wait her turn. As it turned out, her next "appointment" was for her son as well, and wasn't really an emergency, but was, in her opinion, "quite important." She would have to wait and take her turn, and I added for good measure, that it would be imperative to have her son here, unless she was an attorney. She wasn't an attorney but she said she would wait and huffed to her seat.

He's a Good Boy and a Safe Driver

Finally, we got to the "J's" and her son's name was called. She approached the bench and told me to dismiss the speeding ticket (a 75 in a 55 mph zone) as it was just a bit of teenage foolishness and it really shouldn't go on his record as he was a good student, attended church and didn't have time to come to court over a thing like this. I asked the mom if she was with her son when he was pulled over. She said, "no," but why was I doing this *to* her son who had a good record, and was a safe driver. She went on for some time before I stopped her. As gently as I could, with mom interjecting at every breath I took, I explained that she could not give evidence in this case because she had no direct knowledge of the event and she could not represent her son, since she was not an attorney.

They Are Called Helicopters Because They Hover

I started to move on to the next defendant when she launched into a barrage of questions, comments and arguments. It took me a while to get her quieted down and move on to the rest of the calendar. How do you handle helicopter parents? They are loosely defined as family members who hover over their children, intruding into their lives, influencing their decisions, arguing with their choices, and intervening whenever their children experience any sort of personal difficulty. How do you politely advise parents who are so involved that they need to let go? How do you insist that a young driver may take an individual action that no amount of parental intervention can just make go away? How do you expect a young driver to become an individual capable of driving lawfully and safely when there is a parent who wants to rescue them all the time?

Heading Them Off at the Pass

In the courtroom with tight calendars, long discussions on drivers being responsible for their own actions may need to become a part of every judge's repertoire of speeches. Sometimes just saying to the hovering parent that they cannot solve this problem for their child because it would rob the young driver of the opportunity to learn that their driving behavior has consequences is enough. Sometimes an opening statement to the courtroom can make parents more comfortable, allowing their young drivers to act more independently and confidently. The message must be that parents need to prepare their sons and daughters so that they will be able to take care of themselves, drive safely and act independently.

Rotor Wash is Dangerous

Whatever tactic you use, you must be aware that your frustration level will become more agitated in the rotor wash from the hovering parent. Some courts simply don't allow parents to participate at all and have ejected over-zealous parents from the courtroom in order to maintain a semblance of order. Often when the parent is removed the young driver is actually relieved and the infraction process moves more smoothly. However, expect the ejected parent to be angry and vocal. Some judges take the middle ground and allow parents to stay by their young drivers but do not allow them to talk for the young driver under the theory: if you are old enough to drive you are old enough to explain what you were doing.

We Are Not Alone

Taking a cue from the educational arena, educators often start with a reality-based conversation, reassuring the parent that their young adult will have the necessary support at school. A review of the roles of and responsibilities for the student sometimes helps explain to the parent that letting go is best for their child's development. We in the courtroom are not alone in handling hovering parents. We can learn to reassure parents while keeping the responsibility square on the young driver. We can prepare the parents with our opening talks. We can give the hovering parent the ability to be there as support for the young driver without allowing them to take over the landing pad, ah, um, I mean the courtroom.

JUDGE QUOTES THE BEATLES

In preparation for his sentencing on a felony burglary conviction, Montana resident Andrew McCormack was required to fill out a form which asked for a "recommendation as to what you think the Court should do in this case." Mr. McCormack wrote: *"Like the Beetles say, 'Let It Be.'"*

What follows is Judge Gregory R. Todd's Sentencing Memorandum:

MONTANA THIRTEENTH JUDICIAL DISTRICT COURT, YELLOWSTONE COUNTY

STATE OF MONTANA, Cause No. DC 06-0323
Plaintiff Judge Gregory R. Todd

V.

ANDREW SCOTT MCCORMACK,
Defendant.

SENTENCING MEMORADUM

Mr. McCormack, you pled guilty to the charge of Burglary. To aid me in sentencing I review the pre-sentence investigation report. I read with interest the section containing Defendant's statement. To the question of "Give your recommendation as to what you think the Court should do in this case," you said "Like the Beetles say, 'Let It Be.'"

While I will not explore the epistemological or ontological overtones of your response or even the syntactic or symbolic keys of your allusion, I will say **Hey Jude**, **Do You Want to Know a Secret**? The greatest band in rock history spelled their name B-E-A-T-L-E-S.

I interpret the meaning of your response to suggest that there should not be any consequences for your actions and I should just **Let It Be** so that you could lie in **Strawberry Fields Forever**. Such reasoning is **Here, There and Everywhere**. It does not require a **Magical Mystery Tour** of interpretation to know **The Word** means leave it alone. I trust we can all **Come Together** on that meaning.

If I were to overlook your actions and **Let It Be**, I would ignore that **Day in the Life** on April 21, 2006. Evidently, earlier that night you said to yourself **I Feel Fine** while drinking beer. Later, whether you wanted **Money** or were just trying to **Act Naturally**, you became the **Fool on the Hill** on North 27th Street. As **Mr. Moonlight** at 1:30 a.m., you did not **Think for Yourself**, but just focused on **I, Me, Mine**.

Because you didn't ask for **Help**, **Wait** for **Something** else, or listen to your conscience saying **Honey Don't**, the victim later that day was **Fixing a Hole** in the door you broke. After you stole the 18 pack of Old Milwaukee you decided it was time to **Run for Your Life** and **Carry That Weight**. But when the witness say **Baby It's You**, police responded **I'll Get You** and you had to admit that **You Really Got a Hold on Me**. You were not able to **Get Back** home because of the **Chains** they put on you. Although you hoped the police would say **I Don't Want to Spoil the Party** and **We Can Work It Out**, you were in **Misery** when they said you were a **Bad Boy**. When the police took you to jail you experienced **Something New** as they said **Hello Goodbye** and you became **Nowhere Man.**

Later when you thought about what you did, you may have said **I'll Cry Instead**. Now you're saying **Let It Be** instead of **I'm a Loser**. As a result of your **Hard Day's Night**, you are looking at a **Ticket to Ride** that **Long and Winding Road** to Deer Lodge. Hopefully you can say both now and **When I'm 64** that **I Should Have Known Better.**

DATED this 26th day of February, 2007.

Hon. Gregory R. Todd, District Court Judge

Postscript: *McCormack was sentence to three years of probation and ordered to pay a fine and do community service.*

Additional cases quoting musical lyrics:

***U.S. v. McPhee*, 336 F.3d 1269, 1276 n. 9 (11th Cir. 2003), quoting Simon & Garfunkel's *I Am A Rock* when trying to determine if something was a rock or an island for purposes of deciding whether a crime took place in territorial waters.**

Jorgensen v. Beach 'n' Bay Realty*, 125 Cal. App. 3d 155 (1981), citing Bob Dylan's Homesick Blues for the proposition that *"you don't need a weatherman to know which way the wind blows."

For more examples see *"[Insert Song Lyrics Here]: The Uses and Misuses of Popular Music Lyrics in Legal Writing"* by Assoc. Professor of Law, Alex Long, Oklahoma City University School of Law, in Vol. 64, Spring 2007, Issue 2 of the Washington & Lee Law Review, pg. 561 or download at: http://law.bepress.com

Unpublished Opinions

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

REASONABLE ATTEMPTS TO SERVE ARREST WARRANT TOLLS STATUTE OF LIMITATIONS

Unpublished Decision

Ticia Watkins committed six felonies. However, the issue in *State v. Watkins*, Slip Copy, unpublished, 2007 WL 29115577 (October 5, 2007) was whether or not she was charged within the statute of limitations. She committed the crimes in February and March 2003. A two year statute of limitations applied to the crimes. The statute of limitations starts to run on the day after the offense is committed. However, two things can stop the running of the statute of limitations. First, the filing of a complaint and the delivery of the warrant to law enforcement for arrest of the defendant "commences prosecution" and therefore stops the running of the statute of limitations *if the warrant is executed without unreasonable delay.* Second, the statute does not run for any period during which the accused is concealed within the state so that the warrant cannot be served.

Prosecutors filed the complaint against Watkins on April 22, 2003. She was not arrested until May 2005, slightly over two years after she committed the offenses. The initial delay in filing the charges (2 months) was as a result of the prosecution trying to protect the identity of a confidential informant who was involved in other investigations. The record was full of various efforts on the part of police to locate Watkins. Watkins was stopped by police at one point, but gave her sister's name. It wasn't until a subsequent investigation that it was discovered that it was really Watkins who had been stopped. There were at least 45 inquiries against the national computer database for Watkins or her sister in the two year period.

The Court in Watkins found that the delay in executing the warrant was not unreasonable, particularly in light of the defendant's attempt to conceal her identity and whereabouts to police. The reason for the initial delay in filing charges was justifiable and the state was able to show proof of more service attempts by far than the other cases that have examined this issue and found delays to be "unreasonable." Her convictions stand.

CIRCUMSTANTIAL EVIDENCE CAN SUPPORT MIP CONVICTION

Unpublished Decision

Officer sees defendant walking on sidewalk at 12:30 a.m. in Hays. He sees defendant take a drink from a cup he is carrying. When the defendant sees the officer, he puts the cup by his side and quickly turns away from the officer. The officer gets out of his patrol car, whereupon the defendant dumps the contents of his cup in the grass and starts walking away, quickly. The officer tells him to stop. He does and walks back toward the officer.

The officer noticed that the defendant had bloodshot eyes and smelled of alcohol. The smell grew stronger as he spoke. The cup he was carrying also smelled of alcohol. He told the officer he was 20 years old. The officer said, *"You shouldn't be drinking if you are under 21."* The defendant replied, *"Yeah, you are right, I shouldn't be drinking."* The officer performed a preliminary breath test on the cup, which detected the presence of alcohol.

In *State v. Beard*, Slip Copy, *unpublished*, 2007 WL 3275917 (Kan. App. November 2, 2007), the Court found that these facts presented sufficient evidence to support the defendant's conviction for being a minor in possession of alcohol. *"[E]ven a conviction for the gravest offense can be supported by circumstantial evidence…circumstantial evidence is evidence of events or circumstances from which a reasonable factfinder may infer the existence of material fact at issue."* The evidence presented was sufficient for a rational factfinder to have found beyond a reasonable doubt that Beard was guilty of being a minor in possession of alcohol.

CIRCUMSTANTIAL EVIDENCE WILL SUPPORT A CONVICTION FOR TRANSPORTING AN OPEN CONTAINER; CONTAINERS DO NOT HAVE TO BE ADMITTED INTO EVIDENCE; A MERE TYPO IN THE SOCIAL SECURITY NUMBER WILL NOT PROHIBIT CONSIDERATION OF A SENTENCING JOURNAL ENTRY ESTABLISHING A PRIOR DUI CONVICTION

Unpublished Decision

Defendant was stopped and arrested for DUI. In the course of searching his vehicle, officers recovered an open beer can "stuck between the driver and passenger seat" and also a 1/4 full bottle of tequila "underneath the driver's seat" which was "obviously open" and a "nearly empty" bottle of vodka in the passenger seat. The bottles were never analyzed to substantiate they were alcoholic in nature.

(Continued on page 22)

Unpublished Opinions

(Continued from page 21)

In *State v. Vanbibber*, Slip Copy, unpublished, 2007 WL 3275898 (Kan. App. November 2, 2007), the court held that having the content tested *"is not essential to a successful conviction of an open container violation; from the description of the bottles, their labels, and the officer's testimony that they contained alcohol, and absent any evidence challenging the nature of the substances therein,, the jury could reasonably infer that the substances were alcoholic in nature."*

The bottles were not admitted into evidence. Instead, the officer's photograph of the bottles was admitted. The defendant objected as to "not the best evidence." The Court of Appeals responded:

""*Vanbibber's argument is not well drawn…"* It pointed out that the best evidence rule only applies to written documents. The photographs were properly admitted. There was no requirement that the bottles be presented and placed into evidence.

Finally, Vanbibber was a 6 time DUI offender. In proving up one of his priors, the sentencing journal entry establishing the conviction had an erroneous digit in the social security number. All other identifying information corresponded to Vanbibber. It had the correct name, date of birth, driver's license number, and the same attorney as was representing him in the current case. The Court found that the journal entry was properly admitted and considered. It was clearly just a typographical error, which did not prohibit its consideration.

SONG CITES

Top 10 most frequently cited popular music artists in legal writing (either opinions or law review articles).

Bob Dylan.....186
The Beatles.....74
Bruce Springsteen...69
Paul Simon.....59
Woody Guthrie.....43
Rolling Stones.....39
Grateful Dead.....32
Simon & Garfunkel...30
Joni Mitchell.....28
R.E.M.....27

Source: Alex B. Long

VOLUNTARY EXTENSION OF PROBATION MUST BE FILED BEFORE THE END OF THE PROBATION UNLESS THERE IS A MOTION TO REVOKE FILED WITHIN THE 30 DAY WINDOW ALLOWED BY STATUTE

Unpublished Decision

Crishna L. Zielke entered an agreement to extend her probation 23 days after her probation expired. No motion to revoke her probation had been filed. Upon a subsequent revocation of the "extended" probation, she argued that the extension was not valid and the court had no jurisdiction to revoke her probation. The State countered that since it had the ability, pursuant to K.S.A. 2006 Supp. §22-3716(d), to file a motion to revoke within 30 days after the end of the probation, the voluntary extension by the defendant was in effect a stipulation to a violation of probation and extension within the 30 day window.

The Court of Appeals disagreed. In *State v. Zielke*, *Slip Copy*, *unpublished*, 2007 WL 4105252 (Kan. App. November 16, 2007), the Court held that in order for the court to retain jurisdiction after the probation has ended, a motion to revoke must be filed within 30 days of the termination of the probation alleging violations during the term of the probation. Since no motion was on file, the court had no jurisdiction to extend the probation.

PRETRIAL JURY ORIENTATION IS NOT A "CRITICAL STAGE" OF THE PROCEEDINGS

Unpublished Decision

In *State v. Jefferson*, Slip Copy, *unpublished*, 2007 WL 4158168 (Table) (Kan.App. November 21, 2007), the Court of Appeals held that pretrial jury orientation (where the judge addresses the potential jurors as a group and explains some of the history of the jury system and advises them of the constitutional and statutory qualifications necessary to sit as a qualified juror) is not a "critical stage" of the proceeding under the Sixth Amendment requiring the defendant's presence.

FAILURE OF BREATH TEST MACHINE TO PRINT A LEGIBLE TEST SCORE IS NOT FATAL TO ITS ADMISSION

Unpublished Decision

In *State v. Nelson*, Slip Copy, *unpublished*, 2007 WL 4158192 (Table) (Kan. App. November 21, 2007) the trooper testified that after the breath sample was obtained, the display screen showed a result of .142. However the machine's paper printout was difficult to read, so he wrote on the paper printout the result displayed on the screen.

The Court found that paragraph 7 of the KDHE protocol ("*After the final Air Blank cycle the instrument will print the test result*") is not a direction to the person administering the test, but merely a statement that the machine will print the test result. Failure of the printer to print a legible test score was

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Unpublished Opinions

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not the result from the trooper's failure to follow the KDHE protocol. Both the trooper and the defendant saw and confirmed the test results shown on the screen. There was no error in admitting the result.

In addition, in this case, the trooper testified that he followed the KDHE protocol for administering breath tests. However, he did not specifically testify that he put a sterile mouthpiece on the machine. The defendant argues therefore that the foundation for admission of the test result was inadequate. The Court disagreed and found that the evidence was sufficient based on the case law. If the defendant was concerned about this he could have cross-examined the officer about it.

FOR PASSENGER TO HAVE STANDING TO OBJECT TO SEARCH OF CAR, THE SEARCH MUST BE AS A DIRECT CONSEQUENCE OF THE PASSENGER'S STOP OR SEIZURE

Unpublished Decision

Sharmia Robinson and Zeliece Gatson walked towards a Jaguar in a hotel parking lot and placing items in its trunk. The Jaguar was registered to Gatson and police were aware that Gatson had a warrant for her arrest. Police officer approached her and she confirmed she was Gatson. As the officer was arresting Gatson, he was monitoring and to some extent directing the movements of Robinson, for his own safety. Robinson entered the passenger side of the Jaguar several times. Upon handcuffing Gatson, the officer asked her if what she wanted to do with her property or whether she wanted Robinson to take any of it or drive her car away. No response was given. The officer walked Gatson to his patrol car. Robinson followed them. He asked to speak with Gatson. The officer rolled down the window and allowed them to speak. When Gatson complained of the hardness of the patrol car seat, the officer asked Robinson to step away with another officer, so that he could address Gatson's concerns. Robinson walked away and stood by the curb with the back up officer.

Gatson gave consent for the officer to search her vehicle. The officer found marijuana. When he asked Gatson about it she stated that she and Robinson had smoked marijuana in the hotel the previous night. The officer walked over to Robinson and relayed what Gatson had told him. Robinson eventually admitted to smoking marijuana at the hotel and consented to the officer searching his pockets. The officer found $700 cash and a bag of cocaine.

Robinson challenged whether Gatson's consent was valid. The Court found he did not have standing to challenge the search of the Jaguar. The Court distinguished this from *State v. Epperson*, 237 Kan. 707, 716 (1985) which held that a passenger has standing to challenge a search after an unlawful stop of the vehicle, by finding that Epperson's right to challenge the vehicle search in that case was because he was the person who was actually stopped and seized and the search was a consequence thereof. In this case, the search of the vehicle was as a consequence of Gatson's arrest, not his. Therefore, he lacks standing to object to the introduction of any of the evidence recovered from the Jaguar. The court further found, after an extensive review of the facts, that Robinson had not been seized, therefore his consent for the officer to search his pockets was voluntary.

Editor's Note: *In this case and several others recently, the Court has had the benefit of seeing the dash board video tape of the encounter. In this case in particular, Justice Buser dissents to the finding that Robinson's consent to the search of his pants pockets was voluntary, based on his observations of the interaction as displayed on the videotape. This powerful evidence gives the appellate courts the opportunity to evaluate the credibility of various arguments based on observed actions and demeanor on the tapes, which has not historically been the role of the court.*

ITEMS FOUND IN PLAIN VIEW DURING EMERGENCY SEARCH ARE ADMISSIBLE

Unpublished Decision

Police received an anonymous call concerning a knife fight. The caller stated that the fight involved a butcher knife and that one of the participants had robbed the La Quinta Inn days earlier. They arrived at the reported location and found fresh blood on the screen door and a butcher knife lying on the porch. The defendant answered the door with blood on his hand, forehead and around one of his eyes. He refused to allow the officers to enter the residence. One of the officers pushed him aside and went in anyway to look for other injured persons. There were none. However, while they continued to question the defendant, one of the officers observed in plain view a plastic baggie of cocaine.

In *State v. Dunn*, Slip Copy, *unpublished*, 2007 WL 4246863 (Kan. App. November 30, 2007), the Court had little trouble concluding that the officers had the right under the emergency exception to the warrant requirement to enter the house without consent. Based on what they saw, they had a reasonable and good faith belief that someone inside the residence may be in need of immediate aid or assistance. Once inside, the officers could legitimately question the defendant about the fight. Any

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MORE FAMOUS KANSANS

Brian Hall, Executive Producer, Hannah Montana, Leawood

Mark Greenwood, Bass Guitarist, Garth Brooks, Topeka

Unpublished Opinions

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contraband found in plain view, when the officers are lawfully in the place from which it is viewed, is admissible.

PROSECUTOR CAN REFER IN CLOSING TO DEFENDANT'S FAILURE TO TAKE THE INTOXILYZER AS EVIDENCE OF GUILT

Unpublished Decision

Larry Clah was convicted of DUI. He refused the breath test. In *State v. Clah*, Slip Copy, *unpublished*, 2007 WL 4374019 (Kan.App. December 14, 2007) the defendant objected to the following portion of the prosecution's closing statement:

"So, the next thing Officer Sipp wanted him to do was take an Intoxilyzer 5000 test, but the defendant refused that test. He refused to quantify the amount of alcohol he just admitted to drinking to the officer. Why would he refuse to be tested, if he wasn't' intoxicated? By taking and passing a few simple tests, either the field sobriety tests or the Intoxilyzer 5000, the defendant could have ended the encounter with Officer Sipp and been on his way...Mr. Clah didn't cooperate with an Intoxilyzer because he'd already refused to do his standardized field sobriety tests. There's no evidence against him there. All that's left is the Intoxilyzer 5000, and … he had a reason not to take the Intoxilyzer 5000. If he was sober, it would have proved his sobriety, but if he was drunk, that would have been it. The only reason to refuse a breath test is if you are drunk and you know you will fail it. There is no other reasonable excuse. ...The refusal is what one might refer to as [consciousness] of guilt. In other words, if the defendant knew he was not drunk, why wouldn't he have taken the test? The reason that he didn't take the test is that he knew he couldn't pass it, he knew it would quantify the amount of alcohol, and that's all [consciousness] of guilt."

The Court found that given the fact that K.S.A. §8-1001(i) provides that an individual's refusal to submit to a breath test *"shall be admissible in evidence against the person at any trial on a charge arising out of the alleged operation...of a vehicle while under the influence of alcohol"*, the prosecutor's statements were well within the wide latitude given prosecutors.

EXCLUSIONARY RULE HAS NO APPLICATION IN DRIVER'S LICENSE HEARINGS

Unpublished Decision

Defendant appeals his driver's license suspension on the basis that the officer lacked reasonable suspicion to stop his vehicle and probable cause to arrest him. In *Custer v. Kansas Dept. of Revenue*, Slip Copy, *unpublished*, 2007 WL 4374037 (Kan. App. December 14, 2007), the Court reiterated its prior ruling in *Martin v. Kansas Dept. of Revenue*, 36 Kan.App.2d 561 (2007), *rev. granted* 283 Kan. ___ (February 13, 2007), and found that Fourth Amendment issues and the exclusionary rule have no basis in civil driver's license revocation proceedings.

"...any benefits in applying the exclusionary rule to a driver's license revocation hearing would substantially outweigh the social costs in doing so. A license revocation hearing is a civil proceeding, not a criminal one...Its sole purpose and goal is to protect the public "by removing dangerous drivers from the roads...By allowing drivers to challenge the constitutionality of traffic stops and arrests in a civil proceeding for purposes of applying the exclusionary rule, society's goal of efficiently removing drunk drivers from the roads would be drastically undermined." (Citations omitted).

ON-LINE CHAT WITH 14 YEAR OLD FOR SEX

Unpublished Decision

Bradley Schrader, 34, engaged in an on-line chat with a police officer posing as a 14-year-old girl. He also contacted her on the phone. Sexually suggestive comments were made in each conversation they had, which continued for a couple weeks. The "minor" advised Schrader that her parents were not home and invited him over. He suggested several sexual things they could do when he arrived. He arrived at the address and was arrested by police. He was subsequently convicted of attempted aggravated indecent liberties with a child and attempted sodomy.

He appealed on the basis that the statute's blanket proscription of consensual, intimate activities of all minors without regard for maturity violated the Due Process Clause by selecting an arbitrary age. This violates the minor's rights. And, he argued, the statute also violates his First Amendment freedom of association by preventing him from maintaining an intimate relationship with a minor. *(Yes, a law firm in Wichita actually presented this argument to the court!).*

In *State v. Schrader*, Slip Copy, *unpublished*, 2007 WL 4577915 (Kan. App. December 21, 2007) the Court wrote:

"We could stop at this point and affirm...We choose to write further to demonstrate how utterly without legal merit and frivolous are the claims presented on appeal."

After proceeding to deny his claims, the Court goes on:

"Moreover, Schrader's argument leaves us almost, but not quite, speechless...In summary, we conclude Schrader's claims are preposterous and devoid of serious legal thought. Schrader's efforts to put legal clothing on a raw and shameless predatory act is rejected."

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Percentage of fatal crashes by characteristic, 2004			
Driver Age:	**16**	**17-19**	**20-49**
Driver error	**78%**	**69%**	**55%**
Speeding	39%	33%	23%
Single vehicle	52%	45%	39%
3+ occupants	29%	24%	18%
Drivers killed with .08+ BAC	13%	25%	44%
Sources – FARS, NHTSA 2004			

Unpublished Opinions

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AGE OF DEFENDANT AND VICTIM ESSENTIAL ELEMENT IN DOMESTIC BATTERY
Unpublished Decision

K.S.A. 2005 Supp. §21-3412a(a)(1) prohibits the intentional or reckless causing of bodily harm by a family or household member against a family or household member. *See also*, POC §3.1.1.(a)(1). The statute goes on to define "family or household members" as persons "18 years of age or older."

In *State v. Makupa*, Slip Copy, *unpublished*, 2007 WL 4571098 (Kan. App. December 28, 2007), the State offered no evidence at trial of either the defendant's or the victim's age. Although the State argued that it had presented sufficient circumstantial evidence when the victim testified that she was married to the defendant and he had purchased alcohol for her, the Court found said evidence was insufficient to establish their ages. The Court reversed the defendant's conviction for domestic battery.

COURT COSTS AND OTHER FEES ARE NOT PART OF THE SENTENCE, THEREFORE THEY DO NOT HAVE TO BE PRONOUNCED FROM THE BENCH AT THE TIME OF SENTENCING TO BE ASSESSED
Unpublished Decision

In *State v. Phillips*, Slip Copy, *unpublished*, 2007 WL 4571093 (Kan.App. December 28, 2007), the defendant appealed the Court's imposition of court costs, a booking fee and the court-appointed attorney fee because they were not pronounced from the bench at the time of sentencing, but was instead added later in the filed journal entry.

He argued that the case law is clear a judgment in a criminal case, whether it imposes confinement, a fine, probation or suspends the sentence is effective upon pronouncement from the bench. A journal entry that imposes a sentence a variance with that pronounced from the bench is erroneous and must be corrected.

However, the Court of Appeals held that this case law is inapplicable in the situation involving assessment of costs and fees, because they are not part of the sentence, but are instead statutorily mandated. They are not part of the penalty.

"Because courts costs and other court-ordered fees are not punitive in nature, they do not constitute part of the sentence that must be pronounced at the sentencing hearing to be effective."

JUDICIAL BIAS BASED ON ROMANTIC RELATIONSHIP WITH PROSECUTING ATTORNEY
Unpublished Decision

Terry Hooker was convicted of felony murder, among other charges. He later brought a habeas corpus action claiming that the trial judge was biased in the case because seven years prior to the trial the judge had a romantic relationship with the prosecutor. A hearing was held on the issue. The parties stipulated that the relationship was when both were single, it lasted about one year and both are now married to other people. The defendant did not point to any particular rulings in the case that evidenced bias.

In *Hooker v. State*, Slip Copy, *unpublished*, 2007 WL 4571102 (Kan. App. December 28, 2007), the Court found that nothing in the stipulation would create "reasonable doubt concerning the judge's impartiality in the mind of a reasonable person." Therefore, there was not a sufficient showing of bias or prejudice.

NEITHER THEFT NOR CRIMINAL DEPRIVATION ARE LESSER INCLUDED OFFENSES OF ATTEMPTED ROBBERY
Unpublished Decision

In *State v. Stevens*, Slip Copy, *unpublished*, 2007 WL 68636 (Kan.App. January 4, 2008), the Court of Appeals held that neither theft nor criminal deprivation of property are lesser included offenses of attempted robbery. It also reiterated prior case law that criminal deprivation is no longer considered a lesser included offense to theft.

Attorney General Opinions

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AG OPINION NO. 2007-41
December 4, 2007

Sale of automatic weapons and silencers prohibited in Kansas even if allowed by Feds

Federally licensed firearm dealers must abide by the prohibitions on possession automatic weapons and silencers unless an exception applies. In Kansas, a federal firearms dealer cannot sell silencers to other federal firearms licensees or others authorized by the federal Gun Control Act because the state law is more restrictive. The dealer may only sell a serviceable silencer to a Department of Justice certified laboratory. They cannot sell silencers to law enforcement agencies. Likewise, even though federal law may allow licensed dealers to sell certain automatic weapons to governmental entities, Kansas law only allows dealers to sell automatic firearms to DOJ certified laboratories.

The Verdict

Winter 2008 Issue 42`

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Municipal Court Clerks' Spring Conference
April 4, 2008
Hutchinson, KS

Municipal Judges' Annual Conference
April 28-29, 2008
Topeka, KS

District Judges' Spring Conference
June 8-10, 2008
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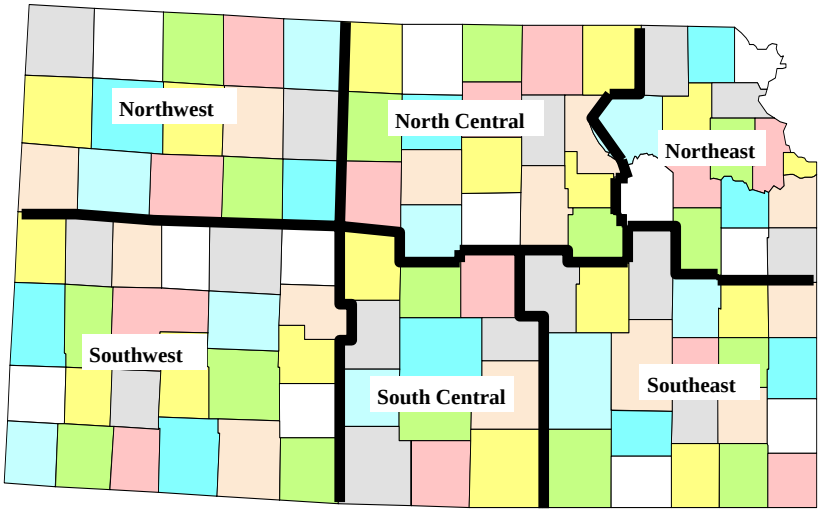
KMJA MEMBERSHIP REGIONS



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

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