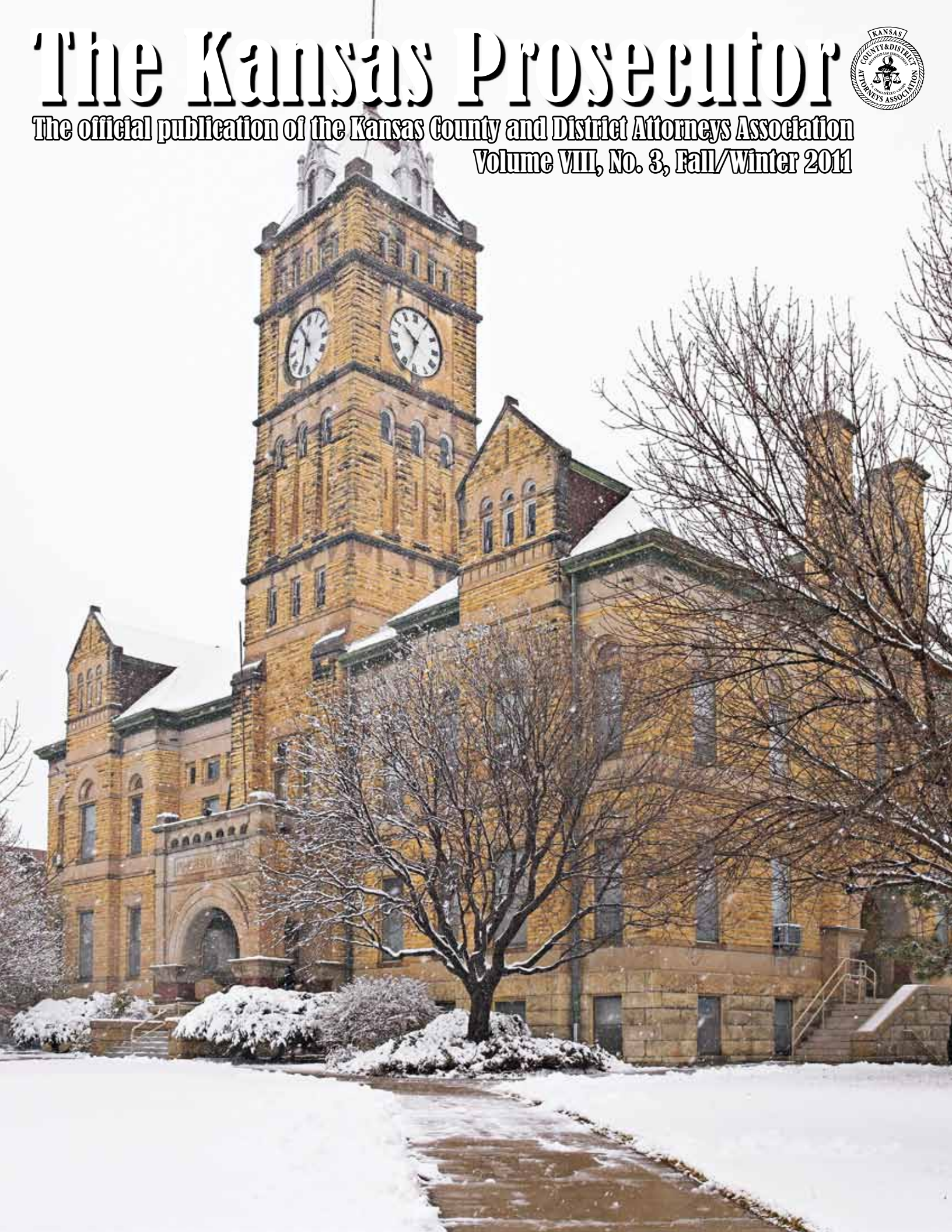


The Kansas Prosecutor



The official publication of the Kansas County and District Attorneys Association
Volume VIII, No. 3, Fall/Winter 2011



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Our mission:

The purpose of the KCDA is to promote,
improve and facilitate the administration
of justice in the State of Kansas.

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and District Attorneys Association

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About the Cover

The Mitchell County Courthouse is located at 111
South Hersey in Beloit, Kan. Located within the
native limestone building are many of the county's
departments and offices. These include the County
Clerk, Register of Deeds, County Treasurer,
Appraiser, Public Works, District Court, and the
County Commissioners' meeting room.

Mitchell County was given official status by the
State of Kansas in 1871. Work on the current
courthouse was started in 1900 and in November of
1901 the building was dedicated.

*Photo by John D. Morrison, Prairie
Vistas Photography*



President's Column

by **Melissa Johnson, KCDA President**
Assistant Seward County Attorney

Gratitude and Looking Forward

Several years ago, I was attending one of the KCDA Fall Conferences when I was approached by Ellis County Attorney and Past President Tom Drees. Tom asked if I would be interested in serving on the KCDA Board of Directors. I told Tom that I would have to check with my boss to see what his feelings were and Tom told me "Don't worry, we already talked to him and he said it's fine." So I began my service on the Board of Directors.

During my time serving on the Board, I have been in awe of the tremendous amount of dedication and effort that members of our association, including my colleagues on the Board of Directors, continue to exhibit in order to make Kansas a better and safer place to live. Many of you have traveled hundreds of miles, spent many hours away from your own families, and worked countless evenings and weekends all to ensure that in any particular case, that justice was done. As part of that effort, there have been times when the law simply hadn't kept up with technology or society and many of you have given freely of your time and energy to make needed changes through the legislative process. For all of those reasons, you have my unwavering respect and admiration.

As part of that process to continually improve our profession, many of you attended the KCDA Fall Conference in Topeka. I would like to personally thank all of the speakers, section leaders, and particularly Justin Edwards and the CLE Committee, for all of their time they devoted to making the conference a success. Also, I would like to thank our Executive Director Steve Kearney and Past President John Wheeler for their efforts in working with the Office of Judicial Administration to allow us greater scheduling flexibility so that our conference could be held on Monday and Tuesday instead of Sunday and Monday as had been the case the previous year.

I would also like to again take this opportunity to thank Past President John Wheeler for his leadership and dedication throughout his tenure on the Board of Directors, but more particularly for the last year when he served as President of the KCDA and also as a member of the Blue Ribbon Commission. John has worked tirelessly on behalf of our organization as the President of KCDA, but also as a voice for prosecutors throughout the state during the Blue Ribbon Commission process. I know that we all look forward to the report being issued shortly, so we will have a better idea how the proposed changes will impact our daily efforts.

As I look forward to the coming year, I am excited about many projects through KCDA including the return of the Support Staff component of our training conferences. As I am sure you all are aware, the support staff part of our conference has not been held during our last couple of conferences. There have been several of you who have volunteered either personally or through someone from your office to make that vital training piece something that will be beneficial to us as prosecutors as well as to our support staff. We also are continuing to solicit feedback from the membership of KCDA to determine how we may better serve the needs of our members. As always, if you have ideas or suggestions, please contact a member of the Board of Directors or the wonderful staff at Kearney and Associates to ensure that as an organization, we are addressing the needs of our members.

Given the current financial condition of the State and local government, I'm sure that in the coming year, we will all continue to be asked to do more with less. Additionally, with the legislative priorities that were set by the KCDA Board, I know that there will be spirited debate with at least a few of our legislative items. It is shaping up to be a busy and exciting year! 🍁

2012 KCDAA Legislative Agenda

It seems that the dust just settled on the 2011 legislative session, but the 2012 legislative session is quickly coming upon us. Though every session has its own headlines and quirks, the 2012 session will have an added ingredient that is only seen once every 10 years – reapportionment. In addition to 2012 being an election year for all 165 seats, reapportionment will permeate the air of the Statehouse, and there will be plenty of political gamesmanship brought out. Further, there is also a budget to pass, which in recent time has not been the easiest or prettiest process. While the politicians will be busy building and destroying their platforms for election or defeat, their constituents will – as always – attempt to bring matters of concern before the legislature for another year.

Any legislative agenda in this environment will be a challenge to navigate through the legislative process. As always, the leadership and lobbying team of KCDAA stand ready to succeed in this challenging environment. Your lobbying team is present at all times in the Statehouse while the legislature is in session. If you are aware of any issue that needs to have legislative redress or are concerned about a piece of legislation introduced, please contact KCDAA leadership or your lobbyists, Steve Kearney and Patrick Vogelsberg at any time. KCDAA strives to keep you informed during the session with regular weekly legislative updates while in Session. We also encourage you to utilize the following resources to inform yourself on legislative matters:

Kansas Legislature website -
<http://www.kslegislature.org/li/>

Kansas Legislative Research Department -
<http://skyways.lib.ks.us/ksleg/KLRD/klrd.html>

During its fall board meeting, the KCDAA board of directors approved the 2012 legislative agenda and presented it to the membership at the awards

luncheon. This action was just one part in a process that occurred over several months in developing the 2012 legislative agenda. Requests for legislative proposals were made available to the membership at the spring conference in June, and even more widely through e-mail, posts on the KCDAA website, and publication in the *Kansas Prosecutor* magazine. By the August 31 deadline, the KCDAA office had received more than 20 proposals. The legislative committee then held several meetings to go through the proposals and narrow down the list to a viable agenda.

The legislative committee narrowed down the proposals using the following guidelines: (1) matter of statewide concern; (2) importance to KCDAA members; (3) support for; (4) opposition; (5) amount of political capital in pursuing; and (6) likelihood of passage.

In the end, the KCDAA board of directors approved four legislative agenda items that will be pursued this session.

2012 Legislative Agenda

- 1. Felony murder; lesser included crimes instructions.** This bill is a partial fix for *State v. Berry*, ___ Kan. ___ (July 22, 2011), that mandated lesser-included instructions in felony-murder cases where the evidence would support such lesser. This piece of legislation would add the following subsection: “*Instructions on lesser included crimes shall not be required or given with respect to a charge of first-degree murder pursuant to K.S.A. 2011 Supp. 21-5402(a) (2) and amendments thereto unless the evidence of the underlying felony or felonies is weak or inconclusive. The provisions of this subsection shall be applied retroactively to any charge or conviction under former K.S.A. 21-3401(b) in any legal challenge or proceeding that comes before a district or an appellate court. If a defendant received*

a lesser-included-offense instruction and was convicted of a such offense in lieu of first-degree murder under K.S.A. 2011 Supp. 21-5402(a)(2) and amendments thereto or former K.S.A. 21-3401(b), on or between the dates of July 22, 2011 and [the effective date of this provision], and was subsequently convicted of the lesser offense, the retroactivity provision of this subsection shall not be used as the basis for reversal or vacatur of the conviction for the lesser offense.”

2. **Reciprocal discovery.** This legislation would amend K.S.A. 22-3212 to provide for full reciprocal discovery between the state and defendant in criminal cases. The language would be added to K.S.A. 22-3212(c)(1) and state, *“If there is no written report, the defendant is to provide a summary of what the witness is intending to testify including the witness’s opinions, the bases and reasons for those opinions, and the witness’s qualifications. The witness’s report or defendant’s written summary of the report is to be provided to the prosecution no later than 30 days prior to trial or any hearing the defendant intends to use such testimony.”* Further the legislation would add a new subsection (c)(2) which would state, *“The defendant shall also provide to the prosecution the names and addresses of all witnesses and provide any tangible papers, objects or exhibits that the defendant intends to produce at any hearing or trial. This shall be provided no later than 30 days prior to trial or any hearing the defendant intends to produce such witness, paper, object or exhibit.”*

3. **Speedy Trial.** This language would amend K.S.A. 22-3402 in the following way:
 - a. Adding that a person charged will be discharged after 90 days unless the delay shall happen as a result of the application or fault of the defendant or defendant’s attorney
 - b. Amend subsection (3) to read: *If any trial scheduled within the time limitation prescribed by subsection (1) or (2) is*

delayed by the application of or at the request of the defendant or defendant’s attorney, ~~the trial shall be rescheduled within 90 days of the original trial deadline.~~, the deadline for trial shall be the original trial deadline plus 90 days and the time tolled as a result of such delay. The original trial deadline is the date of arraignment plus either the 90 days prescribed by subsection (1) or the 180 days prescribed by subsection (2), before any tolled time is considered.

- c. Amend subsection (4) to read: *After any trial date has been set within the time limitation prescribed by subsection (1) ~~or~~ (2), or (3) if the defendant fails to appear for the trial or any pretrial hearing, and a bench warrant is ordered, the trial shall be rescheduled within 90 days after the defendant has appeared in court after apprehension or surrender ~~been~~ surrendered on such warrant. However, if the defendant was subject to the 180-day deadline prescribed by subsection (2) and more than 90 days of the original time limitation remain, then the original time limitation remains in effect.*
- d. Amend subsection (5) to read: *For those situations not otherwise covered by subsections (1), (2), and (3), ~~The time for trial may be extended beyond the limitations of subsections (1) and (2)~~ for any of the following reasons:*
- e. Amend subsection (5)(b). *A proceeding to determine the defendant’s competency to stand trial is pending ~~and a determination thereof may not be completed within the time limitations fixed for trial by this section.~~ If the defendant is subsequently found to be competent to stand trial, the trial shall be scheduled within 90 days of such finding. However, if the defendant was subject to the 180-day deadline prescribed by subsection (2) and more than 90 days of the original time limitation remain, then the original time limitation remains in effect. The time that a decision is pending on competency shall*

- never be counted against the State;*
- f. Amend subsection (6) to read: *In the event a mistrial is declared, a motion for new trial is granted, or a conviction is reversed on appeal to the supreme court or court of appeals, the time limitations provided for herein shall commence to run from the date the mistrial is declared, the date a new trial is ordered, or the date the mandate of the supreme court or court of appeals is filed in the district court.*
 - g. Add a subsection: (7) *The defendant's attorney may request a delay in any proceeding without consulting the defendant and may do so over the defendant's objection. If the defendant or defendant's attorney requests a delay and such delay is granted, the delay is charged to the defendant regardless of the reasons for making the request. If a delay is initially attributed to the defendant but is subsequently charged to the State for any reason, such delay may not be considered against the State under subsections (1), (2), and (3) and may not be used as a ground for dismissing a case or for reversing a conviction.*
 - h. Add a subsection: (8) *When a scheduled trial is scheduled within the period allowed by subsections (1), (2), and (3) and is delayed because a party has made or filed a motion or because the court raises a concern on its own, the time elapsing from the date of the making or filing of the motion or the court's raising a concern until the matter is resolved by court order shall not be considered when determining if a violation under subsections (1), and (2),(2) or (3) has occurred. If the resolution of such motion or concern by court order occurs at a time when less than 30 days remains under the provisions of subsections (1), (2), or (3), the time in which the defendant must be brought to trial is extended thirty days from the date of the court order.*
 - i. Add a subsection: (9) *If the State requests*

and is granted a delay for any reason provided in this statute, the time elapsing because of the order granting the delay may not be subsequently counted against the State if a court later determines that the district court erred by granting the State's request.

- j. Add a subsection: (10) *The provisions of this statute shall be applied retroactively in any legal challenge or proceeding that comes before a district or an appellate court.*

4. **Aggravated intimidation of a witness.** This legislation would clarify that prevention of a report of abuse to a mandatory reporter is a violation of the statute. First it would add to subsection (a) an additional culpability term that indicates the change. Second it would amend subsection (a)(2)(A) to read: *Making any report of the victimization of a victim to any law enforcement officer, prosecutor, probation officer, parole officer, correctional officer, community correctional services officer, or judicial officer, the secretary of the department of social and rehabilitation services, any agent or representative of the secretary of the department of social and rehabilitation services, or any person required to make a report under K.S.A. 38-2223;*

There was significant effort that went into developing this legislative agenda, and I wish to thank those members of the KCDA legislative committee for their time. We will strive to keep you informed with our weekly legislative update emails.

Again, the KCDA asks that at any time you have a concern about particular bills during the upcoming session, you do not hesitate to contact KCDA leadership or the KCDA lobbying team.



NOTICE



State of Kansas

Office of Judicial Administration

Kansas Judicial Center
301 SW 10th
Topeka, Kansas 66612-1507

NOTICE

Kansas Attorney Information Available Online, effective November 1, 2011

The Appellate Clerk's Office administers annual attorney registration and maintains information on over 14,000 attorneys licensed to practice law in Kansas. Much of that information is available under the Kansas Open Records Act, K.S.A. 45-215, *et seq.* See also Kansas Attorney General Opinion No. 87-168.

Requests for information are currently answered by phone, mail, or e-mail by clerk's staff. Those requests have become increasingly burdensome over the years. In these days of limited budgets and even more limited personnel, more than 40 states have established online attorney directories to handle public information requests more efficiently. Kansas will join those states on November 1, 2011, by launching a site on www.kscourts.org where basic attorney information will be available by electronic query.

The information posted on the website will include the attorney's name; registration number; date admitted to the bar; business address (which can be a post office box); business phone/fax; and current status as active, inactive or retired. If an attorney doesn't have a business address or phone/fax, those areas will be blank.

An attorney will still be able to have mailings sent to a home address, and that address will not appear on the website.

For further information about the online directory, call the Appellate Clerk's Office at (785) 296-3229 and ask to speak with Carol G. Green, Clerk of the Appellate Courts.

Don't Forget: Your tax deductible contribution can be made out to KPF

Projects under Development by the Kansas Prosecutors Foundation, include:

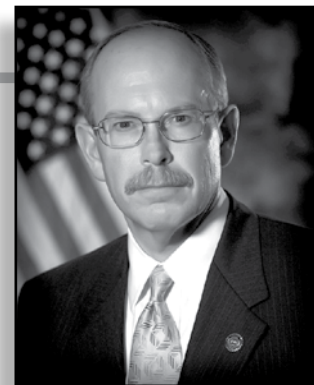
- KCDA Law School Scholarships
- KCDA Undergraduate Honors Stipends
- KPT&AI National Speaker Bureau for Prosecutor Continuing Legal Education
- KCDA Law Day Activities in Kansas High Schools
- 'Finding Words' – helping child victims speak
- Grant for a Statewide Victim/Witness Notification System
- Sponsor KVAA
- And so much more...

Learn more at www.kpfonline.org



Send donations directly to:

Kansas Prosecutors Foundation, 1200 SW 10th Ave., Topeka, KS 66604



Improving Forensic Science Services in Kansas

Dear Fellow Criminal Justice Professional:

On July 5, 2011, I had the privilege of being appointed as the 12th Director of the Kansas Bureau of Investigation (KBI) by Attorney General Derek Schmidt. I received interim authority from the Kansas Senate – Confirmation Oversight Committee on September 1, 2011. A full vote by the Senate with regard to confirmation will occur during the upcoming legislative session. I am anxious for the opportunity to lead the KBI and to work with you in the coming months and years.

I look forward to continuing the positive and productive relationship with prosecuting attorneys that the KBI has enjoyed across our great state. It is our intent to build upon that relationship by continuing to provide top-notch criminal investigative, laboratory, and record related services. We recognize that we can never sacrifice quality as it relates to those core services, but with reducing resource levels, we must adjust the quantity of services that we provide.

All of us in the criminal justice field have seen the stress that reduced budgets have placed on the delivery of laboratory and investigative services. To reconcile those resource reductions with ever increasing requests for service, we have found it necessary to prioritize the cases that we engage and laboratory services that we provide. The KBI has established the following investigative priorities to help us effectively manage our service requests:

- Homicides / Aggravated crimes against persons
- Offenses committed against children
- Drug trafficking and manufacturing organizations
- Crimes affecting governmental integrity/ security
- Multi-jurisdictional / Serial cases

These priorities are not exclusive and we will work with you in the event you have a unique or unusual circumstance that merits attention. We will also make every effort to communicate to you anticipated time frames involved so that you can plan accordingly.

In addition to our investigative priorities, we will focus on three service priorities:

- A reduction in turnaround times for forensic laboratory cases.
- A reduction in turnaround time for forensic computer examinations.
- A reduction in turnaround time on investigative cases.

While these are our identified priorities, over the next several months, I plan to meet with a wide variety of prosecutors and law enforcement administrators in our state so that I can hear first-hand what they need and expect from the KBI. I encourage Kansas prosecutors and other law enforcement professionals to contact me directly if they have concerns or suggestions.

I truly understand that our backlogs with regard to forensic testing are particularly troublesome to the efficient and effective prosecution of criminal cases. We will work hard to reduce backlogs and improve turn-around times on forensic exams. To do that, we need your help. While we would not ask you to do anything that you believe would compromise a prosecution or undermine a fair and impartial presentation of a case, we do ask you to consider the following suggestions whenever practical:

- Work with defense counsel to seek stipulation and avoid the need for laboratory analysis (and the associated fee) when the identity of a substance is not in dispute.

- Introduce laboratory reports instead of requiring the appearance of a forensic scientist.
- Allow scientists to testify remotely when possible, pursuant to K.S.A. 2011 Supp. 22-3437(b)(1)(2).
- Issue subpoenas for forensic personnel only when you have a firm hearing or trial date.
- Schedule forensic testimony to reduce waiting time and overnight stays for laboratory personnel.
- Request only those forensic examinations that are needed to make a fair and impartial presentation of the facts.
- Rely on the use of drug field-testing and the testimony of the arresting officer at the preliminary hearing stage.
- Aggressively pursue the collection of statutorily imposed laboratory fees on all cases where forensic examinations are completed. Laboratory fee funds are a critical piece of the funding equation and provide for equipment upgrades, processing supplies and scientists' salaries.

Working together, I am convinced that we can squeeze maximum efficiency from the resources that we have available to us, while working to recruit and retain highly qualified forensic scientists and to build capacity within our organization. In order to build that forensic capacity within the KBI, we will aggressively pursue the acquisition and deployment of new technology. We will work diligently to move our plans for a new full function forensic laboratory off of the drawing board and into operation. We will hone our work processes to improve our timeliness and, most importantly, we will work to retain our forensic personnel and reverse the trend of being a training ground for other laboratories with higher salary scales.

I look forward to collaborating with you and all segments of the criminal justice community in Kansas to identify and deliver those services most needed from the KBI. The KBI is a great organization, filled with talented, professional employees. I am proud to have the opportunity to be a part of it.

Thank you for all you do to make Kansas citizens safe. 🍀

Kirk Thompson, KBI Director

Kirk Thompson is a lifelong Kansas resident and a career law enforcement officer. He began his career as Deputy Sheriff in Barton County, Kan. In 1979, he was hired as a Special Agent with the KBI. His initial duty assignment was with the Field Investigations Division at KBI Headquarters. Over the ensuing years he served in a variety of supervisory and management positions within the agency, eventually being named as Associate Director (second in command) by then Director Larry Welch. In 2008, Kirk retired from the KBI with almost 30 years of service.

In May 2008, Kirk accepted a position with the Topeka Police Department (TPD) as a Captain in command of the Professional Standards Unit. The time spent with the TPD was a career high point. Lessons learned while working at the local level will be invaluable as the KBI delivers on its mission to provide resources and direct support to local law enforcement partners.

Kirk has been married for the past 35 years to Stephanie, who is employed in the banking industry. They live in Topeka. Kirk and Stephanie have one daughter Mandy, who is an Advanced Registered Nurse Practitioner in the Kansas City area. Her husband Paul is a Surgical Resident, completing his final year of training. Mandy and Paul have twin daughters.

Kirk is a graduate of the 194th session of the FBI National Academy and the Kansas Certified Public Managers program. He graduated from Washburn University with a Bachelor of Science degree in Criminal Justice. Kirk currently serves on the Board of Directors for the Midwest Counterdrug Training Center (MCTC). He was active in bringing the Midwest HIDTA program to Kansas, served as a co-chair on the Kansas Criminal Justice Information System (KCJIS) committee and served on many other law enforcement related committees and boards.

KCDAA Member Highlights: Richard James, Clay County Attorney & Lynn Koehn, Haskell County Attorney

by Amanda G. Voth, Assistant Attorney General

The size of prosecution offices in Kansas vary widely. While Sedgwick County has around 50 prosecutors, many counties across Kansas have only one county attorney. This article highlights two single-prosecutor offices: Richard James, the Clay County Attorney, and Lynn Koehn, the Haskell County Attorney.

Richard James, a retired Colonel from the United States Air Force, became a lawyer as a second career. He planned to return home to Clay County following law school to farm with his cousin. James had dreamed of farming during retirement, and planned to open a small law practice where he could work a couple of days a week.

After graduating from Washburn University School of Law, James moved to Clay Center in pursuit of his dream. Within months of moving to Clay County and opening his small practice, citizens approached him about running for county attorney. After repeatedly declining offers, James eventually accepted the opportunity and decided to run for election. James took office as Clay County Attorney in January 2005.

Currently, James files approximately 200 cases per year, trying an average of 9 to 10 jury trials a year. For James, the most satisfying type of case to prosecute involves child molestation. He likes watching child predators get sentenced to prison and knowing that the defendant is off the streets and cannot harm another child. Even after seven years, James is still surprised at the number of violent crimes that occur in the 9,500-person county. James was also shocked at how many drug cases he filed, noting that marijuana and methamphetamine consume the majority of the drug cases he prosecutes.

James enjoys the complete independence serving

as county attorney brings to him. Other than the citizens who live in Clay County, he noted, he does not have a boss. James likes living in the same small county as both victims and defendants. Because he knows the background of the people involved in the cases he prosecutes – whether witnesses, victims, or defendants – he feels that he can more easily accomplish justice rather than arbitrarily enforce the laws.

Serving as the only prosecutor in the county also, at times, has its drawbacks for James. “When I’m gone, the entire system grinds to a halt unless I hire someone to stand in for me,” he explained. The last two weeks in July are James’ yearly vacation time. For the last seven years, James has scheduled his vacation at the same time as the district court judge in Clay County so he does not have to hire an attorney to fill in for him while he is gone.

The loneliness of being the only prosecutor in the office is also a drawback for James. The “time factor, the pay factor, and the lone ranger factor all weigh” on James and other one-person county attorneys to a degree, James noted.

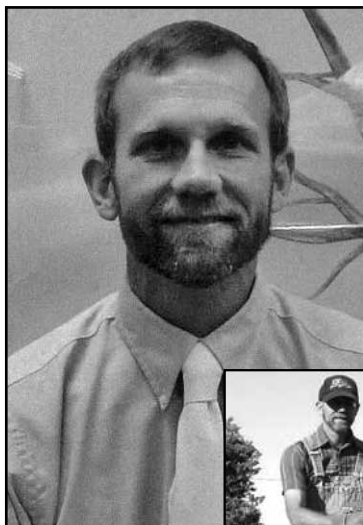
Although James spends nearly 60 hours a week on prosecutorial duties, he still finds time to operate a small private practice and to farm.

James farms more than 500 acres of land and has up to 50 head of cattle.

James offers advice to prosecutors, whether from small offices or large: “never be afraid to ask somebody for help.” He has never had another attorney say he or she was too busy to help him. “You will always receive help if you ask,” he said.

Lynn Koehn took office as Haskell County Attorney in 2009 when he was 27 years old. Koehn attended

law school at the University of South Dakota, and returned home to Kansas to begin his practice of law. Prior to running for county attorney, Koehn worked for the Western Regional Public Defender’s Office. In addition to prosecuting around 90 criminal cases a year, Koehn also runs a successful law practice and serves as City Attorney for both Sublette



Richard James



and Satanta, both communities of approximately 1,000 people. The two small towns are nothing new for Koehn, who grew up in Quinter, Kan., with a population of 800 people.

In Koehn's private practice, he defends criminals and practices general law. He believes that alternating between prosecuting and defending criminals assists in his ability to understand each party's theory of the case more easily. Koehn does not find it difficult to switch from prosecuting a criminal to defending a criminal, and finds good insight to successful prosecution and defense work while making these quick transitions.

Although physically in the County Attorney's Office approximately half of each work week, Koehn acknowledges that being a county attorney is a full-time job. Koehn is constantly communicating with his administrative assistant at the county attorney's office and with law enforcement.

Time management and communication are key




Lynn Koehn

for Koehn. Routine communication with law enforcement, victims, defense attorneys, court staff, commissioners, and the public has enabled Koehn to prosecute cases effectively and efficiently.

Koehn enjoys the autonomy of serving as the only prosecutor in the 4,000-person county. Koehn is easily able to make decisions without someone else second-guessing him. He also likes the flexibility he has to operate a private practice without it hindering his work as county attorney.

Balancing his duty as a prosecutor with the duty he owes to the citizens – including defendants – has been a learning process for Koehn. However, treating everyone with respect, from defendants, to their families, to the victims and witnesses, has aided in this balancing act.

Communication and respect for everyone involved in the justice system are the two traits Koehn carries with him to ensure that he serves the interests of the citizens of the county while serving justice. 

We want to share your news!



If you have something you would like to share with the KCDA membership, please keep us informed.

We'd like to publish baby announcements, new attorneys, anniversaries, retirements, awards won, office moves, if you've been published or anything else worth sharing with the KCDA!

Information submitted is subject to space availability and the editorial board reserves the right to edit material. Send your information to:

KCDA, attn: Mary Napier
1200 S.W. 10th Avenue
Topeka, Kansas 66604
(785) 232-5822
or e-mail:
mary@napiercommunications.com

Feel free to submit digital photos with your announcement!

2012 Deadlines:

Spring 2012: March 16, 2012

Summer 2012: June 29, 2012

Fall 2012: October 26, 2012

Anniversary

Chris McMullin, Johnson County Chief Deputy District Attorney, celebrated his 20th anniversary as a prosecutor in November 2011.



Births

Andrew Bauch, from the Kansas Attorney General's office, and his wife Skyler O'Hara, who works at the Dole Federal Courthouse in Kansas City, Kan., had a baby boy July 29, 2011. His name is Samuel Andrew Bauch. He was 8 pounds, 3 oz. and 20 inches long.

Travis Harrod, from the Kansas Attorney General's office, and his wife LeAnn, who works for SRS, had a baby girl October 5, 2011. Her name is Miriam Grace Harrod. She was 8 pounds.

Elizabeth Sweeney-Reeder, Assistant Miami County Attorney, gave birth to Charlotte Rose Hope Reeder on October 31. Charlotte was 6 pounds 8 ounces and 19 inches long. Mom and baby are well and went home on November 2. This is the second child for Elizabeth and her husband Jeff. Their son, Patrick, is 6 years old.



New Faces

Kansas Attorney General's Office

Kansas Attorney General Derek Schmidt has based one of his criminal prosecutors in Goodland to work closely with law enforcement and prosecutors in the western part of the state. Assistant Attorney General **Nicole Romine**, who serves in Schmidt's criminal litigation division, began

her posting in Goodland on October 1. She will continue her duties handling criminal prosecutions for the attorney general's office, working with county attorneys on local prosecutions, and working on criminal appeals from her post in western Kansas. Romine is the first full-time, general-assignment criminal prosecutor on the attorney general's staff based outside of Topeka in recent Kansas history. Schmidt also has three drug prosecutors posted with task forces in southwest Kansas and southeast Kansas.



Lyon County Attorney's Office

Sarah Washburn has been appointed as an assistant Lyon County Attorney effective September 6, 2011. She graduated from Washburn University School of Law in May 2010, and comes to the Lyon County office from Kansas Legal Services, Garden City office.

Riley County Attorney's Office

Barry Disney joined the Riley County Attorney's office August 8, 2011.

Wyandotte County District Attorney's Office

Logan McRae joined the Wyandotte County District Attorney's office in October 2011. Logan, who is from Wichita, received her undergraduate and her law degree from



Kansas University. While in law school, Logan was on Moot Court Council and competed in the University of San Diego National Criminal Procedure Moot Court Tournament. Logan was also on the Kansas Journal of Law and Public Policy as a staff editor her 2L year and Director of Administration Policy and Alumni Relations her 3L year. Rae earned the Advocacy Certificate. She clerked for Judge Walker of the 9th Judicial District of Kansas and interned with the Shawnee County District Attorney's Office. Rae will be handling juvenile offender cases.



Retirement

After over 30 years in public service, **Nola Foulston** has made the decision to "retire" at the end of her term as District Attorney in January 2013. She plans to return to the private practice of law at that time.

"I have had a wonderful experience as District Attorney, and feel that it's time now for me to step down from this position and become a private citizen," said Foulston. "I have had a wonderful career that I can be proud of. Leaving behind this lifetime calling to serve the public interest is not something that I will ever forget. There have been as many high points as there have been low points along the way, but in all, I would not have traded this experience for any other. I owe my thanks and grateful appreciation to the citizens of this community who have granted me the opportunity to serve as their District Attorney for the past 22 years."

KCDAA Award Winners

The Kansas County and District Attorneys Association (KCDAA) is pleased to announce its annual award winners: Gerald Kuckelman – Prosecutor of the Year; Dennis Paul Theroff – Lifetime Achievement Award; Amy Hanley – Associate Member Prosecutor of the Year; and Representative Pat Colloton – Policymaker of the Year. This was the first year for the Associate Member Prosecutor of the Year and Policymaker of the Year awards. All of the award winners were honored during the KCDAA Fall 2011 Conference Awards Luncheon on Monday, October 10 at the Capitol Plaza Hotel in Topeka.

2011 Prosecutor of the Year

by Andrew Bauch, Assistant
Attorney General

Gerald Kuckelman Atchison County Attorney

The Prosecutor of the Year award is given to a prosecutor for outstanding prosecution of cases throughout the year, and for significant contributions to the profession during that year.


This year's winner was Gerald (Jerry) Kuckelman, the Atchison County Attorney. Kuckelman received his Juris Doctorate from Washburn University in 1985, and immediately went to work for then-Kansas Attorney General, Robert Stephan. In 1987, Kuckelman returned to his hometown of Atchison where he opened a general practice office that he maintains to this day. In 2000, Kuckelman was elected the Atchison County Attorney, and is currently serving his third term.

Kuckelman received this year's award for his handling of the Patricia Kimmi homicide. In November 2009, Patricia Kimmi was kidnapped from her rural residence in Atchison County. Roger Hollister was a person of interest early on in the investigation, but investigators were unable to find Kimmi's body. Kuckelman orchestrated an intense



criminal investigation focusing on the recovery of Kimmi, and resisted the immense public pressure to quickly charge the case. Kuckelman's perseverance paid off when Kimmi's remains were discovered in 2010 along a creek bed near Hollister's property. Shortly after the discovery, Hollister was charged with capital murder (non-death penalty) under the theory of a contract killing.

Kuckelman lead the prosecution of the case against a defense team of three seasoned attorneys. The jury trial lasted six days and included the testimony of 25 witnesses. The jury convicted Hollister of capital murder in three hours, and Hollister is now a lifetime guest of the Kansas Department of Corrections.

Kuckelman resides in Atchison with his wife Tricia, their four children, and his cat. Kuckelman is an active leader in the local Republican Party, has served on various boards at the local Catholic school, and has served as the Elwood, Kan., Municipal Judge since 1990. 

2011 Lifetime Achievement Award

Paul Theroff Senior Assistant District Attorney, Wyandotte County DA's Office

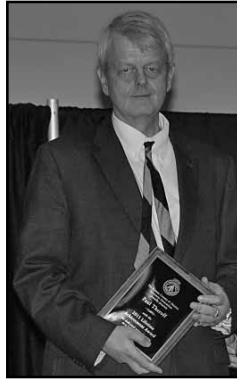
This award is presented to a regular KCDAA member for his/her longevity as a prosecutor. The nominee must have served no less than 25 years in a prosecutor position, and not previously received this award.

Dennis Paul Theroff is a Senior Assistant District Attorney and Lead Charging Attorney at the Office of the District Attorney, Twenty-Ninth Judicial District of Kansas. His public service to that office began in January 1982. Over the last

KCDAA Award Winners

29 years, Theroff served first as a trial prosecutor, was instrumental in developing an office system of intake and evaluation of new cases for charging decisions, and is currently the primary attorney assigned to ex parte court orders. He also maintains data, advises on office automation, and completes special assignments with high professionalism.

As the lead charging attorney, Theroff has been involved in the evaluation of more than 1,000 homicide investigations in an office that files an average of 1,600 criminal cases each year. Hundreds more cases each year are declined due to Theroff's experienced discretion. Theroff's nomination described him as a consummate behind-the-scenes professional as he has the wisdom and experience to know not only when to decline a



case, but also possesses the diplomacy and inherent authority necessary to convince an eager law enforcement officer when a given case should not be filed.

Theroff has also been behind-the-scenes of the KCDAA over the years. He has attended many KCDAA conference over the course of his career, and he has made suggestions for statutory amendments sent through representatives to the association.

During his time with the Wyandotte County District Attorney's office, Theroff has even trained junior prosecutors and provided counsel to the DA. This makes him a very valuable asset to the office. These also are among his highest achievements because his imprint will be self-evident for years to come in Wyandotte County and across Kansas. 🏛️

2011 Associate Member Prosecutor of the Year

by Vic Braden, Deputy
Attorney General

Amy Hanley
Assistant Attorney General

This award is presented to a prosecutor for outstanding prosecution of a case or cases throughout the year from an office other than a county or district attorney's office. The nominee must be an associate member of KCDAA. This year's winner was Amy Hanley.

With aggressiveness tempered by risk management, innovativeness, and organizational prowess, Hanley knows how to put together a persuasive case. In January 2011, she was given the chance to display these skills when assigned two difficult murder cases. The first case was State v. Delbert McBroom. The victim, Scott Noel, was hog-tied in the kitchen of his house and shot in the back of the head with a 12-gauge shotgun. In March 2011, Hanley confidently and strongly presented this circumstantial case to an Osborne County jury, resulting in a felony murder conviction. The second case was State v. James Kraig Kahler. Kahler stormed into a house where his wife Karen, two daughters Lauren and Emily, and son Sean



were staying with Dorothy Wight (Karen's grandmother), and systematically executed all four women. Hanley led the prosecution team in presenting this case to an Osage County jury in August 2011. Kahler was convicted of capital murder and sentenced to death for his evil acts.

Beyond fulfilling her duties as a prosecutor, Hanley has been active in building advocacy excellence within the legal community in Kansas. She serves regularly on the prosecutor speaking circuit, where she discusses trial tactics, child

predator prosecutions, and computer forensics. Her primary passion in building advocacy is mentoring law students to strive for excellence in their chosen profession. Over the past two years, Hanley has demonstrated this enthusiasm by coaching Washburn's School of Law Texas Young Lawyers Association (TYLA) trial team. Inspired by her infectious zeal and superior teaching skills, the team has excelled to unprecedented levels of achievement, as evidenced earlier this year with one team

KCDAA Award Winners

advancing to the regional finals in Little Rock, Ark.

To help balance the pressures of a career in prosecution, Hanley maintains a strong bond with her family and values other interests. Among these interests are cooking and entertaining. Hanley comes from a family of skilled hostesses, including both of her grandmothers who were excellent cooks

and regularly entertained for family and friends.

Hanley is a native of the central Kansas town of Lost Springs (population 70). She holds a bachelor's degree in English from Kansas State University and earned her Juris Doctor from Drake University. Her husband, John, is an advertising and public relations officer for Sunflower Bank. 🌻

2011 Policymaker of the Year

by Steve Howe, Johnson
County District Attorney

Pat Colloton Kansas Representative

This award is presented to an individual who is determined to have made the most significant impact on policy related to county and district attorneys either during the past year or over an extended career of public service.

Pat Colloton is an attorney who is a member of the bar and has practiced law in the states of Kansas, Illinois, New York, Massachusetts, and Wisconsin. Her legal career includes work in the Civil Rights Division of the Justice Department in Washington DC, a Wall Street law firm in New York, and a large law firm in Milwaukee. Representative Colloton received her undergraduate degree in chemistry and psychology and her law school degree from the University of Wisconsin.

Colloton is currently a member of the Kansas House of Representatives and represents parts of Leawood and Overland Park in suburban Kansas City. She is chair of the Corrections and Juvenile Justice Committee, Chair of the Joint Committee on Corrections and Juvenile Justice Oversight. She also serves on the Judiciary and Education Committees and the Legislative Educational Planning Committee. Colloton is a member of the Kansas Sentencing Commission, the Kansas Reentry Policy Committee and serves as Chair of the Board of Directors for the Justice Center of the Council of State Governments in Washington D.C. and as Vice Chair of the Law and Public Safety Committee of the National Council of State Legislatures.

In her spare time, she is a member of the Criminal Justice Advisory Council, which provides



guidance to Johnson County on public safety issues. Representative Colloton is a tireless worker who strives to better the lives of citizens of Johnson County and Kansas. She has been a leader in helping the criminal justice system deal with those who have serious mental illnesses. This includes her efforts to prevent the closing of the Rainbow Mental Health Hospital, which is relied upon by law enforcement as an alternative to incarceration of those who are mentally ill. Colloton has also been

on the forefront in formulating policies to address state and county run re-entry programs for those prisoners who are close to being released back into the community.

With her current committee assignments, Colloton has been actively involved in many of the bills submitted by the KCDAA, individual prosecutors, and law enforcement. I have always found Colloton to be approachable and willing to understand our needs and concerns associated with various pieces of legislation. She understands how important public safety is to each of our communities. Colloton has supported many local and statewide initiatives supported by prosecutors and law enforcement.

In the coming year, we will all be faced with huge budget challenges, which will impact many of our agencies. I am confident that Colloton will listen to our concerns and, when possible, advocate for the needs of our organizations. These efforts make her an excellent recipient of the Policymaker of the Year Award. 🌻

Prosecutorial Liability

by Steve Phillips, Assistant Attorney General--Civil Litigation Division, Office of Kansas Attorney General Derek Schmidt and Toby Crouse, Foulston Siefkin LLP

In *Heffington v. Bush*,¹ Joan Heffington, a *pro se* litigant, the founder of the Association for Honest Attorneys (A.H.A.), and a later independent candidate for governor in Kansas, filed a federal suit against numerous individuals and agencies, including a state district court judge, an insurance company, various medical providers and President George W. Bush. She alleged that “President Bush had issued a National Security Letter (NSL) against her and had influenced doctors to intentionally botch up her surgery so she would die.”² She alleged President Bush did this in retaliation over her fight for justice.³ Heffington’s suit was, of course ultimately dismissed, and the dismissal was, of course, affirmed on appeal. Heffington did also sue a prosecutor, along with a district court and others over criminal charges brought against her son. That suit also was, of course, ultimately dismissed, and the dismissal was, of course affirmed on appeal.⁴

This article is about lawsuits for money damages against county and district attorneys for acts they have performed as prosecutors.⁵ George W. Bush is not a prosecutor. But Heffington’s cases demonstrate the likelihood of anyone in the public eye getting sued at some point. This article cannot tell you how not to get sued. Getting sued does not mean that the plaintiff will win; non-meritorious suits are routinely thrown out by courts before discovery even takes place on short motions to dismiss, although sanctions will probably not be awarded against the plaintiff if the plaintiff is *pro se*.

Not all possible causes of action can be discussed herein. As a practical matter, common-law and statutory defenses available to prosecutors are of more importance than the various causes of action and will be dealt with in more detail here.

I. COMMONLY ASSERTED CAUSES OF ACTION AGAINST PROSECUTORS.

The most commonly asserted cause of action against prosecutors for the prosecutorial function is a federal cause of action under 42 U.S.C. § 1983. Although a federal cause of action, § 1983 cases may be filed in either federal or state court. To state a claim under 42 U.S.C. § 1983, a plaintiff must allege that there has been a violation of a right secured by the United States Constitution or a federal law, and that the defendant acted “under color of state law.”⁶ A defendant acts under color of state law when he or she exercises power “possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.”⁷ Public defenders, for instance, are generally held to not be acting under color of state law for purposes of § 1983, because although government employees, their duty is to the client and therefore more similar to that of a private defense lawyer.⁸ Prosecutors are routinely held to be acting under color of state law, unless their actions are well outside their job duties. For instance, a prosecutor who was the victim of a robbery at a restaurant, was held to not be acting under color of state law for a poke in the eye he gave the alleged perpetrator after police brought him over for identification.⁹ Any prosecutor in the Attorney General’s Office, in a District Attorney’s Office, a County Attorney’s office, or even a municipal prosecutor, could be a defendant for actions taken by virtue of the office. Supervisors may be defendants, as may be the employing entity, depending on whether it is state or municipal.

Section 1983 claims, also commonly called constitutional torts, can take a wide variety of

Footnotes

1 #08-4097, 2009 WL 151560 (D. Kan. 2009), *aff’d* 337 Fed.Appx. 741, 2009 WL 1803282 (10th Cir. 2009).

2 *Id.* at 2.

3 *Id.*

4 *Heffington v. District Court of Sedgwick County*, No. 05-4028, 2005 WL 1421530 (D.Kan. 2005), *aff’d* 214 Fed. Appx. 800, 2007 WL 211280 (2007), *cert denied* 552 U.S. 886 (2007). The dismissal of the prosecutor was on grounds of prosecutorial immunity.

5 Federal prosecutors are not within the purview of this article.

6 *West v. Akins*, 487 U.S. 42, 48, (1988);

7 *West*, 487 U.S. at 48.

8 *Polk Cnty. v. Dodson*, 454 U.S. 312, 325 (1981); *Esqui-bel v. Brian Williamson*, 421 Fed.Appx. 813 (10th Cir. 2010).

9 *Collins v. Alevizos*, 404 Fed.Appx. 58 (7th Cir. 2010) (“[The prosecutor’s] access to Collins was not made possible because he was a prosecutor, it was made possible because he was the victim of a robbery.”)

ill-defined forms. Generally, it is not enough to just allege negligence under 42 U.S.C. § 1983. Claims are commonly asserted for violation of First Amendment rights, Fourth Amendment rights, due process rights, and equal protection rights. Actions under § 1983 are subject to a two-year statute of limitations.¹⁰ The two claims most commonly asserted against prosecutors are Fourth Amendment malicious prosecution claims and claims that a prosecutor took some act in retaliation for the exercise of the plaintiff's First Amendment rights.

As noted, most claims against prosecutors under § 1983 are easily dismissed, before discovery. Claims for retaliation for exercise of First Amendment rights are problematic, however, because at times the federal courts come close to treating the mere allegation of such as a fact question.

To establish a §1983 retaliation claim, a plaintiff must plead and prove: (1) that plaintiff was engaged in a constitutionally protected activity; (2) that defendant's actions caused plaintiff an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the defendant's actions were substantially motivated as a response to the exercise of First Amendment rights.¹¹ When the allegation centers on malicious prosecution, the plaintiff must also plead and prove the absence of probable cause for the prosecution.¹² Because a conviction is inherently supported by probable cause, suits in which the defendant was convicted should be easily dismissed. Allegations of retaliation by something less than an actual conviction are more difficult to get dismissed because the defense is unable to play the trump card of an actual conviction.

For instance, in *McCormick v. City of Lawrence*,¹³ Plaintiff McCormick alleged that an Assistant Kansas Attorney General had reported him to the Consumer Protection Division for possible unlicensed practice of law in retaliation for McCormick's exercise of his rights to access the courts (by filing several pro se cases the A.A.G. had helped defend). The district court came very near holding that it was irrelevant

whether McCormick was practicing law without a license,¹⁴ which could have left the A.A.G. liable for retaliation for reporting an act that was in fact illegal. The Court, however, ultimately dismissed A.A.G. on grounds of qualified immunity (a defense discussed later.)

Fourth Amendment malicious prosecution actions arising from lawfully issued arrest warrants require the proof of five elements: "(1) the defendant caused the plaintiff's continued confinement or prosecution; (2) the original action terminated in favor of the plaintiff; (3) no probable cause supported the original arrest, continued confinement, or prosecution; (4) the defendant acted with malice; and (5) the plaintiff sustained damages."¹⁵ Note that under these elements, if the plaintiff was actually convicted, there is no viable malicious prosecution claim. And as will be discussed, the defense of Absolute Prosecutorial Immunity cuts off most malicious prosecution claims anyway. Cases in which there has not been an actual conviction often turn on whether there is probable cause to support the original arrest. However, because prosecutors should not be signing probable cause affidavits themselves, cases against them should not get this far.

State law claims for malicious prosecution are similar to federal, but as will later be discussed, probably cannot be asserted against prosecutors in Kansas. Other state causes of action sometimes asserted include libel and negligence. But again, so long as they concern the prosecutorial function, dismissal is likely.

II. EMPLOYER LIABILITY AND RESPONDEAT SUPERIOR.

The extent of employer liability depends on the employer. For purposes of a § 1983 action, the state and its agencies are immune from suit due to the 11th Amendment and because they are not considered to be "persons" subject to suit under § 1983.¹⁶

Municipal entities—cities and counties— may

10 *Brown v. Unified School Dist. 501, Topeka Public Schools*, 465 F.3d 1184, 1188 (10th Cir. 2006).

11 *Becker v. Kroll*, 494 F.3d 904, 925 (10th Cir. 2007).

12 *Id.*

13 No. 02-2135, 2008 WL 1793143 (D. Kan., 2008).

14 *Id.* at 5.

15 *Novitsky v. City of Aurora*, 491 F.3d 1244, 1258 (10th Cir. 2007).

16 *Novitsky v. City of Aurora*, 491 U.S. 58, 71 (1989).

Likewise, District Attorneys and County Attorneys are entitled to Eleventh Amendment immunity for official capacity suits. *Nieler v. Board of County Comm'rs of Republic County*, 582 F.3d 1155, 1164 (10th Cir. 2009).

be defendants to a § 1983 suit because they are not entitled to 11th Amendment immunity and are considered to be “persons” for purposes of § 1983.¹⁷ Municipal entities are liable for compensatory damages when the violation is attributable to the enforcement of a municipal custom or policy.¹⁸ In other words, municipal liability is not simply based on *respondeat superior* liability.

Likewise, a supervisory official’s liability may not be based simply on *respondeat superior*.¹⁹ It is “not enough . . . for a plaintiff merely to show defendant was in charge of other state actors who actually committed the violation.”²⁰ In any § 1983 action against any defendant, personal participation must be alleged.²¹ “[A] sufficient causal connection must exist between the supervisor and the constitutional violation.”²² For example, ‘mere negligence’ is not enough to hold a supervisor liable under § 1983, a plaintiff must first show the supervisor’s subordinates violated the constitution . . . [and also] establish that the supervisor acted knowingly or with deliberate indifference that a constitutional violation would occur.”²³ Thus, a plaintiff must allege facts that show a culpable mind and that the individual had a duty to supervise the persons and actions that allegedly violated her rights.²⁴ As to state law claims under the Tort Claims Act, an employing entity is liable under the doctrine of *respondeat superior*. The Kansas Court of Appeals recently explained:

Under K.S.A. 75–6103, “each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment....” And under K.S.A. 75–6109, “a governmental entity is liable, and shall indemnify its employees against damages,

for injury or damage proximately caused by an act or omission of an employee while acting within the scope of his or her employment.” Those provisions statutorily impose liability on a governmental entity subject to the KTCA for employee negligence.²⁵

III. DEFENSES

A. Federal Defenses.

Defenses to § 1983 actions are all defenses created by federal law, mostly federal common-law. The Kansas Tort Claims Act has essentially no effect on federal causes of action. State law cannot make state employees immune from federal claims.²⁶

One significant defense to § 1983 actions is, like in all cases, the plaintiff must have standing to bring the action. Often, § 1983 plaintiffs attempt to assert the rights of third parties who are not before the court. Numerous law review articles are written on standing, so an in-depth discussion of the subject is beyond this article. A plaintiff “generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights and interests of third parties.”²⁷

Prosecutors enjoy absolute prosecutorial immunity from liability in § 1983 claims. In *Imbler v. Pachtman*²⁸, the Supreme Court held that a state prosecuting attorney who acted within the scope of his duties in initiating and pursuing a criminal prosecution and in presenting the state’s case is *absolutely immune* from a civil suit for damages for alleged deprivations of the defendant’s constitutional rights under § 1983.²⁹ The Court so held *even* where the prosecutor knowingly used perjured testimony at the trial, deliberately withheld exculpatory information, and failed to make a full

17 *Monell v. Department of Social Services*, 436 U.S. 658 (1978).

18 *Id.*

19 *Jenkins v. Wood*, 81 F.3d 988, 994 (10th Cir. 1996) (“[T]here is no concept of strict supervisor liability under § 1983.”)

20 *Serna v. Colo. Dept. of Corrections*, 455 F.3d 1146, 1151 (10th Cir. 2006) (citations and internal quotations omitted).

21 *Bennett v. Passic*, 545 F.2d 1260, 1262-63 (10th Cir. 1976).

22 *Serna*, 455 F.3d at 1511.

23 *Id.*

24 *Iid.* at 1151-52, 1154.

25 *Estate of Belden v. Brown County*, ___ Kan. App. 2d ___, No. 104,246, 2011 WL 3759946 at 36 (2011).

26 *Sage v. Williams* 23 Kan. App. 2d 624, 631 (Federal civil rights claims brought pursuant to 42 U.S.C. § 1983 are not subject to the state law limitations of the Kansas Tort Claims Act ...) (citing *Cory v. Thompson*, 795 F.Supp. 368, 370 (D.Kan.1992)). See also *Scheideman v. Shawnee County Bd. of County Comrs*, 895 F.Supp. 279, 282 (D.Kan. 1995) (It is well-established that federal civil rights claims are not subject to the Kansas Tort Claims Act.).

27 *Warth v. Seldin*, 422 U.S. 490, 499 (1983).

28 424 U.S. 409 (1976).

29 42 U.S.C.A. § 1983.

disclosure of all facts casting doubt upon the state's testimony.

Prosecutors are not immune from liability for everything they do, however.³⁰ Absolute immunity only applies to investigative or administrative functions when those acts are "necessary so that a prosecutor may fulfill his function as an officer of the court."³¹ (Investigative or administrative functions are entitled to qualified immunity³² as will be discussed later.)

Absolute immunity also does not apply to providing legal advice to the police,³³ signing a probable cause affidavit or information,³⁴ public statements,³⁵ or investigative work normally performed by a detective or police officer (*e.g.*, planning and executing a raid on a suspected weapons cache).³⁶

No prosecutor should be signing probable cause affidavits; that can easily and more appropriately be done by law enforcement officers who have actual knowledge of the facts. But other acts exempt from absolute liability may not be so easily avoided. Administrative functions are inherent in any office. Within ethical limits, public statements may be a political necessity.

Advising police also seems inherent in the job of a prosecutor. Section 1983 cases, based on advice, can be a legal morass. Presenting a search warrant to a judge has been held to be subject to absolute immunity in *Burns v. Reed*.³⁷ But in one particularly troubling Tenth Circuit case, *Mink v. Suthers*, a prosecutor reviewed but did not sign an affidavit for a search warrant, yet was denied absolute immunity: not for presenting it to the magistrate who approved it, but merely for reviewing the affidavit and concluding that it constituted probable cause.³⁸

Another significant federal doctrine that is

sometimes raised as a defense to suits against prosecutors is the doctrine from *Heck v. Humphrey*,³⁹ in which the United States Supreme Court reasoned that civil actions "are not appropriate vehicles for challenging the validity of outstanding criminal judgments." The Court thus held that a claim for damages is not cognizable under § 1983 if a judgment in plaintiff's favor would necessarily imply the invalidity of his conviction or sentence, unless the prisoner can show that the prior conviction had previously been invalidated.⁴⁰ Consequently, when a plaintiff files a civil rights action in a federal district court after having been convicted, the "district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence."⁴¹

If a prosecutor is without absolute immunity, the next layer of protection is qualified immunity. The doctrine of qualified immunity shields government officials performing discretionary functions from liability for damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.⁴²

Whether qualified immunity is applicable is subject to a two-part test: 1) whether "taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right," and 2) "whether the right was clearly established . . . in light of the specific context of the case."⁴³ To answer this question, the court decides "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation."⁴⁴ A court may consider either part of the test first.⁴⁵

To survive summary judgment, the "clearly

30 If you have any questions about what you are doing, it is advisable to call the Attorney General's office or your county's insurer. For municipalities insured by KCAMP, call its "Attorney Assist" line for any questions at (888) 671-4351

31 *Pfeiffer v. Hartford Fire Ins. Co.*, 929 F.2d 1484, 1490 (10th Cir.1991) (quoting *Snell v. Tunnell*, 920 F.2d 673, 693 (10th Cir.1990)).

32 *Gagan v. Norton*, 35 F.3d 1473, 1475 (10th Cir. 1994).

33 *Burns v. Reed*, 500 U.S. 478, 495-96 (1991).

34 *Kalina v. Fletcher*, 522 U.S. 118, 120 (1997).

35 *Buckley v. Fitzsimmons*, 509 U.S. 259 (1993).

36 *Hampton v. Chicago*, 484 F.2d 602, 608 (7th Cir. 1973).

37 *supra*.

38 482 F.3d 1244, 1263 (10th Cir. 2007).

39 512 U.S. 477, 487 (1994).

40 512 U.S. at 486-87.

41 *Id.* at 487.

42 *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Boles v. Neet*, 486 F.3d 1177, 1180 (10th Cir. 2007).

43 *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

44 *Id.*

45 *Pearson v. Callahan* 555 U.S. 223 (2009).

established” right must be “particularized, meaning that there must ordinarily be a Supreme Court or Tenth Circuit decision on point, or clearly established weight of authority from other courts.”⁴⁶

In *Mink*,⁴⁷ the § 1983 claim was a Fourth Amendment claim for search and seizure involving a search warrant issued for possible criminal defamation in a satirical editorial in an internet-based journal. After remand, in another trip back up to the 10th Circuit, the prosecutor was denied even qualified immunity for her review of the affidavit, because under the facts, “no reasonable prosecutor could believe it was probable that publishing such statements constituted a crime warranting search and seizure of Mr. Mink’s property.”⁴⁸ Ultimately the district court granted summary judgment in favor of the plaintiff on the issue of liability against the prosecutor.⁴⁹ At worst, the *Mink* series of cases could swallow both absolute immunity and qualified immunity, by allowing any claim against a prosecutor to proceed based on the prosecutor’s evaluation of the evidence. More hopefully, *Mink*, is just an example of bad facts making bad law, because the internet journal was apparently obviously satirical and would not support criminal defamation charges.

B. State Defenses.

Sovereign immunity is no more; in K.S.A. 75-6103 (a), the Kansas Tort Claims Act, provides generally:

Subject to the limitations of this act, each governmental entity shall be liable for damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment under circumstances where the governmental entity, if a private person, would be liable under the laws of this state.

Kansas case law appears to provide prosecutors significantly more protection from state law claims than does federal law. In *Massey v. Shepack*,⁵⁰ the Court said:

A prosecutor has absolute immunity from common law suits for malicious prosecution. [cites omitted]. Likewise the power of the county attorney to investigate alleged violations within his jurisdiction is unquestionable, and his motive in so doing may not be the subject of a lawsuit against him. A county attorney has absolute immunity for his conduct in investigations.

Similarly, in *Sampson v. Rumsey*,⁵¹ the Court said, “The same policy considerations requiring absolute immunity for communications made during the course of a prosecution require immunity for conduct in investigations which may lead to a prosecution.”

Both *Massey* and *Sampson* were decided before the United States Supreme Court decided *Kalina*. But rather than follow the federal rule by analogy, Kansas seems to have continued with near blanket absolute immunity for prosecutors. Recently the courts have put it in terms of the Public Duty Doctrine, which generally is that absent a special relationship, public officials do not owe a duty to individuals, but rather the public in general. The Court of Appeals has explained:

An analysis of the defendants’ potential liability for negligence under the KTCA begins and ends with duty. A tort is a breach of duty imposed by law. [Citation omitted.] In order to be liable for negligence, a defendant must owe a duty of care to the injured plaintiff. The existence of a duty is a question of law, and we have unlimited review of questions of law. [Citation omitted.]

Generally, law enforcement and social services

46 *Holloway v. Vargas*, 535 F.Supp.2d 1219, 1226 (D. Kan. 2008) (finding that “clearly established law under Supreme Court and Tenth Circuit precedent foreclosed a stop based only on an anonymous tip that did not include any standard indicia of reliability” and as a result summary judgment was denied). See also *Prison Legal News, Inc. v. Simmons*, 401 F. Supp. 2d 1181, 1192 (D. Kan. 2005) (holding that “ordinarily a court would expect to see cases from at least three other circuits before concluding that a right is clearly established

based on the ‘clearly established weight of authority from other courts.’”)

47 *Supra*.

48 *Mink v. Suthers*, 613 F.3d 995, 1010 (10th Cir. 2010).

49 *Mink v. Knox*, 2011 WL 2174401 (D. Colo. 2011).

50 12 Kan.App.2d 770, 775 (1988) (citing *Smith v. Parman*, 101 Kan. 115 (1917).

51 1 Kan.App.2d 191, 197 (1977).

officials owe a legal duty only to the public at large. [Citations omitted.] Under the public duty doctrine, officials have no duty to any individual except where circumstances create a special relationship or specific duty. [Citations omitted.] Where there is no duty, there can be no breach.⁵²

In a post-*Kalina* decision, *McCormick v. Board of County Commissioners of Shawnee County*,⁵³ the prosecutor faced both § 1983 and state law tort claims for signing an allegedly false probable cause affidavit. The Kansas Supreme Court allowed only the § 1983 claims to proceed (because *Kalina* might allow cause of action, at least if there was malice or knowledge of falsity in filing the affidavit). The Court held that all state law claims were properly dismissed by the district court based on the Public Duty Doctrine.

In addition to the public duty doctrine, there are statutory defenses in the Tort Claims Act that might be asserted. K.S.A. 75-6104(e), provides in relevant part:

A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from . . . any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved . . .

The discretionary function exception has been held not to apply, however, to allegations of willful, gross, or wanton conduct.⁵⁴

K.S.A. 75-6104(c) provides a defense for "enforcement of or failure to enforce a law, whether valid or invalid, including, but not limited to, any statute, rule and regulation, ordinance or resolution..."

Although the Tort Claims exceptions should certainly be raised, *McCormick* seems to stand for the proposition that blanket absolute prosecutorial immunity survives as to state law claims, and that

should be the first defense raised to any state-law claim against a prosecutor.

IV. TORT CLAIMS REPRESENTATION

K.S.A. 75-6108(a) provides for the defense of government employees. It provides, in relevant part:

Upon request of an employee in accordance with subsection (e), a governmental entity shall: (1) Provide for the defense of any civil action or proceeding against such employee, in such employee's official or individual capacity or both, on account of an act or omission in the scope of such employee's employment as an employee of the governmental entity, except as provided in subsection (c); and (2) provide legal counsel to such employee when such employee is summoned to appear before any grand jury or inquisition on account of an act or omission in the scope of such employee's employment as an employee of the governmental entity, except as provided in subsection (c).

In other words, the state provides the defense for state employees, counties for county employees, and cities for city employees. District Attorneys and deputies and assistants are considered by the Attorney General's Office to be state employees. The Attorney General's Office considers county attorneys and their deputies and assistants to be county employees and will deny state representation on that basis. Recently, though, several counties have attempted legal challenges, arguing essentially that since county attorneys assert state authority, they should be considered state employees.

Representation may be denied on several bases.

K.S.A. 75-6108(c) provides:

(c) Except as provided in K.S.A. 75-4360 and amendments thereto, a governmental entity may refuse to provide for the defense of an action against an employee or representation of the employee if the governmental entity determines that:

(1) The act or omission was not within the scope

52 *Kennedy v. Kansas Dept. of SRS*, 26 Kan.App.2d 98, 100 (1999).

53 272 Kan. 627, 648 (2001).

54 See e.g., *Barrett ex rel. Barrett v. Unified School Dist.*

No. 259, 272 Kan. 250 (2001) (interpreting K.S.A. 75-6104(e) to apply to ordinary negligence only, not to allegations of willful, gross, or wanton negligence).

- of such employee's employment;
- (2) such employee acted or failed to act because of actual fraud or actual malice;
- (3) the defense of the action or proceeding by the governmental entity would create a conflict of interest between the governmental entity and the employee; or
- (4) the request was not made in accordance with subsection (e).

The Attorney General's Office has traditionally taken a fairly narrow view of the exceptions and has generally provided a defense when one should arguably be provided. One hurdle in obtaining a defense is that a request must be properly made. K.S.A. 75-6108(e) requires a written request within 15 days after service, with such request directed to the Attorney General for employees of the state, or to the governing body, if a municipal employee.

The Tort Claims Act also provides for indemnification, generally with the same limitations as to when a defense is provided.⁵⁵

V. WHAT TO DO WHEN YOU HAVE BEEN SUED.

It is very, very likely that even the most prudent prosecutor will – at some point – become the target of a lawsuit. The following is a list of things that you should consider when (or if) you get served with a lawsuit.

The most important thing to do is **immediately** notify the entity that provides coverage for your prosecutorial activities and the County Counselor. As discussed above, this generally means that District Attorneys (and staff) will be defended by the Attorney General's Office and County Attorneys (and staff) will be defended by private insurers. (As mentioned previously, one of the authors – while representing county attorneys – has begun notifying the Attorney General as well.) You and the County Counselor should work together to provide your indemnitor (i) a copy of the Petition or Complaint, (ii) all service-related papers, and (iii) a brief summary of the lawsuit. Prompt notification will increase your chances of getting coverage for your claim, aid in any removal to federal court, and

prevent the entry of default judgment.

The next thing to do is to gather all of the information relevant to the claim. Civil litigation is now heavily focused not only on what you have written or filed, but also any electronic documents you created, emails that you have sent or received, text messages, or voicemails. Immediately securing these items will reduce the likelihood that they will be lost to document retention purging or sent to an offsite file (where things rarely return). Corraling and giving this data to your defense counsel will help get your attorney up to speed and help them understand the issues at play.

The final thing to remember is not to take this personal. Prosecutors, like most other civil defendants, are (often times justifiably) outraged that they have been sued and feel it is an affront to their integrity, professional reputation, or personal values. These natural feelings should not cloud your judgment or how you discharge your duties. Continue acting in a professional and courteous manner to all people you encounter, even if you believe one or more individuals have slandered you or are out to get you. This is especially true if law enforcement officers have been sued with you. Do not personally or with their aid undertake any actions that may be viewed (by a savvy plaintiff's lawyer) as an act of retaliation. This will only add to your troubles. Instead, take the lawsuit in stride and put your trust in your defense counsel. He or she is well-armed to defend the claims that have been made against you. 📞

County Courthouse Portraits



Mitchell County Courthouse

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⁵⁵ See K.S.A. 75-6109, 75-6111.

Unreasonable Expectations About Privacy?

By Angela Wilson, Senior Assistant District Attorney, 18th Judicial District of Kansas

Shifting privacy expectations and law enforcement

Advancements in technology have forever changed the practice of law and the procedures of law enforcement. It should be of little surprise that these drastic changes have created a need to expand the analysis of the Fourth Amendment as applied to technology. While prosecutors attempt to predict the direction of appellate courts in applying existing tenets of search and seizure law to the constantly evolving technology, shifts in federal law and the opinions of judges across the country offer different perspectives and challenges.

High Tech Tracking: The use of GPS technology in modern law enforcement

From telephones to gaming devices to modern vehicles, the proliferation of Global Positioning Satellite (GPS) technology has changed the way that law enforcement officers throughout the United States conduct investigations. Whether the suspect's phone transmits a location which is recorded by his cellular phone service provider or a car thief is tracked by the victim's "On Star" service, the prevalence of GPS tracking has given law enforcement yet another way to solve crimes and hold offenders accountable.

One of the more significant developments in Fourth Amendment law as it relates to technology and GPS devices is the emergence of doctrine about GPS surveillance. Most commonly, law enforcement will place a GPS tracking device on a vehicle and then monitor the movements of the vehicle without physically following it.

The U.S. Supreme Court heard arguments in *U.S. v. Jones*¹ on November 8, 2011, and the

High Court will decide whether placing a GPS device on a suspect's vehicle is a search under a Fourth Amendment analysis, or if it is simply a non-intrusive investigative tool. In *Jones*, Washington D.C. police placed a GPS device on Jones' Jeep and tracked him 24 hours a day for a month.² Based on the information obtained during that month-long surveillance, the defendant was arrested and then convicted of drug trafficking offenses. *Jones* is expected to give the Supreme Court an opportunity to resolve a split in the circuits about the characterization of GPS tracking.

GPS tracking is not a search

In support of a finding that installation of a GPS device is not a search and therefore has no Fourth Amendment implication, courts have cited *U.S. v. Knotts*,³ the well-known "beeper case." In *Knotts*, officers placed a radio-frequency beeper in a barrel of chemicals before it was delivered to the defendant. Police then tracked the barrel by following the signal emitted from the beeper from the delivery location in Minnesota to the remote cabin on the defendant's property in Wisconsin. The Supreme Court reasoned in *Knotts* that a "person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in movements from one place to another."⁴

This rationale is based on the idea that what is revealed to the public, i.e., the process of driving around on public streets, cannot reasonably be held to be private. If law enforcement could obtain the same information by simply following the suspect around, and need no search warrant to do so, then why should the electronic collection of the exact same information be protected?

Footnotes

1 2011 WL 3332856; *U.S. v. Maynard*, 615 F.3d 544 (C.A. D.C. 2010). Note, Jones and Maynard were co-defendants. Maynard's conviction was affirmed and Jones' reversed by the same opinion.

2 615 F.3d at 556.

3 460 U.S. 276 (1983).

4 460 U.S. at 281.

Several circuits and state courts have adopted this approach to the analysis.⁵ Though holding the defendant did not have standing, one court found “Even if [defendant] had standing, we would find no error... [W]hen police have reasonable suspicion that a particular vehicle is transporting drugs, a warrant is not required when, while the vehicle is parked in a public place, they install a non-invasive GPS tracking device on it for a reasonable period of time.”⁶

Likewise, the 9th Circuit found that the use of a tracking device was simply not a search, that the defendant had no reasonable expectation of privacy in the undercarriage of his vehicle, nor in the driveway or curtilage of his residence where the device was installed.⁷ These courts have consistently found the similarity between the beeper in *Knotts* and the GPS device.⁸ The GPS device merely makes observation of the movements safer and requires fewer people to monitor than following a suspect around on the public roads. The 5th Circuit found that the GPS device placed on a vehicle without a warrant was simply a more efficient version of the beeper approved in *Knotts*.⁹

GPS tracking is a search

The courts holding that use of a GPS device is a search have found the intrusion of the government in the placement of a GPS device are similar to the use of FLIR technology that was determined to require a warrant in *Kyllo v. U.S.*¹⁰ The court in *Kyllo* found that the use of technology that allowed law enforcement to see more than what could normally be obtained without physical intrusion into a constitutionally protected area was a search.¹¹

The courts holding that GPS monitoring is a

search have distinguished *Knotts* in part because prolonged surveillance with a GPS device reveals patterns of behavior and travel more extensively than simply tracking the location of a contraband barrel of chemicals to a specific location.¹² The Circuit court in *Maynard*¹³ also adopted the position that the use of the GPS tracker is a search, rejecting the precedent of *Knotts* primarily based on the extent of the surveillance. The court pointed out that while it is theoretically possible for a stranger to follow the defendant around for 30 days, the likelihood that this would happen is “essentially nil.”

Other critics of treating a GPS installation like a beeper point out that the GPS transmits more information than the beeper: a beeper required the receiver to be within a certain distance of the tracking device and was used for just the one trip. The GPS unit can be monitored from a distance and transmits the precise location of the suspect vehicle even when it is on private property. Even when the car leaves the places that a stranger could view it, the GPS unit can still monitor the location.¹⁴

Some argue that the majority of courts have misapplied the *Knotts* analysis and should instead be comparing GPS devices to the intrusion of a listening device, such as the one placed on the phone booth in *Katz*¹⁵ or the microphone placed inside the heating duct of the defendant’s home in *U.S. v. Silverman*.¹⁶

Proactive Response by Kansas Law Enforcement

While waiting for direction from the U.S. Supreme Court, many Kansas prosecutors and law enforcement agencies are drafting applications and orders for the placement of GPS devices, though there is no clear statutory authority for such an order.

5 *U.S. v. Garcia*, 474 F.3d 994 (7th Cir. 2007); *U.S. v. Marquez*, 605 F.3d 604 (2010); *Wisconsin v. Svwum*, 769 N.W.2d 53 (2009).

6 615 F.3d at 558, quoting *U.S. v. Marquez*, 605 F. 3d 604, 609-10

7 *U.S. v. Pineda-Moreno*, 591 F.3d 1212 (9th Cir. 2010)

8 See, e.g. *U.S. v. Okafor*, 2011 WL 4640883 (D. Minn. 2011).

9 *U.S. v. Hernandez*, 647 F.3d 216 (5th Cir. 2011).

10 533 U.S. 27 (2001).

11 It is interesting to note that the court in *Kyllo* found the intrusion of the use of FLIR technology constitutes a search “at least where (as here) the technology in question is not in

general public use.” 533 U.S. at 34. It would be difficult to argue that GPS technology is not “in general public use.”

12 *CIA v. Sims*, 471 U.S. 159; *Skinner v. Ry. Labor Execs*, 489 U.S. 602; *Commonwealth v. Connolly*, 454 Mass. 808 (Ma. 2009).

13 615 F.3d 544.

14 See, generally, Kaitlyn A. Kerrane, Note, *Keeping up with Officer Jones: A comprehensive look at the Fourth Amendment and GPS Surveillance*, 79 Fordham L. Rev. 1695 (2011).

15 *Katz v. U.S.*, 88 S.Ct. 507 (1967).

16 365 U.S. 505 (1961).

Other prosecutors in other states appear to have taken similar steps to allow a detached and neutral judicial officer make a probable cause determination, even when it is not clear that an order is necessary.¹⁷ Some jurisdictions have drafted orders to place and to monitor the GPS device, seeking authority from a district court judge upon a showing of probable cause. These orders are generally modeled on a search warrant, though the specific language is modified to describe the actions of placing, monitoring, and removing the GPS device.

Investigators who have used the search warrant model have been asking the court that issues the order allowing the placement, monitoring, and removal of the GPS device to also seal the contents of the application. This protects the affidavit in support of probable cause and asks the court for leave to make a return after the GPS device is retrieved, rather than what would be the obvious futility of making a return on the vehicle where the GPS device was placed. Some jurisdictions are requesting a separate order to remove the device after the time for monitoring has expired.

Should the Supreme Court shift away from the traditional holding that the use of a GPS device is not a search, these prosecutors hope to avoid losing evidence that may be obtained while the precise state of this law is in flux.¹⁸ While the use of a search warrant model may not be perfect, the purpose of getting such an order is to protect the evidence should the prosecution later need to demonstrate that the “search” was supported by probable cause, and that determination was made by a judge.

Federal Law: The ECPA and the SCA

The Electronic Communications Privacy Act¹⁹ was first enacted in 1986 and was proposed to expand the privacy protections afforded to information stored in computer networks. The

ECPA applies to the service provider and prohibits the provider from supplying information held in its possession except under certain specific circumstances.

The ECPA requires the service provider to keep all information private unless the government can show probable cause to a judge, who may then order production of the records when relevant to a criminal case. The stated purpose of the ECPA was to apply the same protections regarding wiretaps on communication facilitated by computers that applied to communication via telephone in Title III of the Omnibus Crime Control and Safe Streets Act of 1968.²⁰

There are two parts to the ECPA. Section one prevents disclosure of communication in transit – interception of this information is most like a wiretap. The second part is known as the Stored Communications Act, or SCA, and protects the communication as it is stored in the possession of the service provider.²¹ Practically speaking, this is the e-mail contained on the server at Hotmail or Yahoo, whether or not it has ever been read by the intended recipient.²²

This act also provides procedure for the government to require the ISP to capture communication before the communication happens, allowing the government to later obtain an order to retrieve that stored data. The SCA allows the government to obtain stored communication upon a showing that there are reasonable grounds to believe the information sought is relevant and material to an ongoing criminal investigation. The fact that this is a less stringent requirement than the probable cause mandated by the Fourth Amendment has given rise to confusion in the application of the law.

While it has been well established that disclosure of information in violation of the ECPA does not trigger suppression of the evidence,²³ there are courts appearing to meld the analysis of privacy protected

17 See, e.g. *State v. Brereton*, ___ N.W.2d ___, 2011 WL 3477182 (Wis. App. 2011)

18 It is expected this flux will be resolved soon after the publication of this volume when the Supreme Court decides *Jones*, resolving for a time the question of whether the use of the GPS device is a search.

19 18 U.S.C. § 2510 et. seq.

20 18 U.S.C. § 2518

21 18 U.S.C. § 2701 et. seq.

22 This would include any service provider that provides its users with an email address, whether there is a paid account with that email such as Cox Communications or a free account such as Hotmail, Gmail or Yahoo!.

23 *U.S. v. Perrine*, 518 F.3d 1196 (10th Cir. 2008); holding that ECPA provides for civil penalties against the ISP, not suppression of evidence against the government.

by the Fourth Amendment with the statutorily created rights in the ECPA. For example, in *United States v. Warshak*,²⁴ a panel of the 6th Circuit found that the defendants possessed a reasonable expectation of privacy in the contents of the e-mails stored on the servers of the internet service provider they used.

The defendants in *Warshak* were involved in an Internet business, Berkeley Nutraceuticals, which grossed hundreds of millions of dollars distributing a product advertised to enhance the size of the male sex organ. Through use of fabricated studies to induce the purchase and a program of auto-shipping future orders without any action on the part of the consumer, Berkeley Nutraceuticals built itself into a fraud machine.²⁵ The government obtained an order under 18 U.S.C. 2703(f) for the commercial ISP to preserve more than 27,000 of Warshak's e-mails (over a several months-long period) without Warshak's knowledge and then an additional order under 18 U.S.C. 2703(d) to provide the preserved e-mails to the investigators.

Historically, this analysis was simple: those e-mails were held by a third party, just as bank records or telephone records are, and therefore the defendant would be held to have no reasonable expectation in the privacy of those communications.²⁶ However, the 6th Circuit started to signal an intention to look at this issue differently the first time it considered Warshak's case, in 2007.²⁷ In 2007, the 6th Circuit affirmed a district court injunction prohibiting the government investigators in this case from obtaining any more of the defendants' e-mails without a showing of probable cause or notification that the seizure was to occur. While that opinion was later vacated for lack of ripeness,²⁸ this panel of the 6th Circuit declined to simply hold that the SCA authorized the seizure, and thereby end the inquiry. The panel opined, "if

the exclusionary rule is to have any bite, courts must, from time to time, decide whether statutorily sanctioned conduct oversteps constitutional boundaries."²⁹

The holding in this latest incarnation of *Warshak* is less the concern than is the *dicta* indicating that there may be an expectation of privacy that society will accept as reasonable in those items held by third parties. In support of this, the *Warshak III* court cites the **type** of communication contained in these e-mails. The court looks at the content and concludes that no reasonable person would say the things the defendant said in his e-mail communication unless he expected it to be private. "Given the often sensitive and sometimes damning substance of his e-mails, we think it highly unlikely that Warshak expected them to be made public, for people seldom unfurl their dirty laundry in plain view."³⁰ The court distinguished the very cases upon which law enforcement would inevitably rely in asserting that there is no reasonable expectation of privacy in these e-mail communications passing through the ISP: 1) it's not like a bank account, the court reasoned, because there is a lot more information than the bank obtains³¹; and 2) the mere fact that the ISP is able to intercept the communication and observe its contents does not defeat an expectation by the defendant that the contents of the communication should be kept private.

The fact that e-mail and other electronic communication are so pervasive convinced the court that society would view the defendant's subjective expectation of privacy as reasonable. The court ultimately held that the government action was acceptable on a "good faith" basis; that law enforcement acted under color of federal law, and they in good faith believed that they were authorized under the 18 U.S.C. § 2703(d) order to

24 631 F.3d 266 (6th Cir., 2010)

25 The court noted that at one point the refund policy on Enzyte required the person requesting a refund to provide a notarized statement that he experienced no benefit from the use of the product. The defendants admitted they expected that few men would sign an affidavit attesting that they had "a small penis."

26 *U.S. v. Maryland*, 442 U.S. 735, 99 C. Ct. 2577, 61 L.Ed. 220 (1979).

27 *Warshak v. U.S.*, 490 F.3d 455 (6th Cir. 2007). "Warshak I"

28 *Warshak v. U.S.* 532 F.3d 521 (6th Cir. 2008). "Warshak II"

29 631 F.3d at 282, citing *Pearson v. Callahan*, 555 U.S. 223, 129 S.Ct. 808, 172 L.Ed. 565 (2009); *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151, 150 L.Ed. 272 (2001).

30 631 F.3d at 284.

31 631 F.3d at 688.

obtain the communication.³² Since the SCA was enacted in 1986 and no other court had ever found it to be unconstitutional, and no other case has ever demonstrated a successful challenge to a search based on the Fourth Amendment when the SCA was applied, the court found it was reasonable for the government to rely on the constitutionality of the SCA. Further, the government reasonably calculated that compliance with the statute would lead to admissible evidence.³³

Significantly, the court then penned “footnote 17” which reads as follows:

Of course, after today’s decision, the good-faith calculus has changed, and a reasonable officer may no longer assume that the Constitution permits warrantless searches of private e-mails. 631 F.3d at 289.

The existence of the opinion together with its self-reference as a “game-changer” for future good faith reliance on established federal law makes this an issue to watch. As of the time of this article, no other court found a production order authorized by the SCA was an unconstitutional search of the stored communication.

While this case may signal a substantial shift in federal law, or may be simply an anomaly in the 6th Circuit, a court finding reasonable expectation of privacy in a type of communication historically treated as not protected by the Fourth Amendment is certainly a trend to watch.

More recently, the 9th Circuit applied the ECPA to protect the communication of a citizen of India whose only connection to the United States was that the e-mail communication sought was being stored on Microsoft Corporation’s servers, located in the United States.³⁴ *Suzlon Energy, Ltd.*, sought production of stored e-mails in a “Hotmail” account used by Rajagopalan Sridhar, a citizen of India who is imprisoned “abroad.” Microsoft Corp. objected to the production, citing the specific requirements of the ECPA prohibiting disclosure of stored communication, and refusing to provide

the requested information pursuant to an Australian civil subpoena. *Suzlon* argued that the ECPA did not protect non-citizens, but the 9th Circuit disagreed. In part, the court looked to the legislative history of the ECPA and concluded that it was never intended NOT to apply to non-citizens. In *Suzlon* the court focused on the intent of the ECPA: to prevent the ISP from disclosing information absent a showing of probable cause in a criminal matter.

A different panel of the 9th Circuit in 2009 decided that the ECPA does not cover e-mail interceptions that take place outside the United States, even if the affected person is a U.S. citizen.³⁵ These two cases are puzzling from a pure Fourth Amendment standpoint, since, as the court in *Katz*³⁶ articulated, the Fourth Amendment protects “people, not places.” Neither of these cases would suggest that the protections under the ECPA are either co-extensive or based on the same legal rationale. The ECPA is a law directed at service providers creating a privacy interest, while the Fourth Amendment is directed at the government. Still, it appears that at least some circuit courts are melding the two privacy interests and creating a new field of privacy right.

While no 10th Circuit case has signaled a departure from precedent like the one in *Warshak*, the precedent in the 6th Circuit may inspire some to make the same arguments.

As the ECPA reaches its quarter-century mark next Congressional session, there are many calling for changes and expansion of the privacy provided in the Act. After all, supporters of reform point out, the changes that the world of technology has seen since 1986 should indicate that the law should be updated to reflect those changes. Others are concerned about the fact that to obtain certain stored communication the government need only demonstrate that there are “specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation.”³⁷ Reformers suggest that stored communications should also

32 631 F.3d at 288-289.

33 631 F. 3d at 289.

34 *Suzlon v. Microsoft Corp.*, 2011 WL 4537843

35 *Zheng v. Yahoo!*, 2009 WL 4430297

36 *Katz v. U.S.*, 88 S.Ct. 507 (1967).

37 18 U.S.C. § 2703(d)

be subject to disclosure only upon a showing of probable cause, and not on this less precise and less stringent showing.

Whether the sweeping reforms advocated by some are implemented, there is certainly an effort to “update” the principles addressed in the ECPA,³⁸ whether created by Congress,³⁹ or the Circuit Courts of Appeal. 🌐

38 See, e.g. <http://notwithoutawarrant.com/>;

39 http://cdt.org/pr_statement/sen-leahy-pledges-mark-action-ecpa-reform-bill

About the Author

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Lethality Assessment Protocol

by Megan Fisher, Assistant District Attorney, Johnson County

A Different Approach to Combat Domestic Violence

Prosecuting domestic violence cases is not for the faint of heart. It is difficult, if not impossible, to tell how serious a situation is just by looking at the facts and a criminal history check. Prosecutors run the risk of taking a case too seriously when it is a situation of someone manipulating the criminal justice system to gain leverage in a civil case or not taking them seriously enough and the defendant later kills the victim.

Deciding on a plea offer involves balancing the victim’s wishes, the interests of the community, the possible rehabilitation of the defendant through counseling, the quality of evidence, and the likelihood of conviction. It is impossible to be able to tell in advance whether this incident was a random event and therefore unlikely to be repeated or whether, lurking underneath the facade of a domestic battery, is a defendant who will kill the victim while on probation.

This problem is not just something I’ve personally experienced in handling these cases, it is a problem for all prosecutors who handle them. So prevalent is it, in fact, that in 2003, Maryland came up with a new way of handling domestic violence cases.

The Maryland model for lethality assessments was based on social science research that indicated that domestic violence homicides had certain factors in common. These lethality factors had been used for years by mental health professionals and social workers.

Common lethality factors in domestic violence relationships include the use of a weapon, threats

to kill the victim, threats of suicide, access to guns, strangulation, pregnancy of the victim, abuse of an animal, sexual abuse, jealous or obsessive behavior by the batterer, and separation.

Maryland developed a list of questions based on these factors to be asked of the victim by law enforcement at the scene of domestic violence incidents. Based on the victim’s answers to these questions, the officer could place a call to the local domestic violence hotline and hand the phone to the victim. The theory behind this is based on research that indicates when a victim gets in touch with services, they are far less likely to be abused or killed in the future.¹

In Johnson County, a modified version of this program which included updated research from the U.S. Department of Justice, was pitched to the Chiefs of Police and unanimously adopted by all law enforcement agencies in March 2011. The protocol began to be used by every officer in the county on July 1, 2011.

The Johnson County Lethality Assessment Protocol works much the same way as Maryland’s

Footnotes

- 1 Berk, R.A., Newton, P.J., & Berk, S.F. (1986). What a difference a day makes: An empirical study of the impact of shelters for battered women. *Journal of Marriage and the Family*, 48, 481-490; Bybee, D.I., & Sullivan, C.M (2002). The process through which a strengths-based intervention resulted in positive change for battered women over time. *American Journal of Community Psychology*, 30 (1), 103-132

plan, but with some additional facets. For example, the lethality assessment itself was changed to use the word “strangle” instead of “choke.” Sexual abuse was added as a lethality factor. In total, the lethality assessment instrument itself has 17 questions. If the victim answers “yes” to any of the first three questions or “yes” to six out of the remaining questions, the officer on the scene who administers the instrument will place a call to the local domestic violence hotline and hand the phone to the victim.

The simple act of a police officer telling the victim that he or she is concerned enough for the victim’s safety that the officer is making a phone call to the hotline is very impactful on the victim. Empirical evidence here in Johnson County suggests that many victims have gone into services and informed the counselors that they would not have been so inclined had the officer not been so concerned for their safety.

Not only does administering the lethality assessment at the scene have an immediate impact on a victim’s safety (in the first two months of this program, 12 victims went into shelter immediately here in Johnson County), it can impress upon the victim the dangerousness of their situation.

It is very common for victims to think that their relationship is unique. Every domestic violence prosecutor has heard a victim say that we do not understand *their* situation. *Their* partner is great when sober. However, it becomes much more difficult for victims to deny that their situation is dangerous when they see a list, in black and white, right in front of them, of the things that their “different” partner does. The victim sees that not only is their partner not unique, but what they do is so common, they made a list out of it which is being read to them by a police officer.

When victims realize the dangerousness of their situation and are placed in touch with services designed to help get them out of that situation, recidivism is reduced. The Johnson County program is too new to have statistics on whether domestic violence case numbers are decreasing. However, a similar program adopted in Jackson County, Mo. saw a decrease in domestic violence cases by one third in the first nine months of the program.

The numbers, which have been shared with the Johnson County District Attorney’s Office by Safehome, the local domestic violence shelter are encouraging. For the months of July through September 2011, 275


lethality calls were placed to the hotline. Of those 275, 13 entered shelter immediately (4.7 percent). Fifty-six victims scheduled a clinical intake interview with a counselor and 228 consented to follow-up services with an advocate. Although there is some overlap in the numbers, overall the success rate with getting victims in touch with services is 82.9 percent.

Once the phone call has been made to the hotline, the officer at the scene then designates the case high risk, and the lethality assessment itself becomes a part of the police reports. This enables the assigned prosecutor to become aware of the potential dangerousness of the situation, which in turn allows us to make more informed bond recommendations and decisions on the disposition of the case.

What makes the Johnson County program unique is the addition of a follow-up visit from law enforcement. Two or three days after the incident, the protocol calls for a knock and talk at the residence. The purpose of this is two-fold. If the defendant is there in violation of the no contact order, they can immediately be arrested for violation of the protective order. Even if they are not, the follow-up visit provides law enforcement with an additional investigative tool. Bruises get worse over time and what appeared to be a red mark at the scene could have manifested in a large black eye that can be photographed and used in the case later.

Like any new program, there have been training issues, which result in the number of high risk cases to be inflated slightly. This has happened in the beginning in every other jurisdiction, which has implemented a similar plan. If Johnson County’s program sees the success that other jurisdictions have seen, the numbers not only of high risk cases, but of domestic violence cases overall, should begin to decrease.

The ultimate purpose of this protocol is to get victims into contact with victim services. That, more than anything else, has been proven to get victims out of these poisonous relationships. When that happens, the likelihood of homicide or serious injury at the hands of a partner is reduced dramatically. Although this protocol involves more law enforcement effort in the beginning, the time involved to investigate a homicide is far more than the few minutes required to complete the assessment.

For more information or if you are interested in implementing this protocol in your jurisdiction, please contact the Johnson County DA’s Office. 

by District Attorney Nola Foulston, 18th Judicial District of Kansas
NDAA Kansas Board Representative and NDAA Executive Committee 2011-12



Fall Conference in Nashville, Tennessee

The National District Attorneys Association, tasked by President Jan Scully [District Attorney, Sacramento, California] has proceeded with strategic planning for the organization. Meeting in Nashville, Tennessee, nearly each state representative [including Kansas Director District Attorney Nola Foulston and Associate Board member Kim Parker, Deputy District Attorney] was on site to begin relevant discussion leading to a more effective committee structure that brings value to our members.

Strategic Planning Commences

Appointed by President Scully to head this committee, co-chairs Curtis Hill [District Attorney, Illinois] and Brad Berry [District Attorney, Washington State] have been charged with the



Strategic Planning

responsibility of evaluating each and every NDAA committee, standing or ad hoc, to make sure of their individual effectiveness within the organization and to create more efficient, active and productive committees. Members of the Board of Directors were enthusiastic that the Strategic Planning has commenced noting that this will be an ongoing project to enhance the organization by adding more communication and contact within NDAA that will work to streamline the flow of information to prosecutors around the nation in diverse areas of practice.

Capitol Conference in Washington DC

In lieu of our regularly schedule spring meeting for the Board of Directors, plans have been made to incorporate broader participation by the Board

at the **Capitol Conference** to be held in early February. All prosecutors nationwide are encouraged to attend this conference that brings us in direct contact with Congressional Delegations at the seat of our nation's power. The NDAA has been successful in marshalling support with Congress on difficult criminal justice and prosecution issues, and it is imperative that our members be engaged and knowledgeable not only on state issues, but on federal proposals that may or may not be in our best interest.

The Webb Commission

An example of NDAA working on "the hill" looks to the good work of prosecutors nationwide to address the purpose and intent of the proposed "Webb Commission" that would have created massive unwarranted changes to the criminal justice system. Originally under the 2009 National Criminal Justice Commission Act, it was proposed that Congress create a blue-ribbon, bipartisan commission of experts charged to review the nation's criminal justice system and offering concrete recommendations for reform. In an effort to pass this legislation, at the end of last year, the legislation was incorporated in the Omnibus Appropriations Act, which was blocked for unrelated procedural reasons. Senator Webb reintroduced his bill on February 8, 2011. It was blocked by Republicans in the Senate on Thursday, October 20 by a vote of 57-43 (60 votes required for passage). While this proposed commission may have been well-intended, it was fraught with issues that would drastically tip the scales of justice to the detriment of prosecution offices. The measure called for creating a 14-member bipartisan commission with a \$5 million budget to examine all levels of the justice system - **federal, state, and local**. It is intended to lead to recommendations on how to change

laws, enforcement practices, and prison operations to make the justice system fairer and more cost-effective. The panel would have to complete its work in 18 months.

Pending vote in the Senate, prosecutors responded by contacting their Congressional Delegation [**Kansas Senators Pat Roberts and Jerry Moran were contacted by our office and voted to defeat the bill**] to advise them of the problems with the bill in an effort to block its passage. In late October 2011, Senate Republicans blocked passage of Webb's legislation despite support from many organizations including the National Sheriffs' Association, the International Association of Chiefs of Police, the U.S. Conference of Mayors, the Fraternal Order of Police, the NAACP, the ACLU and Prison Fellowship. Webb is determined to push forward. Two Republican senators, Kay Bailey Hutchison of Texas and Tom Coburn of Oklahoma, spoke against the amendment, **saying that allowing a federal commission to examine state and local criminal justice systems would encroach on states' rights and that the commission's \$5 million budget should be used for other purposes. Hutchison said studying the federal system is within Congress' powers but including state and local justice systems "is an overreach of gigantic proportions."** "We are absolutely ignoring the Constitution if we do this," Coburn said. While a majority of senators supported Webb's amendment, 57-43, it fell three votes short of the 60 needed to be added to a spending bill. Webb blamed Republicans for blocking the legislation and vowed after the vote to keep pressing for the commission.

Current Issues~Media Roundtable

Faster than a speeding bullet... defense propaganda is being disseminated by media outlets supporting various defense issues that offer misstatements of facts and law. In an effort to level the playing field, the NDAA has created the **COMMITTEE FOR FAIR AND TRUTHFUL ADMINISTRATION OF JUSTICE** led by District Attorney William Fitzpatrick [NY], Kim Parker [Kansas] and Josh Marquis [Oregon]. This committee has been established to monitor and rapidly respond to misleading accusations that effect

prosecutors nationwide. [Example: the Innocence Project's continuing vocal stand on prosecution misconduct and prosecutors' unfair tactics]. The working structure of the committee will focus on "hot button" issues so that our organization is well prepared to address issues expediently as they appear in the nation's media. The committee model will follow best practices with talented lawyers speaking on ethical issues, allegations of misconduct and wrongful conviction. In this way, we are prepared to respond nationally to bombastic statements that have no credibility. It's time to get the facts straight and to enable prosecutors to present "the other side of the story." In New York several years ago, the ABA Justice Criminal Justice Committee suggested that DNA is **exonerating thousands of people**. NY prosecutors took the lead to stop being reactive and being proactive and were successful in drafting protocols regarding identification procedures adopted by all NY law enforcement.

Another aspect of this committee would be to extend to all prosecution offices a program for assistance with "cold cases" utilizing the skill and talents of many diverse and distinguished prosecutors nationwide to address these issues.

It is important for all prosecutors to have a keen understanding as to the work of our national organization. I would encourage all Kansas prosecutors to go to the National District Attorneys Website for immediate updates on national criminal justice issues. <http://www.ndaa.org/>

If you may be interested in participating within this committee, please contact Deputy District Attorney Kim Parker [kparker@sedgwick.gov].

My Prosecution.com

Recently, prosecutors have developed a website that provides important information for all members. There is no cost to join, however it is a "prosecutor only" membership. You have to use your office e-mail address. There is a wealth of information on this site that you will find important and helpful in your daily practice. Sign in at www.myprosecutor.com.

Famous Last Words

Josh Marquis [Oregon] who serves on the NDAA media committee recently reported that media

outlets have long not gotten their facts correctly. **Cameron Todd Willingham** (January 9, 1968 – February 17, 2004) was convicted of murder and executed for the deaths of his three young children by arson at the family home in Corsicana, Texas. Willingham's case gained renewed attention in 2009 when an investigative report by The New Yorker magazine suggested that the evidence for arson was unconvincing and that had this information been available at the time of trial, Willingham would have been acquitted. Willingham was executed by lethal injection on February 17, 2004, at the Texas State Penitentiary in Huntsville. He was 36 years old. When asked if he had a final statement, *media reported that his parting words were "Yeah. The only statement I want to make is that I am an innocent man convicted of a crime I did not commit. I have been persecuted for 12 years for something I did not do. From God's dust I came and to dust I will return, so the earth shall become my throne. I gotta go, Road Dog. I love you, Gabby."* While continuing to gain support for a wrongfully executed prisoner, media picked up on this quote in some strange effort to make Willingham's "good character" a "fact" to support that he could not have committed these heinous acts. What the media failed to report was the actual statement of Willingham, somewhat more meaningful than his professed innocence:

He addressed his ex-wife, Stacy Kuykendall, who was watching about 8 feet (2.4 m) away through a window. Willingham said, *"I hope you rot in hell, bitch; I hope you fucking rot in hell bitch; You bitch; I hope you fucking rot, cunt. That is it."* Kuykendall showed no reaction to the outburst. While she initially believed in her husband's innocence, following the trial, she told him she no longer believed him and publicized her change of heart. Willingham was pronounced dead at 6:20 p.m., seven minutes after the lethal dose of chemicals began. And so it goes...

See <http://www.tdcj.state.tx.us> for a listing of all "last words" of Texas defendants put to death including Cameron Todd Willingham.

Social Media for Prosecutors: Should Prosecutors Tweet?

With the burgeoning interest in immediate internet communication, Facebook, Twitter and other

social media sites have become a chronic pastime. [Note: tweet of Shawnee Mission student "dissing" the Governor]. Of course, your office can also use social media as a way to impart information. However, don't venture into this arena without having a plan or format for your site. Remember Supreme Court Rules 3.6 and 3.8 dealing with statements by prosecutors prior to trial if you are thinking of going this communication route. A number of offices do have sites, so if you have an interest, give me a call to discuss parameters of your planned venture into cyber-space.

On another note, I am presently working with a **Kansas Supreme Court Committee** to evaluate suggested revisions to "cameras in the court-room" and whether the court is going to move forward on existing media rules to allow individuals to use electronic devices in the courtroom during trials and hearings. More to come on this topic.

Canine Companions in Court

The fall meeting included an excellent presentation on the use of courthouse dogs that assist individuals with physical, psychological, or emotional trauma due to criminal conduct. These are professionally trained assistance dogs handled by a



Nola finds a canine companion at the NDAA meeting.

criminal justice professional and many courts around the country have allowed this procedure in selected cases. The use of courthouse dogs can help bring about a major change in how we meet the emotional needs of all involved in the criminal justice system. The dog's calming presence creates a more humane and efficient system that enables lawyers and staff to accomplish their work in a more positive and constructive manner. If you are interested in more information and an instructional DVD go to the following link: <http://courthousedogs.com>.

Promising Practices – Deceased Inmate Project

Jill Springs is the Chief of the California Department of Justice Bureau of Forensic Sciences Services where she oversees 12 crime labs in California. She was kind enough to join our meeting to discuss a new practice that could revolutionize cold case investigations. Of note, Jill was the first to do a DNA arrest warrant on a criminal case with the assistance of Ann Marie Schubert Supervising Deputy District Attorney in Sacramento, California.

Across the country there are thousands of inmates who have died without providing DNA samples. California has an ongoing effort to solve cold cases by collecting samples from deceased inmates. Cold cases are dramatically on the increase, and with the introduction of science and technology, police and prosecution officers should be in a better position to work the cases that have long sat idle for lack of evidence. While many profiles of individuals are in a DNA database, the Sacramento group is now working on how we may be able to get DNA from those who are on parole or deceased. Prosecutors agree that there is great value to this project citing the example of Gerald Gallegos who kidnapped, raped, and murdered 10 victims 1978-1980. His wife would assist in luring the victims into his van. While sentenced to death in Sacramento, he was also prosecuted in Nevada where he died of natural causes in 2002. His DNA had never been collected. With his history of random violence, collecting DNA in this instance would have been a positive opportunity for working with unsolved cases that remain cold.

You will be hearing more about this project as they move along with their plans. I will keep you posted.

Justice and Generosity - Applications Being Accepted

The Board of Directors of the National District Attorneys Association has recognized the need to honor, deliver assistance, and to aid prosecutors and prosecution offices and associations under circumstance of demonstrated need. At the summer conference, District Attorney Nola Foulston and District Attorney Gary Lieberstein [Napa,

California] worked diligently to obtain items for our silent auction in an effort to raise funds for Justice and Generosity. We were successful and the result is that applications for funds are currently being accepted with the application period closing on December 19, 2011. For further information on the program, visit the NDAA website. We are already looking forward to an exciting silent auction at our summer conference in the Connecticut seaport town of Mystic. Join us in July and consider providing an item to add to the auction. Last year, we had sensational B&B packages, Kentucky Derby tickets, Indy 500 tickets, and lots of miscellaneous items that raised over \$18,000. If you are interested in participating for Kansas, please contact District Attorney Nola Foulston [foulston@sedgwick.gov].

Future Training and Prosecutor Resources

The NDAA continues to pursue reopening the NDAA Advocacy Center. Plans are in the works with Utah prosecutors and the Salt Lake City Law School to initiate new programming that will reinstate our wonderful advocacy center that was closed due to lack of federal funding. As we come closer to finishing this project, you will be advised on the different courses that are planned.

Future Prosecuting Training Opportunities include:

- NDAA Capital/Spring Conference: Capital Conference Feb. 6-8; Spring Conference Feb. 5-8, 2012, Washington, D.C.
- Government Civil Practice February 12–16, 2012, San Antonio, Texas
- Unsafe Havens II Advanced Trial Advocacy Training for Prosecution of Technology-facilitated Child Sexual Exploitation March 5-9, 2012, AOL, Dulles, VA
- Prosecuting Sexual Assaults : March 24-29, 2012, Savannah, Georgia Hyatt Regency Savannah
- 2012 National Cyber Crime Conference: Massachusetts Attorney General's Office in partnership with NDAA and the National White Collar Crime Center April 30- May 2, 2012. 🌐

2012 KCDA Spring Conference



SAVE THE DATE

Watch www.kcdaa.org for details.

**Thursday, June 14 -
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