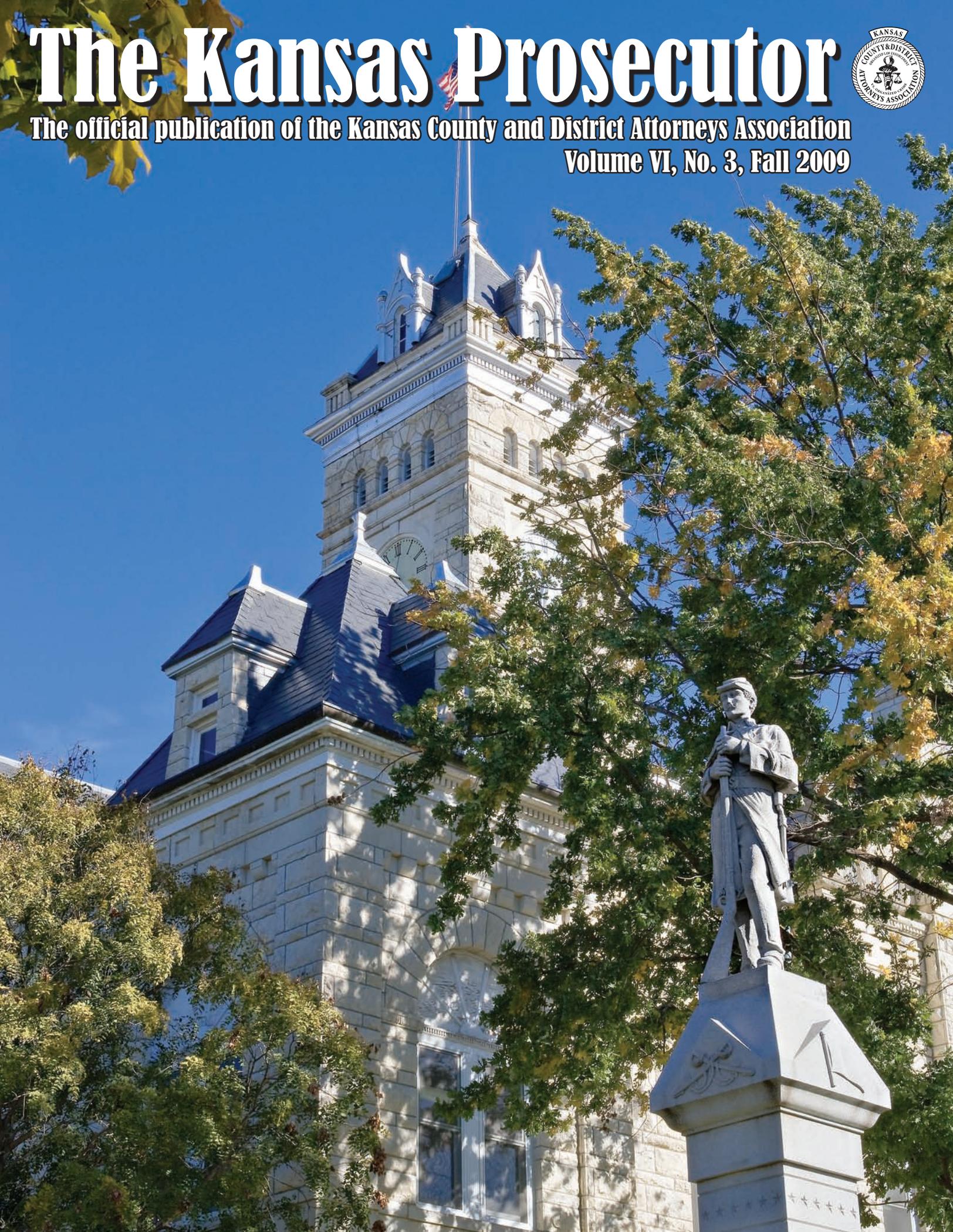


# The Kansas Prosecutor



The official publication of the Kansas County and District Attorneys Association  
Volume VI, No. 3, Fall 2009



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*Our mission:*  
 The purpose of the KCDAA is to promote,  
 improve and facilitate the administration  
 of justice in the State of Kansas.

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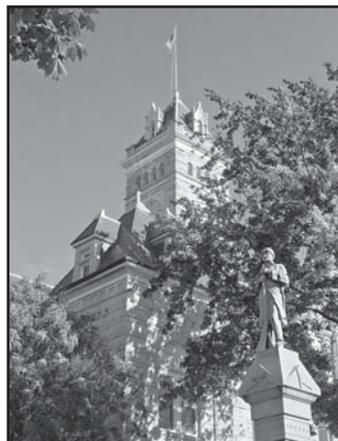
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## About the Cover

The Clay County Courthouse is located  
 at 724 5th Street in Clay Center, Kansas. The  
 Courthouse was constructed in 1900-1901 on  
 land donated in the 1860s for use as a public  
 square. The building is a two-story Romanesque  
 style structure with a full basement and an attic.  
 The exterior walls are constructed of rough hewn  
 stone laid in alternating courses of narrow and  
 wide stone, which give the building a banded  
 effect.

The architect was J. C. Holland of Topeka  
 and the construction was done by J.C. and H.H.  
 Zeigler and J.T. Dalton of Junction City.

Photo by John D. Morrison, Prairie  
 Vistas Photography



# President's Column

by Ann Swegle, KCDA President  
Deputy District Attorney, Sedgwick County District Attorney's Office

## Legislative Opportunities During Upcoming Session

The coming year promises to bring many new opportunities and challenges for Kansas prosecutors. In the legislative arena, it is anticipated that it will be an active session in regard to criminal justice issues. One of the earliest expected actions relates to funding the judiciary. Last session, the judiciary's budget was severely cut based on a misunderstanding of the impact on court revenues of a newly authorized surcharge on certain court cases. Despite the dismal condition of state revenues, many are optimistic that the legislature will appropriate sufficient funds that a furlough of judicial employees, slated to begin in January, can be averted.

The KCDA Board of Directors has adopted a list of six legislative priorities for the next session. These priorities were selected from the many suggestions submitted by our membership and were recommended by our Legislative Committee, chaired by Marc Goodman. Your ideas for proposed legislation drive the work of the association in this important area. Thankfully, we have been very successful in recent years in securing passage of many of the bills we have supported. Your ideas help shape the laws we enforce and the procedures we follow, enabling us as prosecutors to perform the myriad of duties we have in the most effective ways for our communities. And while the association can only effectively undertake the primary support of a limited number of bills, bear in mind that we may be able to assist you in marshalling through independently sponsored legislative proposals by providing supportive testimony.

Our legislative priorities for the 2010 legislative session are as follows:

- SB 67 – introduced as a KCDA priority in the 2009 legislative session, this holdover bill seeks to amend K.S.A. 21-3437 relating to mistreatment of dependent

adults and to create a new misdemeanor crime of endangering a dependent adult. Endangering adults is defined as intentionally and unreasonably causing or permitting a dependent adult to be placed in a situation in which the dependent adult's life, body or health may be injured or endangered.

- Amending K.S.A. 22-3716 related to probation revocations. Our amendment seeks to foster the ideal of "truth in sentencing" by eliminating the ability of a court to shorten the length of a previously imposed sentence after a finding of a probation violation.
- A *State v. Horn* fix. Amendments to K.S.A. 21-4643(a)(1)(G) are proposed to ensure those convicted of "Jessica's Law" attempts, conspiracies, and solicitations would be convicted on an off-grid offense with life imprisonment (Hard 25) rather than a severity level 1 offense with a grid sentence.
- Amending K.S.A. 22-3212(b) to allow for the redaction of personal identifiers from material provided through discovery. Recently, there have been at least two incidents in Kansas where a criminal defendant used personal identifiers found in police reports such as social security numbers, dates of birth, and home addresses, to intimidate witnesses and perpetrate identity theft related crimes.
- Amending K.S.A. 21-4204(a)(4) to extend the 10-year prohibition on gun possession to include drug manufacture.
- Amending K.S.A. 65-4105(d) to add BZP (benzylpiperazine) to the list of schedule I drugs. This is a synthetic drug similar to Ecstasy and it is extremely potent.

The Legislative Committee is composed

of the heads of our practice sections and other members appointed by the KCDAA President. This committee provides a critical function for our association by developing, reviewing, and suggesting prioritization of proposed legislation received from our general membership.

KCDAA has one other standing committee that performs an essential function for our organization – the Continuing Legal Education (CLE) Committee, chaired by Justin Edwards. This

committee establishes the agenda and contents for the educational programming that is put on at our spring and fall conferences, and the committee has done an exceptional job in providing us outstanding educational opportunities.

I would welcome additional members on both of these committees. Please let me know if you are interested in serving on either committee in the coming year. You can contact me via e-mail at [aswegle@sedgwick.gov](mailto:aswegle@sedgwick.gov).

The Kansas Prosecutors Foundation website was launched in November!

Learn more about the Foundation and how to make donations at [www.kpfonline.org](http://www.kpfonline.org)



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**KANSAS PROSECUTORS FOUNDATION**

The KCDAA Board of Directors established the Kansas Prosecutors Foundation to further the administration of justice in the best interests of the public. Several key points gave rise to the KPF formation:

- The continuing struggle to attract, train and keep quality, career-minded prosecutors.
- Criminal prosecution law has become an area of expertise involving complex issues that demands specialized continuing legal education.
- An obligation to promote the highest of professional training opportunities for the criminal justice system, particularly as it pertains to prosecution.
- The continuing lack of adequate victim/witness assistance and notification.
- Philanthropy is an essential component of a statewide bar association.

The KPF is organized as a Kansas, not-for-profit corporation, with Internal Revenue Service status under §501(c) (3) of the IRS Code.

**Under Development by KPF:**

- KCDAA Prosecutor Chair – Professor at Kansas Law Schools
- KCDAA Law School Scholarships
- KCDAA Undergraduate Honors Stipends
- KPT&AI National Speaker Bureau for Prosecutor Continuing Legal Education
- KCDAA 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...

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**Don't Forget: Your tax deductible contribution can be made out to KPF and sent directly to: Kansas Prosecutors Foundation, 1200 SW 10th Ave., Topeka, KS 66604**



## Past President's Column

by **Thomas Stanton, KCDA Past President**  
Deputy District Attorney, Reno County District Attorney's Office

# Thank You for My Time as KCDA President

I want to once again thank the membership of the Kansas County and District Attorney's Association for the support I received as President of the organization the past two years. It has truly been a privilege to serve you on the Board of Directors and in the various capacities on the Executive Board.

When I graduated from the KU Law School in 1990, I knew I wanted to be a prosecutor. I had been a police officer, and I wanted to represent the citizens of Kansas against those who committed crimes against them. I did not expect to have a great impact on prosecution in the state of Kansas, but I did hope to have an impact for the people wherever I might practice. I would have been satisfied to accomplish that goal.

I subsequently found that my growth as a prosecutor was greatly enhanced by the work being done by other, more experienced prosecutors through the KCDA and the Kansas Prosecutors Training and Assistance Institute. I attended conferences planned by other prosecutors, which gave me the tools to prosecute cases in Kansas. I am thankful to all those prosecutors, who I admittedly cannot name, who worked tirelessly to give me those prosecution tools.

I had the opportunity to become involved with the KCDA and the KPT&AI in the late 1990s while working for Julie McKenna in Saline County. Julie was on the Board of the KCDA during that time, and she suggested I volunteer for one of the committees within the organization. The next thing I knew, I was on the Legislative Committee, and I was Chairman of the CLE Committee.

The work these standing committees do is extremely important to prosecutors in Kansas. The Legislative Committee reviews the suggestions for legislation submitted by the membership, and suggests a legislative agenda to the Board. Every prosecutor in Kansas has the opportunity to affect the law in our state by submitting legisla-

tion that will allow us to better serve the people, and allowing us to identify and correct problems with Kansas Statutes. The CLE Committee is responsible for planning the conferences put on by the KPT&AI. Without these conferences, prosecutors would be required to look elsewhere for their required CLE hours every year.

Service on these standing committees led to my election to the Board. Keith Schroeder, the Reno County District Attorney, gave me the opportunity to serve on the Board, and supported my work on behalf of prosecution in Kansas. I have enjoyed the work of the Board ever since. I will miss my involvement with the board, and my service to Kansas prosecutors, once my current term as past president expires. I have been able to serve, and affect, the profession of prosecution to an extent I did not envision when I first stepped into a courtroom as a prosecutor.

I have seen the KCDA and the KPT&AI grow considerable over the last decade. The dedicated men and women with whom I have had the great honor to serve have worked to strengthen the organizations, and we have been assisted by a great group of men and women at Kearney and Associates. Steve and his staff have been indispensable as we have grown, and as we have expanded to create a third organization, the Kansas Prosecutors Foundation.

I now encourage every member of the KCDA to consider making a difference for our profession by getting more involved with the KCDA, the KPT&AI, or the KPF. You can make a difference for Kansas prosecutors. You can affect legislation which would benefit all Kansas prosecutors. You can help train the next generation of Kansas prosecutors. You can be involved in the development of the KPF. The rewards are well worth the effort.

Thanks again for allowing me to serve you. 

# Legislator's Column

by Senator Derek Schmidt

## A Case for Retaining the Kansas Death Penalty



For as long as the death penalty has been reinstated in Kansas, there have been efforts in the legislature to abolish it.

The most recent strategy to abolish capital punishment in Kansas emerged in 2004, when a penalty of life in prison without the possibility of parole was enacted into law as an alternative to the death penalty in capital murder cases. This new sentencing option won broad support in the legislature from both supporters and opponents of the death penalty because it was presented as an additional sentencing alternative that would be available on a case-by-case basis to prosecutors, judges, and jurors in capital cases as they work to do justice in the case before them.

Opponents of the death penalty then commissioned the Legislative Division of Post Audit to conduct a study of the financial cost of carrying out a death sentence as opposed to a sentence of life without parole in capital cases. Despite warnings from the Post Audit staff that the subject really did not lend itself to accurate quantitative comparison, the study was ordered and was conducted to the best of the auditors' ability. The final report makes clear that key cost figures in the report are based on assumptions and not on data, but nonetheless the mere existence of this report is now often cited by death penalty opponents as evidence of an excessive financial cost of capital punishment.

Then came the current economic recession. Dramatic state budget shortfalls created an environment in which every penny of state spending became subject to strict legislative scrutiny. In this atmosphere, opponents of the death penalty advanced this argument for which they had spent years laying the foundation: The state should abolish the death penalty because it costs less to impose a sentence of life without the possibility of parole.

The result was introduction during the 2009 legislative session of Senate Bill 208. That legislation

was presented as an effort to prospectively abolish the death penalty while leaving intact the death sentences of murderers already under sentence of death in Kansas. The bill received hearings in the Senate Judiciary Committee, and when time came for the committee to vote, the measure initially was defeated. A day later, however, the committee reconsidered, one vote changed, and the bill was narrowly reported to the full Senate.

During debate in the full Senate, I pointed out numerous shortcomings in the drafting of the bill. It became clear to supporters and opponents alike that the legislation, if enacted, was likely to have serious unintended consequences. As a result, the Senate sent the bill back to the Judiciary Committee without bringing it to a final vote. The measure has now been committed to study in the Judicial Council, which is attempting to resolve the many technical problems with the bill.

So that's the status of the debate. It's clear the issue will be back, probably during the 2010 legislative session, so interested parties on all sides of the debate should prepare to engage. I have a few observations on the situation:

\* The real issue is not cost. As it always has been and always will be: the real issue is the more fundamental debate about whether a sentence of death is ever an appropriate penalty for the state to impose upon a person convicted of the most serious forms of murder. That debate rests on philosophical and moral views about justice, not on dollars and cents.

\* The vote count in the Senate likely is close. This is an issue that does not, and in my view should not, follow partisan or ideological lines. There are senators across the political spectrum who support capital punishment, and there are senators across the spectrum who oppose it. I make this point to underscore the reality that every single senator's vote counts on this, and people with strong feelings on either side of the debate would be wise to engage

---

with their local legislators early and thoughtfully.

\* This coming session is the time for both sides to mobilize. During consideration of the proposed repeal in 2009, death penalty opponents were organized and engaged. They testified in the Judiciary Committee and made their case. People who support keeping the death penalty on the books were less organized and did not initially engage the committee. They need to be on notice this year: 2010 is the time to engage and make the case for keeping the law intact.

A narrowly crafted, sparingly used death penalty with adequate procedural safeguards to protect against injustice should remain on the books in Kansas. Our current law fits that description. There are homicides so serious, so heinous, that justice requires a jury of the defendant's peers to have the option of imposing a sentence of death as a consequence of the defendant's terrible crime. Not every victim's family will want that option imposed, but some will. The option should remain available to prosecutors, judges, and juries.

Many of the criticisms of capital punishment leveled in other states do not apply in Kansas because of the narrow scope of our state's capital murder statute and the sparing application of the death penalty by prosecutors. The number of defendants under sentence of death in our state is small. Fifteen years after reinstatement of the death penalty, no execution has yet been carried out because of the thorough nature of appellate review to ensure no innocent person is executed. No serious claim of actual innocence has become a focus of the post-conviction legal strategy of a defendant under sentence of death.

When the Judicial Council completes its review of Senate Bill 208, the bill will be substantially better constructed than it was previously. But significant issues will remain even within the text of the bill because some of the drafting questions are intertwined with basic policy choices that are beyond the scope of the Judicial Council's work. At least two major areas of concern will remain.

First, it may not be possible to prospectively repeal the death penalty statute while leaving intact and eventually carrying out the death sentences of those defendants already sentenced. Any change in the law inevitably will give rise to more legal

challenges by those already under sentence of death, and the appellate history to date suggests that the Kansas Supreme Court tends to look sympathetically on claims that the death penalty statute is defective. It also is not difficult to imagine that, if the death penalty were abolished prospectively, the same arguments that led the political branches of government to adopt a prospective repeal would, over years as appeals drag on, be brought to bear on the individual cases that were purported to have been grandfathered. All three branches of state government would feel the pressure to apply the reasoning of those arguments to the small and finite number of persons under sentence of death, and all three branches have within their power the ability to prevent the carrying out of those already-imposed death sentences. The effect of any repeal on currently sentenced defendants is, at best, an unpredictable roll of the dice.

Second, this debate also raises serious policy questions about the definition of "life without the possibility of parole" and under what circumstances it should be imposed. On the back end of the process, for example, it remains to be settled whether the governor should retain the power to pardon or commute the sentence of a defendant sentenced to life without the possibility of parole. On the front end of the process, there should be consideration of whether the list of aggravating circumstances that can lead to a life-without-parole sentence should be broadened to include more homicides than the narrow universe covered by the capital murder statute. It also should be considered whether other serious person felonies, such as certain rapes, should be considered for life-without-parole sentences, just as the legislature in the 2006 Jessica's Law made life without parole a possible sentence for certain sex predators who prey on children.

In the end, this ongoing debate will once again boil itself down to the fundamental policy question that always has been at the core of the death penalty debate in Kansas: Should ordering a state-sponsored execution of a murderer ever be an option available to a jury of the defendant's peers in rendering justice in the case before it?

In my view of justice, I believe the answer to that basic question remains "yes." 

# Legislator's Column

by Senator David Haley

## Death For the Kansas Death Penalty?

As our national economic crisis attempts to recover, the three main branches of government too continue to adjust by rooting out and eliminating expensive and outdated policies. During this increasingly intense scrutiny, the concept of a state imposed death for those convicted of the most egregious crimes remains a large, moving target.

Even the most hardened of skeptics agree that constitutionally imposed defense standards, protracted appeals, lengthier maximum security trials, and prison sentences for defendants charged under the death penalty statute cost exponentially more than any other prosecution. The recognized reality is that exorbitant costs, which accompany each of these cases, have now cost excessive millions in tax dollars.

Since statistics uniformly show no correlation between the threat of the death penalty and crime reduction, death penalty proponents will also justify a death penalty statute as a plea bargaining tool in an effort to broaden its perception beyond the mere "public vengeance" mentality.

As a former assistant district attorney, I too understand the value of plea bargaining. But, Kansas has not followed through with an execution in over 40 years

despite double digit death penalty verdicts. The fact remains that no offender, or defense counsel, actually fears the death penalty.

For these and for other reasons, state governments are increasingly responding by striking the penalty from their statutes. In Kansas, Senate Bill 208 was introduced before the Senate Judiciary Committee this year with bipartisan support. The bill garnered a majority of the committee vote for passage to the full Senate. Only major last minute lobbying by opponents of the bill submerged the bill into an interim study and kept the death penalty from a more comprehensive debate before the full Legislature.

SB 208 successfully incorporated provisions that addressed a number of legitimate concerns heard from previous legislative sessions. For example, SB 208 prohibited retroactivity as a basis for appeal and retained the governor's authority to commute any sentence.

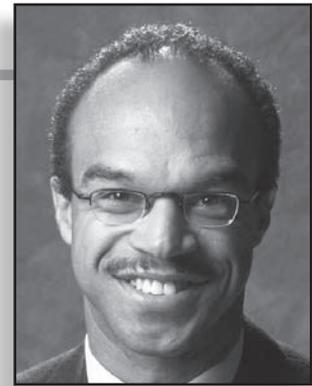
But such staggering costs to each county and the state to actually prosecute death penalty trials grow increasingly difficult to ignore. Although the Legislature is not likely to seriously reconsider so emotionally charged an issue in an election year, if losses in

state revenues continue to restrict our necessities, I am confident Kansas will join other progressive states that have done away with this sad barbaric custom. ☺

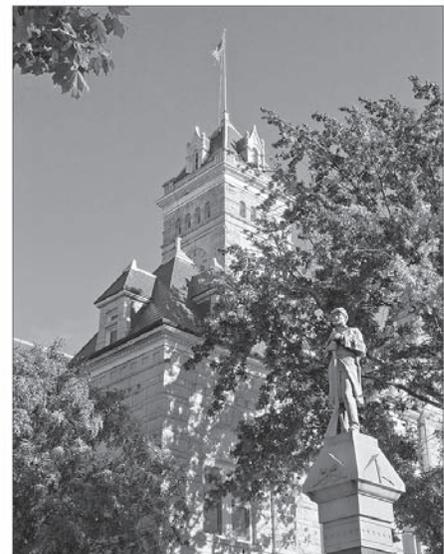
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*Senator David Haley, a Wyandotte County Democrat, is Ranking Democratic Member on the Senate Judiciary Committee and is now in his 15th year in the Kansas Legislature.*

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### County Courthouse Portraits



Clay County Courthouse

*John D Morrison*

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## Attorney General's Column

by Kansas Attorney General Steve Six

# Working to Save Families From the Meth Epidemic

Methamphetamine shatters lives and destroys families through addiction, dependence, and criminal activity. As a district court judge, I saw the impact of this epidemic on the people who appeared before me. As Attorney General, I sought and received grant funds to pursue a comprehensive program—the Kansas Meth Initiative—to reduce the manufacturing, trafficking, and sales of methamphetamine in Kansas by increasing enforcement, training, and education.

Prosecutors across Kansas are well aware of the crimes that meth addiction spawns: theft, robbery, child abuse and neglect, all the way to capital murder. We have also witnessed the severe life-altering scars meth leaves on its users. These dramatic consequences have led to previous legislative efforts such as the Sheriff Matt Samuels Chemical Control Act, which limited the quantity of pseudoephedrine and ephedrine that can be purchased by an individual at the pharmacy counter.

While we saw a temporary reduction in methamphetamine lab seizures following the law's enactment, in recent years the numbers have begun to edge back up as criminals find new ways to obtain the ingredients needed to manufacture meth. Lab seizures dropped from 188 in 2005 to 88

in 2007. However, there were 123 lab seizures in 2008, and the KBI projects more than 140 by the end of 2009. Legislative and law enforcement efforts may have decreased domestic production of methamphetamine, but continued demand for the drug has created new avenues for criminals to obtain access to this deadly substance.

Recognizing there is no one solution to this spreading epidemic, the \$1 million of Kansas Meth Initiative funding will be focused in several areas to supplement existing efforts and to expand enforcement in underserved areas.

As we decrease the domestic production of methamphetamine, experience has shown imported methamphetamine becomes more prevalent. We have seen an increase in methamphetamine smuggled into Kansas by Mexican Drug Trafficking Organizations (DTOS). These DTOS also smuggle a more potent form of methamphetamine known as "ICE" into Kansas for distribution. These DTOS have a sophisticated drug distribution network and information regarding shipments of ICE into Kansas is difficult to obtain.

As Attorney General, I am committed to fostering increased cooperation between local, state, and federal law enforce-

ment agencies in an effort to crack down on these DTOS so that imported methamphetamine can be taken off of the streets of Kansas. By sharing information and intelligence regarding the operation of these DTOS, their operations can be disrupted and eventually, dismantled.

Our drug taskforces are important in our ability to stem the flow of imported drugs. Because major highways cross our state, Kansas has become a popular and convenient point for drug traffickers to meet. For this reason—and the impact illegal drugs and related drug crimes have on our quality of life—law enforcement are working together around the clock on multi-jurisdictional taskforces.

Two specialized drug prosecutors, targeting the southeast and southwest regions of the state, will be funded through the Kansas Meth Initiative. The assistant attorney generals assigned to these taskforces will work with local prosecutors to ensure that drug cases are filed and tough sentences achieved. They prosecute severity level 1 through 3 drug felonies, which includes manufacturing of a controlled substance (meth), sale of methamphetamine, and possession of methamphetamine with intent to deliver or distribute. The assistant attorney generals also provide

expertise to other prosecutors and training to law enforcement.

The same experience and training that these multi-jurisdictional teams employ for interdiction of other controlled substances can be applied to reduce the availability of methamphetamine in Kansas. The experienced prosecutors on these teams can work side-by-side with the dedicated agents and officers to build solid cases and to seek tough sentences for traffickers, as well as for manufacturers.

The flow of methamphetamine into Kansas from these DTOS can be reduced by supporting aggressive drug interdiction operations on our state roadways. We can intercept and seize both the methamphetamine that is being smuggled into Kansas and the proceeds from the sale of that methamphetamine before it gets into the hands of the DTOS.

The Kansas Meth Initiative will also provide training to both law enforcement and prosecutors to help build and prosecute complex drug cases. This training will be offered both to the Kansas Bureau of Investigation and local

law enforcement to teach them to more effectively detect labs and properly collect evidence.

As we increase the detection and collection of methamphetamine labs, we also recognize the need to block the availability of the most crucial ingredients in the manufacturing process. With the full support of my office and the Kansas Bureau of Investigation, the Kansas Legislature passed Senate Bill 33, which created an internet-based, real-time electronic methamphetamine precursor database to track the sales of ephedrine and pseudoephedrine products at the point of sale. The information captured by this database will be available to law enforcement agencies for use in their investigations into the illegal manufacturing of methamphetamine.

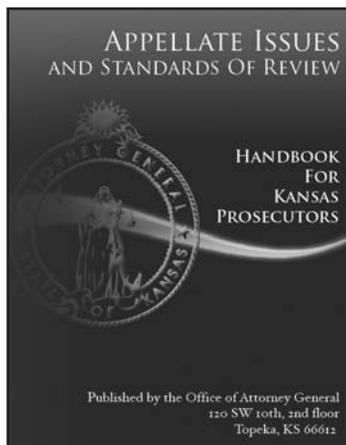
While real-time tracking of pseudoephedrine sales has garnered early backing, continued support for implementing such a program is critical to successful enforcement of our laws regulating over-the-counter sale of precursors. The Kansas Board of Pharmacy is currently in the

process of developing the rules and regulations that will govern the operation of this database.

I will continue to look to other states for model legislation and encourage the use of all available technology to increase the accountability for those who provide the precursors to those who spin cold medicine into deadly toxins.

No matter how strong our laws are regarding methamphetamine possession, production, or trafficking, law enforcement officers must have the necessary tools available to investigate meth-related crimes, and prosecutors must have the resources and expertise available to take cases to trial and get the toughest sentences.

From training law enforcement to prosecution to conviction, the Kansas Meth Initiative enhances our ability to hold criminals accountable and protect our families. This is an important fight for law enforcement and Kansas families, and I am doing my best to ensure we have the tools we need to protect our families from methamphetamine related crimes. 



The Kansas Attorney General's Office is pleased to announce the publication of a new "Appellate Issues and Standards of Review Handbook for Kansas Prosecutors." This **FREE** handbook covers a wide range of appellate issues and includes the relevant appellate standard of review for each. Copies of this handbook were distributed at the Fall 2009 KCDAA conference, but if you were unable to get one, please contact Kris Ailslieger, Assistant Solicitor General in the Kansas Attorney General's Office, to receive a copy. Call him at 785-296-0191 or e-mail him at [Kris.Ailslieger@ksag.org](mailto:Kris.Ailslieger@ksag.org).

**2009 KCDA Award of the Year**  
**Keith Schroeder**  
**Reno County District Attorney**

by Thomas Stanton, Deputy Reno County District 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 of prosecution during that year.**



*Thomas Stanton, outgoing KCDA Award of the Year President (left), awards the 2009 Prosecutor of the Year award to Keith Schroeder. The 2009 KCDA Award winners were nominated by KCDA members and selected by the KCDA Board of Directors.*

Keith Schroeder is the Reno County District Attorney, and has been a prosecutor in Reno County for 20 years. He graduated from the University of Oklahoma in 1986 with an undergraduate degree in law enforcement. He then attended Washburn Law School and graduated in 1989. Schroeder became employed with the Reno County Attorney's Office July 31, 1989, as an Assistant County Attorney. He was promoted to First Assistant County Attorney, and when the office became a District Attorney's Office, he was given the title of Deputy District Attorney. He was elected as Reno County District Attorney in January 2001. Schroeder has tried more than 150 jury trials.

Schroeder currently prosecutes cases involving serious felonies committed against the citizens of Reno County, and has prosecuted every conceivable type of case in his two decades with the office. He has argued many times before the appellate courts of Kansas. In the past year he has argued cases which have resulted in changes in the law, benefiting prosecutors throughout the state of Kansas. In *State v. Anthony Jefferson*, Schroeder successfully

argued that persons who have testified under oath at a preliminary hearing with the opportunity for cross examination but who later refuse to testify at trial, are "unavailable" for the purpose of allowing the preliminary hearing testimony at trial. The Supreme Court decision in *State v. John Prine*, resulted in the amendment of K.S.A. 60-455 to more easily allow prior bad conduct as evidence in cases involving allegations of sexual assault. The amended statute was used to again allow such evidence at the trial of Prine, and he was convicted at a second trial. Schroeder has also dedicated the time and resources of his office to benefit the KCDA.

Schroeder was an originating member of the Reno County/Hutchinson Child Abuse & Neglect Assessment Team and served five years on the Child Death Review Board. He currently serves on the Community Corrections Advisory Board, as well as the SANE/SART Board.

Schroeder has been married to his wife, Karla, for 17 years. He has two sons, Zane and Gage. He keeps busy out of the office with the various sports in which his sons are engaged. 

**Congratulations to Keith Schroeder!**

## 2009 KCDAA Lifetime Achievement Award

### **Dennis Jones** **Kearney County Attorney**

by **Barry Wilkerson, Riley County Attorney**

**The Lifetime Achievement Award is given to a prosecutor with at least 25 years in prosecution, and who has made great contributions to the profession of prosecution in Kansas.**



*Thomas Stanton, outgoing KCDAA President (left), gives the 2009 Lifetime Achievement Award to Dennis Jones. The Awards Luncheon took place on October 12 during the Fall 2009 KCDAA Conference in Topeka.*

It was somewhere around 1992 when I first met Dennis Jones at a KCDAA conference in Salina, Kansas. I was still a young prosecutor who knew very little (not much has changed in that regard, I am just older). Jones, however, took the time to introduce himself to me and introduced me to many of the other KCDAA members and attendees like Randy Hendershot, Gene Olander, and Jim Puntch, just to name a few.

Since that first meeting 17 years ago, a lot of people have come and gone, and there have been a lot of changes. But, Jones has always been an active voice for prosecutors in the legislature and a strong supporter of the KCDAA. It was my honor to nominate Jones for the Lifetime Achievement Award.

Before we get to the professional accomplishments that have highlighted Jones' career, his most impressive and important role was as a father of four boys: Spencer, Christopher, Casey, and Rolley. All four have earned college degrees, two from Kansas State and two from the University of Kansas. Three of his sons are married and are painfully taking their time in making Jones a grandfather.

Jones' professional career as a prosecutor began

in 1984 as the Assistant Kearney County Attorney as well as the City Attorney for the city of Deerfield. In 1988, he was elected Kearney County Attorney and after beating the incumbent in the August primary was actually sworn in as the Kearney County Attorney in October 1988 after his predecessor resigned. Since winning the general election as well in 1988, Jones has been re-elected five times. Just as you would expect, the reason behind his re-elections has been his hard-nosed approach to prosecuting serious crimes. In Jones' words, "if they commit a serious crime, they do serious time." His conviction rate in the prosecution of serious felony crimes is comparable to any other county in the state of Kansas.

In addition to serving as Kearney County Attorney, Jones served 10 years on the KCDAA Board of Directors, serving as a Director then a year each as secretary, president-elect, president, and past president. Jones was appointed by then Governor Graves to serve on The Governor's Tax Equity Task Force and on The Governor's Vision 21<sup>st</sup> Century Initiative Task Force. In 2006, he was appointed by the Governor and Legislative Leadership to review and comment on school finance legislation for the

state of Kansas. In January 2003, he was elected to the position of Republican Party Chairman for the state of Kansas, a position he held until 2005. For the past 17 years, Jones has continuously served on the Advisory Board for the Southwest Kansas Regional Juvenile Detention Facility.

Jones' influence may have been best illustrated by a bill that was pending before a committee several years ago (more than 10). I called Jones on the phone expressing my concerns about the bill. Two days later after a phone call from Jones, that bill was killed in committee.

Jones remains a loyal supporter of the KCDAA and even though he no longer serves on the board, he has been instrumental in a number of legislative issues over the years. From his hard-nosed prosecution style to his ability to sway legislative votes, Jones has been a good friend to the association and to prosecutors across Kansas for 25 years. No one



*Dennis Jones stands with his son Chris Jones at the KCDAA Awards Luncheon.*

has been more deserving of the Lifetime Achievement award. Thank you, Dennis. 🏆

### **Congratulations to Dennis Jones!**

*We want to share your news!*



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

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*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 KCDAA!*

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

KCDAA, 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!**

**Deadlines for 2010:**

**Spring 2010: March 12**

**Summer 2010: June 25**

**Fall 2010: October 22**

## New Faces

### *Finney County Attorney*

The Office of the Finney County Attorney has added two attorneys to its staff this year bringing the number of Assistant County Attorneys to eight. **Seth A. Lowry** joined the office as an Assistant County Attorney May 25, 2009. Seth is originally from New York where he obtained his Bachelor of Arts Degree from the University of Rochester, Rochester, NY in May 2002. He then graduated from Regent University School of Law, Virginia Beach, Va. in May 2007. After being admitted to the New York Bar, Seth was employed as a Judicial Clerk for the Honorable Harold F. See, Jr., Senior Associate Justice for the Supreme Court of Alabama. After joining the Finney County Attorney's Office, Seth practiced under a Kansas Temporary Permit until taking the Kansas Bar Exam in July 2009 and his admission by the Kansas Supreme Court in September 2009.

**Eric Fournier** joined the office as an Assistant County Attorney September 28, 2009. Eric is originally from Rhode Island where he obtained his Bachelor of Arts Degree from Roger Williams University, Bristol, RI, in May 2007. Eric then attended Washburn University's School of Law where he graduated in May 2009. He took the Kansas Bar Examination in June 2009 and was admitted by the Kansas Supreme Court in September 2009.



### *Leavenworth County Attorney*

Lauren Bristow has joined the staff in Leavenworth County as an Assistant County Attorney. Lauren worked for a civil firm in Salina before coming back to her hometown to be an ACA. She is a Washburn Law graduate.



### *McPherson County Attorney*

**Andrew R. Davidson** joined the McPherson County Attorney's Office as Chief Deputy County Attorney. **Jamie L. Karasek** joined the McPherson County Attorney's Office as a Deputy County Attorney.



### *Miami County Attorney*

**Robert Johnson** has joined the Miami County Attorney's Office as Assistant County Attorney. Bob received his JD from the University of Kansas School of Law. He has worked as an Assistant County Attorney in Finney County and Assistant District Attorney in Johnson and Shawnee County. He will be handling a felony and misdemeanor caseload.



### *Saline County Attorney's Office*

**Dan Runge** has joined the staff at the Saline County Attorney's Office. Dan is a May 2009 graduate of the University of Kansas School of Law. He earned his Bachelor of Science in History from Kansas State University in 2006 and participated in Washburn University School of Law's study abroad program in Utrecht, the Netherlands in 2007. While in law

school, Dan served as a staff editor of the Journal of Law and Public Policy, interned for the Honorable Lawton Nuss of the Kansas Supreme Court, and participated in the Paul E. Wilson Project for Innocence and Post-Conviction Remedies. Dan and his wife Lacey married in August 2009. He is the son of Jim and Diana Runge and the late Johanna Vader-Runge. Dan is a big K-State fan and enjoys spending time with his family and travelling.



### *Wyandotte County District Attorney*

Heather Marshall joined the office of the Wyandotte County District Attorney in November 2009. She is a 2002 graduate from the University of Nebraska School of Law.



## Forensic Analyses of Real Estate Appraisal Reports

*For Cases Including*

**Eminent Domain  
Ad Valorem Tax  
Charitable Gift  
Casualty Claim**

*By*

**Anthony Reynolds, MAI**

POB 774

La Crosse, KS 67548

reynolds2@gbta.net

Tel: 785-222-2781

Fax: 913-272-0048



## K.S.A. 60-455's New Provisions<sup>1</sup>

by Kristofer Aillsieger, Assistant Solicitor General  
Office of Kansas Attorney General Steve Six

# Responding to Ex Post Facto Challenges

One of the challenges that defendants have raised in the months since the changes to K.S.A. 60-455 went into effect is that it violates the prohibition against ex post facto laws to apply the changes to cases pending when they were enacted, or in cases where the crimes charged occurred prior to the changes.

The general rule is that “[t]he following two elements must be present before a law will be considered an ex post facto violation: ‘(1) The law must be retrospective, applying to events occurring before its enactment, and (2) it must alter the definition of criminal conduct or increase the penalty by which a crime is punishable.’”<sup>2</sup>

Since K.S.A. 60-455 is a rule of evidence rather than a substantive rule of criminal law, it would seem that the changes to the statute would fall outside of the general rule. The changes neither alter the definition of criminal conduct, nor increase any criminal penalty.

However, defendants have latched onto a couple of case decisions to argue otherwise. They are *Thomas v. Hannigan*,<sup>3</sup> and *Carmell v. Texas*.<sup>4</sup>

### Thomas v. Hannigan

In *Thomas v. Hannigan*,<sup>5</sup> the Court of Appeals said:

The Ex Post Facto Clause of the Constitution forbids enactment of any law which punishes an act which was not punishable at the time it was committed, imposes additional punishment to that then prescribed, aggravates the crime, or **alters the legal rules of evidence.**

Since the changes to K.S.A. 60-455 alter the rules of evidence, the argument is that their retroactive application violates the Ex Post Facto Clause. However, this statement by the Court of Appeals is merely dicta and is without citation to any other authority.

The origin of this statement appears to be the following explanation of ex post facto laws by United States Supreme Court Justice Chase in *Calder v. Bull*:<sup>6</sup>

- 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action.
- 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed.
- 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.
- 4th. **Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.**

It is important to note that this seminal exposition of ex post facto laws does not include such a broad statement with respect to rules of evidence as the Court of Appeals made in *Thomas*. The *Calder* definition includes only rules of evidence that require less or different testimony than the law required at the time of the offense in order to convict. In other words, the Ex Post Facto Clause only bars retroactive application of changes to the rules regarding the *sufficiency* or *quantum* of evidence required to convict. Thus, the dicta in

### Footnotes

- 1 The material in this article was previously presented at the 2009 KCDA Fall Conference.
- 2 *Anderson v. Bruce*, 274 Kan. 37, 43, 50 P.3d 1 (2002).
- 3 27 Kan.App.2d 614, 6 P.3d 933 (2000).

- 4 529 U.S. 513, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000).
- 5 27 Kan.App.2d at 616-17 (emphasis added).
- 6 3 Dall. 386, 390, 1 L.Ed. 648 (1798) (emphasis added).

*Thomas v. Hannigan* truncates the actual definition of an ex post facto law as determined by the United States Supreme Court and is, therefore, incorrect.

The Kansas Supreme Court, on the other hand, got the quote right in *State v. Chamberlain*,<sup>7</sup> and that should eliminate any argument based on *Hannigan*.<sup>8</sup>

## Early U.S. Supreme Court Cases

That the Ex Post Facto clause does not bar retroactive application of changes to evidentiary rules regarding the admission, rather than the required quantum, of evidence is borne out of subsequent Supreme Court cases. For example, in *Hopt v. Utah*,<sup>9</sup> the Court held that a statutory change rendering felons competent to be witnesses could be applied in a criminal trial even though at the time the crime was committed, felons were ineligible to be witnesses. The Court ruled that this did not violate the Ex Post Facto Clause because the rule change simply enlarged the class of persons competent to testify and did not “alter the degree, or lessen the amount or measure, of the proof which was made necessary to conviction when the crime was committed.”<sup>10</sup> The Court explained:

Any statutory alteration of the legal rules of evidence which would authorize conviction upon less proof, in amount or degree, than was required when the offense was committed, might, in respect of that offense, be obnoxious to the constitutional inhibition upon *ex post facto* laws. But alterations which do not increase the punishment, nor change the ingredients of the offense or the ultimate facts necessary to establish guilt, but – leaving untouched the

nature of the crime and the amount or degree of proof essential to conviction – only removes existing restrictions upon the competency of certain classes of persons as witnesses, **relate to modes of procedure only, in which no one can be said to have a vested right, and which the state, upon grounds of public policy, may regulate at pleasure. Such regulations of the mode in which the facts constituting guilt may be placed before the jury can be made applicable to prosecutions of trials thereafter had, without reference to the date of the commission of the offense charged.**<sup>11</sup>

The Court reiterated this a few years later in *Thompson v. Missouri*.<sup>12</sup> After Thompson’s murder conviction was reversed by the Missouri Supreme Court on the grounds that certain writings were improperly admitted for comparison purposes, the Missouri legislature changed the law to allow the admission of such writings (much as occurred in Kansas with respect to K.S.A. 60-455 after the *Prine* decision). At Thompson’s second trial, the same writings were admitted and he was again convicted. He appealed to the United States Supreme Court which stated, “we cannot perceive any ground upon which to hold a statute to be ex post facto which does nothing more than admit evidence of a particular kind in a criminal case upon an issue of fact which was not admissible under the rules of evidence as enforced by judicial decisions at the time the offense was committed.”<sup>13</sup> Noting that the change in the statute did not change the amount or degree of proof necessary to convict, the Court

7 280 Kan. 241, 246-47, 120 P.3d. 319 (2005).

8 There are actually a number of Court of Appeals cases that perpetuate the erroneous statement in *Hannigan*, all of which should be superseded by *Chamberlain* as well as applicable U.S. Supreme Court precedent. The error seems to have first appeared in *State v. Moon*, 15 Kan. App.2d 4, 7-8, 801 P.2d 59 (1990), overruled on other grounds by *State v. Sutherland*, 248 Kan. 96, 804 P.2d 970 (1991), and was repeated in several other cases. See e.g. *Lamb v. Kansas Parole Board*, 15 Kan.App.2d 606, 765, 812 P.2d 761 (1991); *State v. Lamunyon*, 21 Kan. App.2d 281, 285, 898 P.2d 1182 (1995); *Nemecheck v. McKune*, 24 Kan.App.2d 72, 74, 941 P.2d 952 (1997). The error is inexplicable given that both *Moon* and *Lamb*

cite *Miller v. Florida*, 482 U.S. 423, 429, 107 S.Ct. 2446, 96 L.Ed.2d 351 (1987), which stayed true to the original *Calder* definition, and the fact that the Kansas Supreme Court had recognized the *Calder* definition as early as 1904 in *State v. Tyree*, 70 Kan. 203, 205, 78 P. 525 (1904).

9 110 U.S. 574, 4 S.Ct. 202, 28 L.Ed.262 (1884), overruled on other grounds by *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970).

10 110 U.S. at 589.

11 110 U.S. at 590 (emphasis added).

12 171 U.S. 380, 18 S.Ct. 922, 43 L.Ed. 204 (1898)

13 171 U.S. at 387.

further noted it “left unimpaired the right of the jury to determine the sufficiency or effect of the evidence declared to be admissible.”<sup>14</sup> In language it could describe what has occurred recently with K.S.A. 60-455, the Court said, “[t]he statute did nothing more than remove an obstacle arising out of a rule of evidence that withdrew from the consideration of the jury testimony which, in the opinion of the legislature, tended to elucidate the ultimate, essential fact to be established, namely, the guilt of the accused.”<sup>15</sup>

Moving up to more modern times, in *Collins v. Youngblood*,<sup>16</sup> the Court cleaned up some divergent case law that has caused confusion over the years, overruling cases that had diverged from the original definition set forth in *Calder* and broadened the ex post facto prohibition to include any change that “alters the situation of a party to his disadvantage.”<sup>17</sup> *Collins* made clear that the ex post facto prohibition applies only to those laws that fit within the *Calder* categories.<sup>18</sup>

## Carmell v. Texas

This brings us to the other case that defendants have cited in arguing against application of the changes to K.S.A. 60-455, *Carmell v. Texas*.<sup>19</sup> In *Carmell*, the Supreme Court held that retroactive application of a change in the Texas rules of evidence violated the Ex Post Facto Clause. It is this very generalized statement of *Carmell*'s holding that Kansas defendants have latched onto to argue that retroactive application of the changes to K.S.A. 60-455 also violates the Ex Post Facto Clause.

But, of course, the *Carmell* holding is not so simple, and if one reads the entire case, one finds a great deal of language that supports retroactive application of K.S.A. 60-455's changes.

What is different about *Carmell* from the other cases cited, and different from K.S.A. 60-455, is that the law at issue in *Carmell* actually changed the quantum of evidence necessary to obtain a conviction.

The law, prior to the change, required not only the victim's testimony, but also corroborating evidence to convict a defendant of certain sexual offenses.<sup>20</sup> After the change, the victim's testimony alone was deemed sufficient.<sup>21</sup> The Court found:

[The statute] is unquestionably a law “that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.” Under the law in effect at the time the acts were committed, the prosecution's case was legally insufficient and petitioner was entitled to a judgment of acquittal, unless the State could produce both the victim's testimony *and* corroborative evidence. The amended law, however, changed the quantum of evidence necessary to sustain a conviction; under the new law, petitioner could be (and was) convicted on the victim's testimony alone, without any corroborating evidence. . . . Requiring only the victim's testimony plus other corroborating evidence is surely “less testimony required to convict” in any straightforward sense of those words.<sup>22</sup>

The Court found that the statute in question fit squarely within the fourth *Calder* category, and therefore, its retroactive application violated the Ex Post Facto Clause.<sup>23</sup> The *Carmell* decision hinged on the fact that the law in question changed the quantum of evidence necessary to convict – it was “a sufficiency of the evidence rule.”<sup>24</sup> While the Court found this law “grossly unfair,”<sup>25</sup> it also made a point to explain:

We do not mean to say that every rule that has an effect on whether a defendant can be convicted implicates the *Ex Post Facto* Clause. **Ordinary rules of evidence, for example, do not violate the Clause.** . . . such rules, by simply permitting evidence to be admitted at trial do not at all

14 *Id.*

15 *Id.*

16 497 U.S. 37, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990).

17 497 U.S. at 50.

18 *Id.*

19 529 U.S. 513, 120 S.Ct. 1620, 146 L.Ed.2d 577 (2000)

20 529 U.S. at 516.

21 *Id.*

22 *Id.* at 530.

23 *Id.* at 530, 552.

24 *Id.* at 545.

25 *id.* at 532.

subvert the presumption of innocence, because they do not concern whether the admissible evidence is sufficient to overcome the presumption. Therefore, to the extent one may consider changes to such laws as “unfair” or “unjust,” they do not implicate the same *kind* of unfairness implicated by changes in rules setting forth a sufficiency of the evidence standard.<sup>26</sup>

Thus, K.S.A. 60-455 being an “ordinary rule of evidence” that does not affect the quantum of evidence required to convict, does not fall into the same category as the Texas law in question in *Carmell*. Accordingly, *Carmell’s* holding does not bar retroactive application of K.S.A. 60-455’s changes.

And if the language cited above was not clear enough, the *Carmell* Court reiterated it again later, noting that “As cases subsequent to *Calder* make clear, [*Calder’s*] language was not intended to prohibit the application of new evidentiary rules in trials for crimes committed before the

changes.”<sup>27</sup> The Court further stated: “The issue of the admissibility of evidence is simply different from the question whether the properly admitted evidence is sufficient to convict the defendant. Evidence admissibility rules do not go to the general issue of guilt, nor to whether a conviction, as a matter of law, may be sustained.”<sup>28</sup>

Thus, K.S.A. 60-455 and the recent changes made to it are plainly distinguishable from the Texas law in question in *Carmell*, and *Carmell’s* holding does not prohibit the retroactive application of K.S.A. 60-455’s changes. Moreover, *Carmell* makes clear that changes to the rules regulating the *admissibility* of evidence, such as K.S.A. 60-455, do not fall into the fourth *Calder* category and can constitutionally be applied retroactively. Ⓢ

26 529 U.S. at 533 n.23 (emphasis added).  
 27 529 U.S. at 538 (citing *Collins v. Youngblood*, 497 U.S. 37, 43 n.3, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990)) (emphasis added).  
 28 529 U.S. at 546.

## STATE OF KANSAS ATTORNEY GENERAL’S CALL

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 OCTOBER 1ST 2009 –  
 JANUARY 13TH 2010  
 CONFERENCE FEE \$75.00

REFUNDS WILL BE  
 GRANTED UNTIL JANUARY  
 13TH WITH A \$10.00 FEE.

#### WHO SHOULD ATTEND:

- ASSISTANT ATTORNEYS GENERAL
- SPECIAL APPOINTED ASSISTANT ATTORNEYS GENERAL
- CITY, COUNTY & DISTRICT ATTORNEYS

#### Join Us:

February 3rd 2010

#### FOR AN AFTERNOON RECEPTION:

Time: 4:00-6:00 PM

Location: Ramada Inn

420 SE 6th St. Topeka, KS. 66607

February 4th 2010

#### CONFERENCE DETAILS:

RAMADA INN TOPEKA, KS.

REGISTRATION 8:00-8:30 AM

Three Training Tracks Available:

Track 1 –DUI Boot Camp

- Drug Recognition Expert Use In Court
- Charging & Jury Selection
- Evidence & Challenges for Intoxylizer

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- Media Policy 101
- Special Media Rule & Prosecutor Ethics
- Amber Alert

Track 3– Government Counsel

- Practices in Federal Court
- Legal Writing; Clear writing techniques for lawyers

#### Plenary Sessions:

- Employment Law
- Parental Controls
- False Claims
- KOMA KORA



# Kansas Public Employees Retirement System

by Glenn Deck, Executive Director  
Kansas Public Employees Retirement System

## KPERS Needs a Cooperative, Comprehensive Solution

This recession has affected practically everyone in one way or another. Most investors, including KPERS, saw unprecedented losses. KPERS' investments did better than many others, but market declines still created a \$2.9 billion decrease in assets.

Fortunately, KPERS' investments have stabilized. But not before the losses had a substantial impact on the long-term funding outlook. A loss that big cannot just be absorbed.

### How Bad Is It?

The most recent actuarial valuation shows the Retirement System's funded ratio has dropped to 59 percent. The funded ratio is the ratio of assets to liabilities. For public defined benefit pension plans like KPERS, funding over 80 percent and rising is good. Funding below 60 percent is poor and needs prompt attention.

KPERS' unfunded liability has increased to \$8.3 billion. The unfunded actuarial liability (UAL) is the difference or gap between actuarial value of assets and actuarial liability for benefits already earned by public employees.

News articles in the last few months have quoted a report issued by the Center for Applied Economics at the University of Kansas calling KPERS bankrupt. KPERS is not bankrupt. KPERS is solvent in the near term.

Benefits for current retirees are safe. And the state also has a legal obligation to pay the benefits employees have already earned. Most members are still working and contributing. KPERS receives over \$700 million in contributions annually. In addition, current retirees are paid over a lifetime, so not all benefits are due at once. KPERS has about \$11 billion in assets and pays out about \$1 billion in benefits each year.

While this is not an immediate crisis, it is serious. Going forward, the UAL will continue

to increase and the funded ratio will continue to drop. Investment returns alone can't fix the funding shortfall. The longer the problem continues, the worse it will get, and the more it will cost.

### How Did We Get Here?

The most direct and immediate cause of the funding shortfall is the recession. This last year has been the worst year for the stock market since 1931. Large investment losses have significantly weakened KPERS' long-term financial health.

Benefit enhancements from the 1990s have also increased the System's liabilities. In addition, state and local governments have contributed less than the actuarial rate for 15 years. Both have had a lasting negative effect on funding.

Lastly, members are living longer and retiring earlier than previously projected. That means KPERS is paying benefits to individual members over a longer period of time than we expected.

All of these issues have combined to create a serious funding problem.

### Where Do We Go From Here?

This fall, KPERS has been doing a new top-to-bottom analysis using this formula:

$$\text{BENEFITS} = \text{contributions} + \text{investments} - \text{expenses}$$

We looked at each of these areas. Based on our findings, we are now in the process of fine-tuning options for consideration by the Governor and legislative committees. In developing ideas, we looked at factors like:

- What are the legal issues?
- What is sustainable?
- Is it consistent with actuarial standards?
- Does it include shared responsibility?
- Does it support an adequate retirement?

Possible options include contribution increases for employers. Employers have shouldered increases in the past, and now they pay almost double the employee rate. In addition, options could mean changes to benefits that haven't been earned yet or contribution increases for members.

The Legislature also asked that we look at options for a 401(k)-type defined contribution plan for **future** employees. With a traditional pension like KPERS, benefits are defined by a formula and plan assets are professionally invested for the membership. With a defined contribution plan, individuals typically direct investments on their own and decide how to pay out their savings during retirement. A switch to this type of plan won't help the current funding shortfall, but

### A Five-Year Look

	UAL (billions)	Funded Ratio
2004	\$4.74	70%
2005	\$5.15	69%
2006	\$5.36	69%
2007	\$5.55	71%
2008	\$8.28	59%

it could affect how benefits for future employees are funded.

At this point, we need more analysis and feedback from legislative committees to better define options and see how they fit together.

Long-term funding and benefit plan designs sound cold and bureaucratic. But at KPERS, we realize they affect members' lives in a very real way. We understand this is your future livelihood. The Legislature and Governor are ultimately responsible for KPERS benefits and funding. With 268,000 members, we have 268,000 reasons to work for a cooperative, comprehensive solution.

There is no easy fix to the challenges we face, but members can count on us to be a trusted partner in finding the solution. 



## Appellate Update: State v. Laturner

by Kristofer Aillsieger, Assistant Solicitor General  
Office of Kansas Attorney General Steve Six

### Lab Reports and the Confrontation Clause

Kansas prosecutors, especially those who prosecute drug crimes, need to take note of the recently released decision by the Kansas Supreme Court in *State v. Laturner*.<sup>1</sup> The Court upheld in part the constitutionality of K.S.A. 22-3437(3), which allows for the introduction at trial of laboratory reports without the live testimony of lab technicians. The Court partially overruled a decision of the Court of Appeals that struck down the entire subsection as unconstitutional. The Supreme Court's ruling salvaged significant portions of the statute, retaining

the notice and demand provisions and the time limitations, while striking the portions requiring a criminal defendant to make specific objections and allowing a trial court to overrule a defendant's objection. The bottom line is that prosecutors may still seek to introduce a lab report in lieu of the lab technician's live testimony by filing notice before trial, but if the defendant objects within the time allowed, the lab technician must testify.

Prior to *Laturner*, K.S.A. 22-3437(3) read:

Whenever a party intends to proffer in a criminal or civil proceeding, a certificate executed pursuant to this section, notice of an intent to proffer that certificate and the

#### Footnotes

1 No. 96,086, Opinion filed October 9, 2009. The opinion can be found on Westlaw at 2009 WL 3233750.

reports relating to the analysis in question, including a copy of the certificate, shall be conveyed to the opposing party or parties at least 20 days before the beginning of a hearing where the proffer will be used. An opposing party who intends to object to the admission into evidence of a certificate shall give notice of objection and the grounds for the objection within 10 days upon receiving the adversary's notice of intent to proffer the certificate. Whenever a notice of objection is filed, admissibility of the certificate shall be determined not later than two days before the beginning of the trial. A proffered certificate shall be admitted in evidence unless it appears from the notice of objection and grounds for that objection that the conclusions of the certificate, including the composition, quality or quantity of the substance submitted to the laboratory for analysis or the alcohol content of a blood or breath sample will be contested at trial. A failure to comply with the time limitations regarding the notice of objection required by this section shall constitute a waiver of any objections to the admission of the certificate. The time limitations set forth in this section may be extended upon a showing of good cause.

The Kansas Court of Appeals held that under *Crawford v. Washington*,<sup>2</sup> this provision is unconstitutional when applied in a criminal prosecution. The Court of Appeals found that lab reports are “testimonial” and admission at trial of such a report without the live testimony of the technician who prepared it violates the Confrontation Clause of the Constitution.<sup>3</sup> The Court of Appeals further held the waiver provisions of the statute invalid because, in its view, a defendant should not be required to take affirmative steps to preserve his Sixth Amendment rights.<sup>4</sup> The Court of Appeals severed what it considered the offending language from the subsection when

applied in criminal cases, leaving in place only the 20-day notice requirement.<sup>5</sup>

On review, the Kansas Supreme Court partially reversed the Court of Appeals. The Supreme Court agreed that lab reports are testimonial, but disagreed with the lower court's opinion that a criminal defendant cannot be required to take affirmative steps to assert his rights.<sup>6</sup> Crucial to this determination was the recent decision of the United States Supreme Court in *Melendez-Diaz v. Massachusetts*.<sup>7</sup>

The *Melendez-Diaz* Court held that laboratory reports showing results of chemical composition testing of substances conducted by a state laboratory constituted “testimonial” evidence, and thus under *Crawford*, could not be admitted in a criminal trial absent the live testimony of the analyst(s) who created them.<sup>8</sup> However, the Court also noted that there is nothing unconstitutional about requiring a criminal defendant to exercise his confrontation rights with respect to such reports before trial.<sup>9</sup> The Court specifically recognized that “notice and demand” statutes – which require a defendant to object to the admission of such reports and demand live testimony within a specified pre-trial time frame – in their “simplest form” do not offend the constitution.<sup>10</sup> This set the stage for the Kansas Supreme Court's decision in *Laturner*.

Reviewing the Court of Appeals' decision in light of *Melendez-Diaz*, the Kansas Supreme Court observed that “*Melendez-Diaz* casts doubts on any portion of the [lower court's] reasoning that suggests a defendant cannot be required to assert the right of confrontation before trial.”<sup>11</sup> The Court also observed that *Melendez-Diaz* “casts doubt on the Court of Appeals' conclusion that a waiver of confrontation rights cannot occur by silence or inaction.”<sup>12</sup> Accordingly, the Court said, “we reject the Court of Appeals' conclusion that K.S.A. 22-3437(3) is unconstitutional because it does not require an explicit waiver by the defendant of the right to cross-examine the laboratory analyst. More generally, the provisions of K.S.A. 22-3437(3) that

2 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)  
3 *State v. Laturner*, 38 Kan.App.2d 193, 204-06 (2007).  
4 *Id.* at 206.  
5 *Id.*  
6 *Laturner*, No. 96,086, Slip Op. at 9, 14-15.  
7 \_\_\_ U.S. \_\_\_, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009).

8 129 S.Ct. at 2532.  
9 *Id.* at 2541.  
10 *Id.*  
11 *Laturner*, No. 96,086, Slip Op. at 14.  
12 *Id.*

mirror the simplest form of a notice-and-demand statute are constitutional.”<sup>13</sup>

The Court did find, however, that the provisions of K.S.A. 22-3437(3) that go beyond simple notice and demand – those that require the defendant to raise specific objections and allow the trial court to overrule those objections – were unconstitutional.<sup>14</sup> In reaching this decision, the Court overruled *State v. Crow*,<sup>15</sup> which had upheld all the provisions of K.S.A. 22-3437(3).<sup>16</sup>

Having found the statute constitutional in part and unconstitutional in part, the Court was then faced with fashioning a remedy. Acting in accordance with the statutory severance clause of K.S.A. 22-3438, the Court determined that it could excise the offending language of K.S.A. 22-3437(3), leaving the rest of the statute intact.<sup>17</sup> This resulted in the deletion of the third and fourth sentences of the subsection.<sup>18</sup>

The result of the *Laturner* decision is that in criminal cases, K.S.A. 22-3437(3) must be read as follows:

Whenever a party intends to proffer . . . a certificate executed pursuant to this section, notice of an intent to proffer that certificate and the reports relating to the analysis in question, including a copy of the certificate, shall be conveyed to the opposing party or parties at least 20 days before the beginning of a hearing where the proffer will be used. An opposing party who intends to object to the

admission into evidence of a certificate shall give notice of objection and the ground for the objection within 10 days upon receiving the adversary’s notice of intent to proffer the certificate. . . . A failure to comply with the time limitations regarding the notice of objection required by this section shall constitute a waiver of any objections to the admission of the certificate. The time limitations set forth in this section may be extended upon a showing of good cause.<sup>19</sup>

Thus, K.S.A. 21-3437(3) remains in effect, but in a changed form. Prosecutors can still proffer a forensic lab report in lieu of the live testimony of a lab technician, but if the defendant objects, then the lab technician must testify at trial. However, K.S.A. 21-3437(3) still allows prosecutors to require a defendant to assert his confrontation rights before trial, and if he fails to do so within the prescribed time limit, he waives them. Thus, even in its changed form, K.S.A. 21-3437(3) still has utility. Because it is likely that some defendants will waive their rights either affirmatively or through inaction, application of K.S.A. 21-3437(3) will forestall the necessity of having lab technicians testify in every trial, and will give prosecutors foreknowledge of those instances when a defendant does intend to challenge the technician’s findings and require his or her presence in court. This, in light of post-*Crawford* case law, is perhaps the best that prosecutors could have hoped for. 

13 *Id.* at 14-15.

14 *Id.* at 15-25.

15 266 Kan. 690, 974 P.2d 100 (1999).

16 *Laturner*, No. 96,086, Slip Op. at 25.

17 *Id.* at 27.

18 *Id.*

19 *Id.* at 28.

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## Event Data Recorders

by Karen C. Wittman, Assistant Attorney General  
Traffic Safety Resource Prosecutor

### EDRs Can Provide An Electronic Witness to Motor Vehicle Crashes

#### What is an Event Data Recorder?

You are probably most familiar with the “black box” in aircraft. These devices have been used as far back as the 1940s. A Flight Data Recorder (FDR) is used in aircraft crash investigation as well as for analyzing air safety issues, material degradation, and engine performance. It usually contains voice data.

An Event Data Recorder (EDR) is a motor vehicle’s “black box”. Early EDRs were called Sensing and Diagnostic Modules (SDM). Federal Regulations defines an EDR as a device or function in a vehicle that records the vehicle’s dynamic time-series data during the time period just prior to a crash event (e.g., vehicle speed vs. time) or during a crash event (e.g., delta-V vs. time), intended for retrieval after the crash event. For the purposes of this definition, the event data does not include audio and video data.<sup>1</sup>

In other words, the EDR should record pre-crash, crash, and post-crash data and record things such as: vehicle speed, vehicle direction, vehicle location, steering performance and, seat belt restraint status. Due to advances in technology, however, the EDR can monitor a plethora of information.<sup>2</sup>

Early EDRs were to help determine if an “event,” such as a front or rear collision, was severe

enough to trigger airbag deployment. The primary purpose of such devices has been to manage airbag deployment, but the boxes have become increasingly more “intelligent,” allowing us to download data and analyze it. In 1999, an average of 112 people were killed every day of the year—one every 13 minutes for a total of 41,611. Of these a total of 20,771 were from passenger vehicles alone.<sup>3</sup> The information EDRs contain can help provide a better understanding of the circumstances in which crashes and injuries occur and will lead to safer vehicle designs. It can also generate information about a crash helpful to answer civil and criminal matters.

#### Are personal motor vehicles required to have these devices?

Although there is no requirements for passenger vehicles to have an EDR, many manufactures have been installing EDRs or something similar on vehicles. General Motors began installing the SDM in its’ passenger fleet in 1990; Ford began installing it in 1997. It is installed over the transmission hump (under the console), under the dashboard, or under the seat. NHTSA (National Highway Traffic Safety Administration) has been using the data since around 1995.<sup>4</sup>

#### Footnotes

- 1 49 CFR 563.5 (b)(5)
- 2 Kowalick, Thomas Real World Perceptions of Emerging Event Data Recorder (EDR) Technologies, Paper Number 146 Monitoring can include: active suspension measurements, advanced systems, airbag inflator time, airbag status, airbag on/off switch position, automatic collision notification, battery voltage, belt status of each passenger, brake status-service, brake status-ABS, collision avoidance, braking, steering, etc., crash pulse-longitudinal crash-pulse lateral, CSS presence indicator, Delta-V-longitudinal, Delta-V-lateral, electronic compass heading, engine throttle status, engine RPM, environment as ice, wet, temperature, lamination & other, fuel level, lamp status, location via GPS data, number of

occupants, principle direction of force, PRNDL position, roll angle, seat position, stability control, steering wheel angle, steering wheel tilt position, steering wheel rate, time and date, traction control, traction coefficient estimated from ABS computer, transmission selection, turn signal operation, vehicle mileage, vehicle speed, VIN, vehicle speeds, windshield wiper status, yaw rate, turn-key start time, vehicle movement time, location at start, velocity at crash, trip time at collision or crash, fire in cabin, water in cabin, audio-chip at air bag deployment.

- 3 National Transportation Safety Board. 2000. *1999 Annual Report*. NTSB/SPC-00/03. Washington, DC.
- 4 Croft, Arthur Sensing Diagnostic Module (SDM): The modern motor vehicle’s “black box” **Dynamic Chiropractic** October 22, 2001

In August 2006, NHTSA issued an EDR rule that will apply to 2013 and later model vehicles. The rule standardizes the information EDRs collect and makes retrieving the data easier. Devices defined as EDRs must record 15 data elements, including vehicle deceleration, in specific formats. Those elements include<sup>5</sup>:

- Change in forward crash speed
- Maximum change in forward crash speed
- Time from beginning of crash at which the maximum change in forward crash speed occurs
- Speed vehicle was traveling
- Percentage of engine throttle, percentage full (how far the accelerator pedal was pressed)
- Whether or not the brake was applied
- Ignition cycle (number of power cycles applied to the EDR) at the time of the crash
- Ignition cycle (number of power cycles applied to the EDR) when the EDR data was downloaded
- Whether or not the driver was using a safety belt
- Whether or not frontal airbag warning lamp was on
- Driver frontal airbag deployment: time to deploy for a single state airbag, or time to first state deployment for a multistate airbag
- Right front passenger frontal airbag deployment; time to deploy for a single state airbag, or time to first stage deployment for a multistage airbag
- Number of crash events
- Time between first two crash events, if applicable
- Whether or not EDR completed recording

## What vehicles have EDRs?

To see if your vehicle has this device go to <http://www.harristechnical.com/downloads/cdrlst.pdf>. This pdf file is current to September 10, 2009. It lists, to name a few, Pontiac, Oldsmobile, Ford, Chrysler, Saturn, Jeep, SAAB, Isuzu, Cadillac, and

Hummer models.

Federal Regulations require the owner's manual for these vehicles indicate an EDR is installed. It also is required to state:

*These data can help provide a better understanding of the circumstances in which crashes and injuries occur. NOTE: EDR data are recorded by your vehicle only if a non-trivial crash situation occurs; no data are recorded by the EDR under normal driving conditions and no personal data (e.g., name, gender, age, and crash location) are recorded. However, other parties, such as law enforcement, could combine the EDR data with the type of personally identifying data routinely acquired during a crash investigation.*

*To read data recorded by an EDR, special equipment is required, and access to the vehicle or the EDR is needed. In addition to the vehicle manufacturer, other parties, such as law enforcement, that have the special equipment, can read the information if they have access to the vehicle or the EDR.<sup>6</sup>*

## How can this help a prosecutor?

On August 17, 2002, at approximately 12:55 a.m., two 16-year-old girls were killed when their vehicle was struck by Edwin Matos' vehicle. The girls were backing from their driveway into the street when Matos' vehicle struck them. The central question in the case was how fast Matos was traveling at the time of impact.

The lowest estimate was the defense expert estimate of 56.91 miles per hour. The state's expert estimated the minimum crash speed of 80-98 mph using traditional accident reconstruction techniques utilizing conservation of momentum principles. The state's expert also testified the speedometer needle fell over to 150 mph, meaning the needle had to have been past 12 o'clock on the dial when the power was lost (and gravity took over) meaning a minimum speed at impact of 80 mph.

5 Office of the Federal Register, 2006. NHTSA—Final Rule. Docket no. NHTSA-2006-25666; 49 CFR Part 563 Event data recorders. Federal Register, vol. 71, no. 166,

pp. 50998-51048. Washington, DC: National Archives and Records.

6 49 CFR 563.11(a)

The “black box” or EDR computer which operated Matos’ airbag recorded a speed of 114 mph just four seconds prior to the crash and a speed of 103 mph within one second of the crash. Evidence showed the airbag was working properly at the time of the accident.<sup>7</sup>

In 2001, Charles Tiedje, a police officer in Arlington Heights, Ill., won a \$10 million settlement for severe injuries he suffered when a hearse struck his squad car Oct. 13, 2000. The hearse driver, Aleksandr Babayev, claimed a medical condition caused him to black out before he hit Tiedje’s car. But the hearse’s black box showed he had been an active driver who accelerated to 63 mph — about 20 miles over the posted limit — seconds before he approached the intersection, then slammed on his brakes one second before impact. Tiedje’s attorney, Robert Clifford, says the black-box information “was an unbiased witness to the crash.”<sup>8</sup>

## Is this admissible evidence?

### FLORIDA

In Matos v. State 899 So.2d 403, 30 Fla. L. Weekly D869 (2005) the court first addressed the issue of whether this evidence represented something “new or novel” as part of the Frye test.<sup>9</sup> Citing Bachman v. Gen. Motors<sup>10</sup> the Florida court stated: It noted the process of recording and downloading SDM data does not appear to constitute a novel technique or method...Crash sensors such as the SDM have been in production in automobiles

for over a decade, and the microprocessors that run them and record their data also run everyday appliances, such as computer and televisions. The Bachman court went on to find the process of recording and downloading SDM data is not a novel technique or method. In any event the state demonstrated that when used as a tool of automotive accident reconstruction, the SDM data is generally accepted in the relevant scientific field warranting its’ introduction. The Florida court agreed.

### MASSACHUSETTS

A defendant’s motion sought to exclude the EDR evidence based on the claim the Commonwealth could not establish the reliability and accuracy of the device.<sup>11</sup> In this case the defendant claimed she was traveling 20-35 mph when the crash occurred. The EDR recorded the defendant traveling at a speed of 58 mph.

Massachusetts uses a modified Daubert formula.<sup>12</sup> The expert in the case used the data obtained by the EDR device and compared it to other instrumentation including high speed video, accelerometers, infrared traps, and sensitive radar. The Massachusetts court concluded the Judge did not abuse his discretion in allowing for the EDR information to be presented in court.

### NEW JERSEY

Rule 702<sup>13</sup> of the New Jersey Rules of Evidence has three requirements:

7 Matos v. State, 13 So.3d 543, 34 Fla. L. Weekly D1382 (Fla.App. 4 Dist. Jul 08, 2009) (NO. 4D08-238), rehearing denied (Aug 24, 2009)

8 [http://www.usatoday.com/news/nation/2003-05-15-box-es-usat\\_x.htm](http://www.usatoday.com/news/nation/2003-05-15-box-es-usat_x.htm) posted May 15, 2003

9 Frye v. United States, 23 F. 1013(D.C. Cir. 1923) “Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while the courts will go a long way in admitting experimental testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.”

10 Bachman v. Gen. Motors, 332 Ill.App.3d 760, 267 Ill.

Dec. 125, 776 N.E.2d 262, 281 (2002)

11 Commonwealth v. Zimmerman 70 Mass.App.Ct. 357, 873 N.E.2d 1215(2007)

12 Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469(1993), Commonwealth v. Patterson 445 Mass. 626, 640 n. 11, 840 N.E.2d 12(2005): “may lay a foundation by showing that the underlying scientific theory is generally accepted within the relevant scientific community, or by showing that the theory is reliable or valid through other means.” See also Commonwealth v. Lanigan, 419 Mass. At 26, 641 N.E.2d 1342(1994)

13 If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion

- The intended testimony must concern a subject matter that is beyond the ken of the average juror;
- The subject of the testimony must be at a state of the art such that an expert's testimony could be sufficiently reliable; and
- The witness must have sufficient expertise to explain the intended testimony.<sup>14</sup>

The court in State v. Shabazz<sup>15</sup> determined there was no dispute, the subject matter was well beyond the ken of the average juror and the expert presented by the state, R. W. Haight,<sup>16</sup> had sufficient expertise. The only factor needing to be determined was whether EDR technology is at a state of the art such that an expert's testimony could be sufficiently reliable to present to the jury. The state's burden was to prove that EDR devices, and the interpretation of the data taken from them, is a non-experimental, demonstrable technology that the relevant scientific community widely, but perhaps not unanimously accepts as reliable.

Haight testified there was no organization within the automotive community which questions the reliability of EDR devices.<sup>17</sup> The court determined the scientific reliability of event data recorder evidence was generally accepted within the automotive and accident reconstruction community and thus met the Frye standards for admissibility.

## ILLINOIS

Bachman v. Gen. Motors,<sup>18</sup> was a civil case in which the driver and her mother brought action against the automobile manufacturer claiming that the vehicle's air bag deployed prior to the collision

thus causing the collision.

Testimony offered and accepted by the court showed information downloaded from the SDM indicated the air bag did not inadvertently deploy, but was a result of the plaintiff's vehicle striking another vehicle.

Using the Frye test, the appellate court stated the trial court did not abuse its' discretion by finding that the process of recording and downloading SDM data is sufficiently established to have gained general acceptance in the relevant scientific community, and thus determining that the Frye admissibility standard had been satisfied.

## NEW YORK

Second degree murder charges were brought against a driver of a Cadillac that struck a Neon stopped at a traffic light. Data was downloaded from the Cadillac to be used against the defendant.<sup>19</sup> A motion in limine was filed by the defendant requesting a Frye hearing regarding the information contained in the SDM.

The state opposed the motion and brought the court's attention to the Illinois cases cited above as well as a Davis-Frye hearing that was held in Michigan,<sup>20</sup> along with other articles.



Here is an example of an EDR.

14 State v. Harvey 151 N.J. 117, 169, 699A.2d 596(1997)

15 400 N.J.Super. 203, 206, 946 A.2d 626, 627 (N.J.Super.A.D.,2005)

16 Mr. Haight has been accredited by the Accreditation Commission for Traffic Accident Reconstruction. He helped develop the crash tests that formed the basis for the accreditation exam. Haight has taught courses in crash reconstruction, has published in the field of motor vehicle crash reconstruction and motor vehicle data recorders and has been involved in almost 1,000 crash tests. He was on the original committee created by NHTSA to develop training for data recording technology. He has testified as an expert witness in approximately 12

states. He is also one of two experts in the country certified to teach classes on data recorders placed into newer vehicles.

17 Besides auto manufacturers, the Insurance Institute for Highway Safety and NHTSA use EDR data to facilitate auto safety research (see Footnote 5, Harvey, id.)

18 See Note 10 supra

19 People v. Hopkins 6 Misc.3d 1008(A), 2004 WL 3093274(N.Y.Co.Ct.) (2004)

20 People of the State of Michigan v. Stephan Wood heard January 10, 2003 in the Circuit Court for the County of Eaton File no. 02-283-FH Charlotte, Michigan- the Honorable Calvin E. Osterhaven presiding

The court stated it was persuaded based upon its review of the cases and other supporting documentation submitted by the People and in the absence of any contrary or contradictory evidence that the SDM module technology has been generally accepted and the need for a Frye hearing was not necessary to determine its admissibility.

## WHO OWNS THE DATA?

The Federal Highway Administration believes the free and clear final sale of vehicles to consumers by manufacturers presumably leaves the manufacturer with no interest in either the vehicle or the EDR therein concluding the owner of the vehicle is the owner of the data.<sup>21</sup>

## 4<sup>th</sup> AMENDMENT ISSUES?

### NEW YORK

In People v. Christmann<sup>22</sup>, the trooper/accident reconstructionist downloaded the information at the scene without a warrant and the information obtained was used at trial. The court reasoned:

...[there is] only a diminished expectation of privacy in the mechanical areas of the vehicle and further found that that expectation must yield to the overwhelming state interest in investigating fatal accidents.

People v. Quackenbush, *supra* at page 539, 647 N.Y.S.2d 150, 670 N.E.2d 434. The Court also found that the search conducted of the safety equipment of the truck in question was of an administrative nature, rather than an attempt to gather information to form the basis of a criminal prosecution. See People v. Scott, 79 N.Y.2d 474, 583 N.Y.S.2d 920, 593 N.E.2d 1328. In the area of automobile safety, there is a high degree of governmental regulation, and a search conducted to carry out this regulation has a lower threshold of reasonableness. Since the testing done of the

SDM records data regarding the performance of the vehicle during the incident such testing is a reasonable extension of Quackenbush. The downloading of the information is not analogous to a container search, nor does it extend to the private areas of the vehicle. There is also no opportunity for a police officer to select only the desired data or to manipulate it.

### TENNESSEE

In State v. Holladay<sup>23</sup> a warrantless search was done of the defendant's vehicle by the Tennessee Highway Patrol. The vehicle had been towed to a police impound lot. The officer also testified he was not doing an "inventory" search of the vehicle at the time. The defendant claimed there was no exception to the general warrant requirement to justify the search. At the suppression hearing, the parties stipulated the vehicle is subject to a reasonable expectation of privacy even in a damaged or unmovable condition. Therefore the burden shifted to the state to prove the downloaded information was obtained lawfully and within the protected realms of reasonable governmental activities. The trial court noted:

This burden by the state is uniquely embraced in the gadgetry of the automobile industry and the computerized mechanism measuring the performance of the history of the operation of the vehicle that may incriminate the driver. The court suppressed because no warrant was obtained.

The appellate court disagreed stating the seizure of the vehicle immediately following the crash did not violate constitutional protections against unreasonable search and seizure. The court also noted police routinely and properly conduct testing of items taken into evidence and under these

21 NAT'L HIGHWAY TRAFFIC SAFETY ADMIN. EVENT DATA RECORDER (EDR) WORKING GROUP, SUMMARY OF FINDINGS 55 at 53(2001) (stating manufacturers retain no "vestigial interests" in vehicles). Applying the same final-sale reasoning to EDRs, "the vehicle owner would presumably own the data as well." *Id.* The FHA acknowledges that this would

create significant problems for authorities due to "the obvious practical difficulties of obtaining permission at the crash scene" and allowing the owner "to withhold the data if he felt this would serve his self interest." *Id.*  
22 3 Misc.3d 309, 314, 776 N.Y.S.2d 437, 441 (N.Y. Just. Ct., 2004)  
23 Unpublished decision, 2006 WL 304685 (2006)

circumstances a vehicle is no different.

Would these rulings still stand with the new automobile standard of *Arizona v. Gant*?<sup>24</sup> No state court has dealt with this issue.

Consent is not recommended by this author simply to eliminate the issue of the owner of the vehicle being unclear as to what information is held in the device and any miscommunication that may follow.<sup>25</sup> Clearly the use of a search warrant could eliminate most arguments made concerning Fourth Amendment issues.

## SELF-INCRIMINATING-5<sup>TH</sup> AMENDMENT ISSUES

*In Pennsylvania v. Muniz*<sup>26</sup>:

The privilege against self-incrimination protects an “accused only from being compelled to testify against himself, or otherwise provide the state with evidence of a testimonial or communicative nature,”<sup>27</sup> but not from being compelled by the state to produce “real or physical evidence<sup>28</sup>.” To be testimonial, the communication must, “explicitly or implicitly, relate a factual assertion or disclose information.”<sup>29</sup>

Clearly the information stored in an EDR is not “testimonial” and should not be considered a “communication” by the driver.

*In Shabazz*<sup>30</sup> the court found:

The defendant’s constitutional privilege against compelled self-incrimination was not violated by use of data from his automobile’s “black box” in the prosecution for death by auto, where data at issue was not testimonial in nature, the box was properly seized under search warrant based upon probable cause, and defendant was free to retain an expert to challenge testimony of state’s expert witness.

Several states have legislation concerning the ownership of EDRs and downloading of EDR information.<sup>31</sup> Kansas has not addressed this issue.

## CONCLUSION

The EDR is a useful tool in determining the cause of a serious collision. The information held within this “electronic witness” can be used for both inculpatory and exculpatory purposes. A person who operates a motor vehicle in a reckless manner should not escape the punishment just because there are no “eyewitnesses” to the collision, nor should a person experiencing unforeseeable mechanical failure or unexpected medical issues be criminally prosecuted. The EDR will not, however, be a replacement for the collision investigator nor the re-constructionist but will, over time, become an integral part of the analytical process, particularly as EDRs find more widespread use.<sup>32</sup>

24 556 U.S. ---, 173 L.Ed.2d 485, 129 S.Ct. 1710 (2009)

25 See also *Kirsch v. State*, 276 S.W.3d 579 (Tex.App.-Hous. (1 Dist.) Dec 04, 2008) (NO. 01-07-00446-CR), petition for discretionary review granted (Apr 29, 2009)

26 496 U.S. 582, 582, 110 S.Ct. 2638, 2640 (U.S.Pa., 1990)

27 *Schmerber v. California* 384 U.S. 757, 761, 86 S.Ct. 1826, 1830, 16 L.Ed.2d 908

28 *id.*, at 764, 86 S.Ct., at 1832

29 *Doe v. United States*, 487 U.S. 201, 210, 108 S.Ct. 2341, 2347, 101 L.Ed.2d 184. Pp. 2643-2644

30 See *supra* note 15

31 **COLORADO: Co. St. 12-6-402:** Requires motor vehicle manufacturers to disclose that a motor vehicle has an event data recorder. Prohibits retrieval of event data from a motor vehicle unless: The owner consents; A court of administrative agency orders it; A peace officer, firefighter, or emergency medical service provider retrieves the data to improve motor vehicle safety, security, or traffic management or for medical research; A motor vehicle dealer or an automotive technician is

diagnosing, servicing, or repairing the motor vehicle; or it is retrieved to facilitate emergency medical services. **ARKANSAS A.C.A. § 27-37-103:** the data from a motor vehicle event data recorder shall only be produced without the consent of the owner at the time of the accident if: (1) A court of competent jurisdiction in Arkansas orders the production of the data; (2) A law enforcement officer obtains the data based on probable cause of an offense under the laws of the state of Arkansas; or (3) A law enforcement officer, a firefighter, or an emergency medical services provider obtains the data in the course of responding to or investigating an emergency involving physical injury or the risk of physical injury to any person. **SEE ALSO: CALIFORNIA:** West’s Ann.Cal. Vehicle Code § 9951, **CONNECTICUT:** C.G.S.A. § 14-164aa, **MAINE:** 29-A M.R.S.A. § 1972

32 R.W. Haight, *Automobile Event Data Recorder (EDR) Technology - Evolution, Data, and Reliability* Collision Safety Institute San Diego, CA www.CollisionSafety.net, 2001

# Learning Prosecution: It Starts in Law School

by Suzanne Valdez, Clinical Associate Professor, The University of Kansas School of Law

Since the fall 2002 semester, I have served as the director of the Criminal Prosecution Clinic at the University of Kansas School of Law. The Clinic, formerly known as the Criminal Justice Clinic, was started in 1970. It is one of the oldest clinics at the KU law school. In fact, a number of today's Kansas prosecutors, both at the state and federal levels, are alumni of the Clinic. Currently, between 15-20 third year law students enroll in the Clinic annually. Students may participate during the academic year and work an equivalent of one eight-hour day. Or they may participate in the intensive summer program in which they work up to a 40-hour week for up to ten weeks.

Most interns are certified to practice law under the Kansas student practice rule, Rule 719 (formerly Rule 709). This certification allows the students to participate in all phases of the criminal prosecution process, including conducting jury trials, as long as they work under the direct supervision of a licensed Kansas lawyer.

As the Clinic director, I oversee the placement of the students in various prosecutorial offices. I also conduct the weekly Clinic class. But the law school depends on the generosity, talent, and commitment of prosecutors to supervise, mentor, and teach the interns the practice of criminal law. Clinic placements include the U.S. Attorney's Office (Kansas), the Kansas Attorney General's Office, and Kansas state district and county attorney offices in Douglas, Franklin, Johnson, Osage, and Wyandotte counties. Occasionally, interns will be placed in municipal prosecutorial offices as well.

The educational value of a law student's participation in the Criminal Prosecution Clinic cannot be overstated. Over the years, I have had the pleasure to get to know these students well in their capacity as prosecutorial interns. Probably the most interesting and exciting part of my oversight responsibilities is when students share their observations and learning experiences orally with the clinic class or with me through their reflective weekly journals. Over the years, students have shared a number of consistent impressions and observations regarding their experiences as prosecution interns. I share some of these with you now (in no particular order)

both to stress how much the students value and appreciate their experience working as prosecution interns and to highlight the importance of the role that prosecutors play in the educational real world experience of a law student who participates in the Clinic.

## ***"Law school classes have taught me little about the actual practice of law."***

If you remember your days as a law student, you may agree with this sentiment unless you participated in a clinic. A majority of law students who participate in the Criminal Prosecution Clinic are third-year students who have completed 60 or more hours of academic credit. These students are less than a year away from law school graduation, taking the bar exam, and starting law practice, yet they do not know what to do in the real world. Interns consistently say at the start of their internships, "I have no idea what I am doing," "I am clueless," or "law school classes did not teach me what to do in real life."

Generally, most law school courses, especially those taught in the first-year curriculum, provide the rigorous intellectual framework for problem-solving, which is necessary for an intern to be able "think like a lawyer" when faced with working through real world problems in a clinical setting. So I do not suggest that law school coursework is any less valuable than that of a clinic experience. But I do promote the importance of law school clinics because of their contribution to making truly well-rounded law school graduates. The Criminal Prosecution Clinic is such a clinic; one that allows interns to "think like a lawyer" while supplying them with the practice skills they will need as licensed practitioners once they graduate from law school.

## ***"Expect the unexpected."***

Law school simulation courses, like Trial Advocacy, Pretrial Advocacy, and Advanced Litigation, encourage students to prepare sometimes lengthy and detailed presentations in accordance with a case file that has a significant degree of certainty. But in real life, crazy things happen.

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One intern had no idea what to do when a witness invoked the Fifth Amendment privilege and refused to testify during a hearing. Another intern, who had spent significant time preparing a witness was shocked when the witness' testimony at the preliminary hearing was starkly different than what the witness previously told prosecutors.

I had a personal experience of this type when prior to a preliminary hearing in a drug case I was prosecuting in Wyandotte County, the undercover police officer who was scheduled to testify stated to me as I was escorting him into the courtroom, "I'm packing." I responded, "Packing what?" because I had no idea what he was talking about. "A gun," he responded. At the time, I was 10 years out of law school and still the unexpected happened.

***"There is a lot of hurry up and wait... and often nothing happens."***

Dockets and other hearings are set at specific times, but rarely does the court start a case at the prescribed time. Interns are surprised to learn that when a case is set at a certain time, there is often time to wait before the court calls the case. And yet, I stress to students to always be on time because you never know when the judge will call your case. Many interns have observed that, during criminal dockets, ADAs, and defense counsel spend a lot of time standing around and waiting for cases to be called.

Interns also are disappointed when they have prepared for a preliminary hearing or bench trial only to have the case plead right before trial, or have the case continued for one reason or another. I tell students that for every ten hearings or trials you prepare for, only one will go. One intern commented, "Now I know what is meant by the turtle symbolizing the slow and steady pace of justice."

***"Most prosecutors are consummate public servants."***

Students remark that prosecutors and staff work tirelessly and conscientiously to achieve justice and to ensure the safety of their community. The Unified Government of Wyandotte County requires its

employees to reside within the county's boundaries, and many prosecutors and staff, including the current District Attorney, have lived a lifetime in The Dotte. As county residents, the DA's office attorneys and staff have a vested interest in eradicating crime in their community.

Students are awed by the structure, efficiency, and functionality of prosecutorial offices. At any given time, prosecutors are in court handling pleas, revocation and sentencing matters, conducting preliminary hearings, or trying cases that range from simple thefts to first degree murder. The out-of-court work and preparation is voluminous. The ADAs and staff prepare for trial, meet with victims, witnesses and law enforcement personnel, consult with various legal experts, haggle with defense counsel to work out plea agreements, and draft documents such as search warrants and appellate briefs. And the work is never relegated to a strict 40-hour week. "This is impressive. This is dedication and public service at its best," one intern commented.

***"Participating in the Criminal Prosecution Clinic was my best experience in law school."***

Consistently, students tell me this. And I respond – "I know. It's been my best experience as a lawyer too." Until now I may not have mentioned that when I became the director of the Clinic, I had no prosecutorial experience whatsoever and I was ill-prepared to take on the responsibility when I was tasked with it.

With the blessing of the KU Law School administration, Wyandotte County District Attorney, Jerome Gorman, and his Chief Deputy, Mike Russell, they graciously took me up on my offer to volunteer my time and services (about eight hours per week) and appointed me a Special Prosecutor. During my approximately three years as a Special Prosecutor in the Wyandotte County DA's Office, I felt privileged to have a wonderful opportunity be a part of the prosecution team. I mostly handled preliminary hearings in all types of felony cases. Occasionally, I assisted with the traffic docket (which the junior ADAs appreciated), and I

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participated in some jury trials.

Perhaps because I was formerly a legal services lawyer, my experience as a prosecutor enlightened, inspired, and educated me in many ways that I never expected. Students feel the same when they complete their respective prosecutorial internships.

Most are firmly convinced that they will be better new lawyers, whether they become prosecutors or not, because of their participation in the Clinic. I enthusiastically second that conviction because my experience as a Special Prosecutor made me a better lawyer too, and a better teacher. 🙏

## **Internships: A Personal Perspective**

**by Jake Cunningham, Legal Intern, Office of the District Attorney, Third Judicial District**

Before I started my internship with the Shawnee County District Attorney's Office, I was in a place familiar to many law school students: I had a wealth of knowledge from class, but I lacked the experience of applying that knowledge in a real world setting. My internship has provided me the opportunity to apply the education I am receiving on an everyday basis in the criminal justice system.

My experience began in January 2009. I was lucky enough to shadow my fellow interns who had been in the office for a considerable amount of time prior to my arrival. Initially, I followed the interns through various court settings. These settings include court trials, motion hearings, show-cause hearings, and the occasional jury trial. Once I had viewed the settings, I was given the chance to jump in as I felt appropriate.

As interns in Shawnee County, we are responsible for the majority of the misdemeanor caseload. This means that we have the exciting challenge of prosecuting a variety of cases that range from misdemeanor drug possession to domestic battery. This variety has been extremely beneficial as I have had to develop an insightful understanding of criminal procedure and the rules of evidence. Further, the variety provides the occasion to explore different trial strategies. Each case requires a different approach and presents unique challenges from evidentiary issues to scheduling conflicts for witnesses.

I have personally been assigned a caseload primarily involving domestic violence. This arena has been especially advantageous in building my trial experience. The prosecution of domestic violence cases requires attentive discussions with victims of crimes that they often are hesitant to discuss with complete strangers. These cases have provided me a world of knowledge and experience in dealing with humans who have lives beyond the courthouse. It has taught me the benefit of actively listening and providing these victims with a comfortable setting that will hopefully lead to a more peaceful home life. However, victims are obviously not always cooperative and these uncooperative victims have provided me an entirely different type of education. I have had to learn how to carefully manage a conversation or multiple conversations with a person who truly has no desire to speak with me.

Perhaps most important of all, this internship has allowed me to meet judges, prosecutors, defense attorneys, law enforcement officers, and court house employees. These are the people who make the criminal justice system function, and I have been privileged with the opportunity to consider them my colleagues for the past nine months. I have gone from a nervous intern to a confident, trial savvy intern who understands the criminal justice system and will forever be the beneficiary of the experience.

by District Attorney Nola Tedesco Foulston, 18th Judicial District  
Kansas State Director, NDAA Board of Directors



## NDAA Board of Directors Fall Meeting ~ Denver, Colorado

The fall meeting of the National District Attorneys Association was held in Denver, Colorado October 15-18, 2009. One of the hosts for this event was Colorado Governor William Ritter. Bill, the former Denver District Attorney, is a long-time friend and colleague who served on the National District Attorneys Association Board of Directors for many years. He has the heart of a prosecutor and continues to support the interests of our law enforcement and prosecution communities nationwide.

The following segments detail issues presented to the full board of directors at the meeting:

### Victim's Rights Committee

The Board has established a new committee to specialize in the area of Victim's Rights. This committee's purpose is to give special attention to the unique issues presented in the prosecutor/victim relationship.

Around the nation, there has been a movement headed by the National Association of Criminal Defense lawyers called the *DIVO* program that seeks to solicit victims to promote outcomes that are favorable for defendants in the criminal justice system. The program is referenced on their website, <http://www.nacdl.org>:

*Victim advocates are a common part of the prosecutorial system. For years, contact with victims has been primarily, if not exclusively, within the province of the prosecutor. In recent years, however, there has been a concerted effort on the part of defense teams to engage specially trained individuals to reach out to victims in their cases, even in capital cases.*

*Defense-Initiated Victim Outreach (DIVO) seeks to reduce the trauma to victim-survivors that often results from the adversarial and technical nature of the legal process. This is done by providing a more active role for homicide*

*victim-survivors in death penalty cases without compromising the due process rights of capital defendants. Trained victim outreach specialists help defense attorneys understand the needs and experiences of victim-survivors; they also help meet the judicial needs of victim-survivors, especially those that can be addressed by the defense and the defendant.*

*See [www.nacdl.org](http://www.nacdl.org) for further propaganda.*

The NDAA Board of Directors believes that the *DIVO* program takes advantage of victims and that it attempts to derive benefits for criminal defendants by playing on misdirected sympathies. The NDAA board will continue to monitor *DIVO* and will work within our own organization to strengthen the prosecutor/victim relationship.

The goal for our national board is a coordinated effort with victim associations around the country to provide information and support for victims of violent crime. The NDAA will begin surveying states to collect data that will improve an understanding of local, state, and national programs presently available. District Attorney Nola Foulston will be working on this committee.

### NATIONAL ADVOCACY CENTER FINANCIAL REPORT

The NDAA's Advocacy Center in Columbia South Carolina, continues to operate at a loss.

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Despite a small “infusion” of grant funding, the center has not yet received the federal funding necessary to support operations. NDAA was given a grant of \$1.6 million dollars. That funding *has not been received* and will only support the center throughout mid-2010. Each Kansas County and District Attorney needs to continue contacting our Congressional Delegation for support of continued funding for this very necessary center for prosecution training. Classes are still being held at the NAC; however, prosecutors are required to pay the cost associated with the training. For information on current course offerings at NAC, please visit this page of our website: [http://www.ndaa.org/pdf/NAC\\_September\\_2009\\_March\\_2010.pdf](http://www.ndaa.org/pdf/NAC_September_2009_March_2010.pdf)

## **ABA CRIMINAL JUSTICE SECTION REPORT**

For the first time a “real prosecutor” is chair of the ABA Criminal Justice Section. District Attorney Joe Hynes of Brooklyn, New York has now balanced the committee with 50 percent of its membership from prosecution. Deputy District Attorney Anne Swern of Brooklyn, an Associate on the NDAA board of directors, actively participates in the ABA functions, and keeps us all well apprised of the positive changes and recent developments. Here are some of the highlights...

The ABA committee is currently working on what prosecutors consider to be a major issue: the use of the term “prosecutorial misconduct” that would be more appropriately described “trial error”. The NDAA board of Directors supports this critical ABA Criminal Justice Section recommendation:

RESOLVED, that the American Bar Association urges trial and appellate courts to distinguish between lawyer “error” and lawyer “misconduct” when describing a lawyer’s action and to recognize that the use of the term “misconduct” to describe a lawyer’s action that would more accurately be characterized as “error” may result in unfairly damaging a lawyer’s reputation and impairing a lawyer’s professional advancement.

The Criminal Justice Section is also working on appropriately simplified language for the *Miranda*

warning to use with juvenile arrestees.

The Criminal Justice Section is currently working on a response and input into the recently issued National Academy of Science Report. Members of the NDAA are actively working with our ABA representatives to assure that concerns of prosecutors and law enforcement are addressed.

## **NATIONAL PROSECUTION STANDARDS 4<sup>th</sup> EDITION**

The Board of Directors has approved the revision of the *National Prosecution Standards and Commentary*, with substantial contributions from one of our “own” Kansas prosecutors. Tom Weilert, formerly of Wichita, serves at the National Advocacy Center and was instrumental in completion of this work.

## **JUVENILE LIFE WITHOUT PAROLE**

Around the country, states that have penalties of life without parole for juveniles convicted of certain heinous crimes continues to be under attack. The NDAA is discussing the relevant issues in the aftermath of the US Supreme Court Roder opinion [eliminated capital punishment for juveniles]. The Heritage Foundation has published a treatise entitled “Adult Time for Adult Crimes: Life Without Parole for Juvenile Killers and Violent Teens.” The author, Charles D. Stimson, presented at our Denver meeting. You can visit their website for further information or to obtain copies of the report: [www.heritage.org](http://www.heritage.org).

## **NATIONAL COLLEGE ACADEMIC TRAINING 2009**

*December 6-10, 2009*

**Forensic Evidence**

San Diego, CA

*December 6-10, 2009*

**Prosecuting Sexual Assaults**

Washington, DC 

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