

The Kansas Prosecutor



The official publication of the Kansas County and District Attorneys Association
Volume 21, No. 1, Spring 2024



- 1917 -
NESS COUNTY COURT HOUSE



CORPORAL
NOAH V. B. NESS
SEVENTH KANSAS CAVALRY
DIED, AUGUST 22, 1864
ABBEVILLE, MISSISSIPPI
IN 1870 THE KANSAS LEGISLATURE NAMED
NESS COUNTY IN HIS HONOR. THIS STATE IS IN
MEMORY OF NOAH NESS AND ALL THE BRAVE MEN WHO
HAVE FIGHTED TO KEEP THIS COUNTRY FREE.
DEDICATED 1917 BY THE
LEGISLATIVE COMMITTEE ON
HONORABLE MEMORIALS

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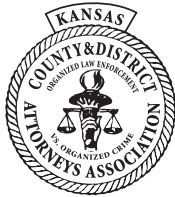
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 County and District Attorneys Association

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 Phone: (785) 232-5822 Fax: (785) 234-2433



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

For questions or comments about
 this publication, please contact the editor:
 Mary Napier
mary@napiercommunications.com
 (785) 783-5494

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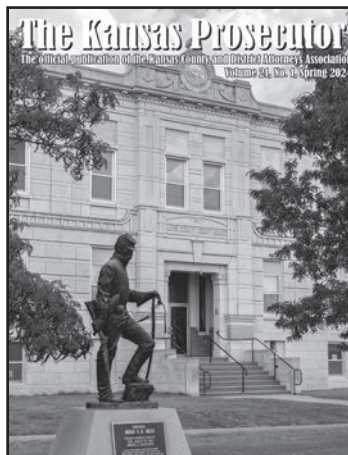
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About the Cover

The Ness County Courthouse was built in 1917 by contractor Cuthbert & Sons in a classical revival style. It was designed by J C Holland & Son of Topeka. The rectangular shaped building is located on spacious landscaped grounds in the center of Ness City. On the roof above the entrances are parapets with crests.

The building houses the County District Court of the 24th Judicial District.

Photo by John D. Morrison, Prairie Vistas Photography



President's Column

By Sherri Schuck, KCDA President
Pottawatomie County Attorney

The Value of Connections

"We make a living by what we get, but we make a life by what we give." ~Winston Churchill

"Life's most persistent and urgent question is: What are you doing for others?" ~Martin Luther King, Jr.

Hello and welcome to the President's Column. It is hard for me to believe that I have been kicking around this membership since 2002. For the past 22 years, I have had the distinct privilege of being part of a most prolific body of individuals dedicated to the profession of prosecution and justice. Although I am grateful to have been the recipient of guidance, knowledge, solidarity, encouragement, and pride, I feel my greater accomplishment has been to offer those same attributes to other prosecutors.


I have been the sitting Pottawatomie County Attorney since January 2004. I was two years out of law school when the opportunity to run for office became available. I was nervous and unsure if I was "ready" to take on the role of "top dog." I was fortunate to have started my career in prosecution with one of the best in our profession, Barry Wilkerson. Barry has been a top contributor to our membership in so many ways through CLE presentations, testimony to legislators, and service to various boards within the KCDA. However, what I recall most as a young (as in experience) prosecutor was his willingness to lead by example, provide guidance, share his knowledge and experience, and offer encouragement.

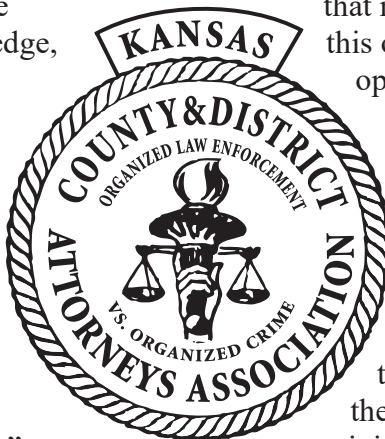
I firmly believe that anyone who is truly

successful both professionally and personally have a network of people they can count on to provide them with sound counsel. I believe just as emphatically that everyone should be a part of someone's network and provide that safety net to others.

Membership in KCDA provides us all with that network of connection. Within this organization everyone has an opportunity to be a beacon of knowledge and experience, creativity and generosity, pillars of strength and encouragement, and advocates for each other. Take advantage of the Model Policies posted on the website. To paraphrase Professor Concannon, "Don't think great thoughts, plagiarize (by not reinventing the wheel)." Engage in the CLE social activities to connect with each other. Reach

out to board members with concerns or issues that affect our profession as a whole; and just as important, get involved. Consider joining some of KCDA's committees (legislative, best practices, CLE); be active in the CLE offered by KCDA (conferences, trial advocacy, AG's call); and speak proudly about our profession, ourselves, and encourage each other to do the same.

The KCDA is your community. Value each other and find strength and safety within its connections. 



KCDAA in Action at the Capitol

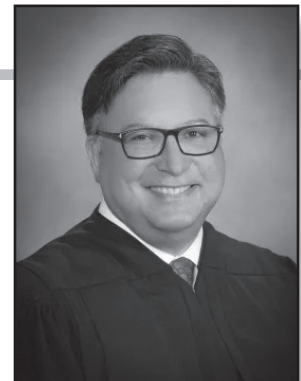


Above left: Johnson County District Attorney Steve Howe testifies in Senate Judiciary Committee for KCDAA on SB413. This measure would impose tougher criminal penalties for fentanyl possession. Above Right: Missi Schoen, Phillips and Norton County Attorney stands with Senator Kellie Warren, Chair of Senate Judiciary. Schoen testified on 2/5/24 on SB 412, which is KCDAA's bill to update how probation sentences are carried out.

Guest Article

By Anthony J. Powell, Kansas Solicitor General

Working Together



I am very grateful for the opportunity given to me by the KCDAA to introduce myself to Kansas prosecutors. As some of you may know, I have the great privilege of serving the people of Kansas and Attorney General Kris Kobach as Solicitor General, and have done so since January 2023. The Office of the Solicitor General is tasked with representing the State of Kansas in the appellate courts of our state and in federal appellate courts around the nation. Also, for the past year, our office has been given the responsibility of writing official AG Opinions for the Attorney General.

My journey to becoming Solicitor General is perhaps unlike my predecessors who were either distinguished law professors or came out of private

practice, typically from a prestigious law firm. I come to the role of Solicitor General after having served 10 years as a Sedgwick County District Court Judge and then nearly 10 years as a judge on the Kansas Court of Appeals. I retired in 2022. Before I became a judge, I was in private practice for 11 years, most of which was with the Wichita law firm of Martin and Churchill, and practiced principally in the area of employment and labor law. I also served eight years in the Kansas House of Representatives. I bring an insider's perspective as a former trial and appellate judge to the role of Solicitor General, and I think I may be one of the few people who have had the privilege to serve in all three branches of our state government.

During my nearly 20 years on the bench, I have had the good fortune to interact with so many wonderful people who are Kansas prosecutors. There are no more dedicated professionals committed to the rule of law and doing justice. During my tenure as a district judge, I got to see prosecutors in action nearly every day—and I was impressed by the dedication and hard work each prosecutor showed in presenting a case to me or a jury. Every prosecutor’s dedication to public service was apparent in the work they did.

On rare occasions a prosecutor would even put their own body on the line. I’ll never forget many years ago when Barry Disney, then an Assistant District Attorney in the Sedgwick County District Attorney’s Office, chased after a defendant who fled my courtroom after he became aware he was going to prison. Barry scrambled down several flights of stairs and tackled the defendant in the lobby of the courthouse! Amazing. I have great respect for Kansas prosecutors.

The most important point I want to leave with you is that my office, and the entire Office of the Attorney General, is here to help you. My experience tells me that cases can be won or lost because of the facts, the law, the performance of trial counsel, and the performance of appellate counsel. Each part plays an important role in the administration of justice. The appellate process is the culmination of the prior stages of the case, and it is before the appellate courts where convictions are upheld and important legal principles are protected.

The Attorney General and local prosecutors have a critical and symbiotic relationship in this part of the process. Unlike many states, where the Attorney General’s Office handles all criminal appeals, and consequently have large criminal appellate staff, here, local prosecutors and our office work together. That is because it is the local prosecutor who has the primary task of bringing a criminal case and seeing it through on appeal. But it is the Attorney General’s name that must go on the brief because ultimately, it is the Attorney General that speaks for the whole state.

It is a truism that “practice makes perfect.” This is especially true in writing and in being an effective appellate advocate. In my own experience

on the Court of Appeals, I noticed that the quality of my opinions improved the longer I was on the court. The typical Kansas prosecutor spends their days in the district court making arguments and questioning witnesses. Criminal practice at the trial court level doesn’t typically require large amounts of briefing. In contrast, the solicitors in our office have years of experience and have written dozens, if not hundreds, of briefs. I got to witness the work of the Solicitor’s Office while on the Court of Appeals, and I can tell you it is first rate.

Because our office reviews all criminal briefs filed on behalf of the state, we see the issues that are frequently before the appellate courts and can help make sure the state’s arguments are in tune with the latest developments in the law and that the state speaks consistently in every case. I think our office’s good work speaks for itself as more than 50 prosecution offices contract with the Attorney General to handle their appeals. That program was started by Attorney General Schmidt years ago and works very well. If your office is not part of this program, you should consider it. I think you will find it money well spent. 🇺🇸

County Courthouse Portraits



Ness County Courthouse

John D Morrison

Prairie Vistas Gallery
950 S Oliver Ave
Wichita, KS 67218
316-214-7566

www.prairievistas.com

Kansas Prosecutors Foundation 2024 Scholarships

Deadline to Apply is May 15, 2024

The KCDA Board of Directors established the Kansas Prosecutors Foundation to further the administration of justice in the best interests of the public. In 2013, the KPF gave out its first law school student scholarships to a law school student from each regent law school. We are currently accepting scholarship applications for 2024, so please help spread the word.

Recipients of KPF scholarships shall meet the following criteria:

- a Kansas resident;
- a 2L or 3L enrolled in a law school in Kansas;
- demonstrate a desire to become a prosecutor;
- exhibit previous or ongoing activities of public service;
- either be pursuing a career in prosecution or the administration of justice; and
- may not be a member within the first degree of relationship to either a member of the scholarship committee or the KPF board.



Award Process

1. Scholarship application forms shall be reviewed and approved by the KPF Board of Trustees.
2. Scholarship application forms are due by May 15th of the year in which the scholarship is sought.
3. The review period of the submitted scholarship applications shall be between May 15 and May 31.
4. The scholarship committee will review only fully completed scholarship applications which comply with the directions of the scholarship application form. Application packets which fail to conform to the scholarship application form requirements by the due date will be considered incomplete and not considered.
5. Final decision on scholarship recipients will take place during the KPF Board meeting each May unless otherwise authorized by the KPF Board.
6. All applicants will receive decision notification, in writing, within ten (10) business days of the KPF Board decision.
7. Scholarships shall be presented to selected recipients at the KCDA conference in June.
8. KPF scholarship will award at least two scholarships – one to a student of each regent law school (unless otherwise determined by the KPF Board). Each selected recipient will receive a minimum of \$1,500 via a check from the Kansas Prosecutor Foundation. The KPF Board of Directors may, at the discretion of the Board, increase the amount of the award for any recipient that have interned in a Kansas Prosecutor's Office, the Kansas Attorney General's Office, or the Kansas District United States Attorney's Office up to an additional \$500.

How to Apply

SUBMIT THE ONLINE APPLICATION AT: [HTTPS://KCDAA.ORG/SCHOLARSHIPS](https://kcdaa.org/scholarships).

Applications need to be submitted with all required materials (essay, proof of enrollment, biography and photo) uploaded and submitted on the online application form by May 15.

If you have any questions, contact: kcdaa10@gmail.com. 

Kansas Prosecutors Visit Washington, D.C.

By Susan Richmeier, Finney County Attorney and KCDA Board Member

Prosecutors from Kansas were among prosecutors from around the nation who traveled to Washington, D.C. for NDAA's 2024 Prosecutor Advocacy Day. Day one, attendees were treated to presentations from influential members of Congress as well as key stakeholders in President Biden's administration. Following a full day of presentations, attendees were able to schedule appointments with their members of Congress and the appropriate staff.

For 2024, NDAA's members have identified five essential themes that will steer their focus: Supporting Prosecutors, Bolstering Law

Enforcement, Enhancing Public Safety, Maximizing Victims of Crime Act (VOCA) Grant Funding, and Advancing Criminal Justice Reform. These priorities encompass a broad range of legislative activities, including the reauthorization of existing laws, reviving previous legislative efforts, and the innovative drafting of new bills.

Attendees from the KCDA included:

- Mark Dupree, Wyandotte County District Attorney
- Susan Richmeier, Finney County Attorney
- Suzanne Valdez, Douglas County District Attorney




2024 Trial Advocacy School Hosted in March

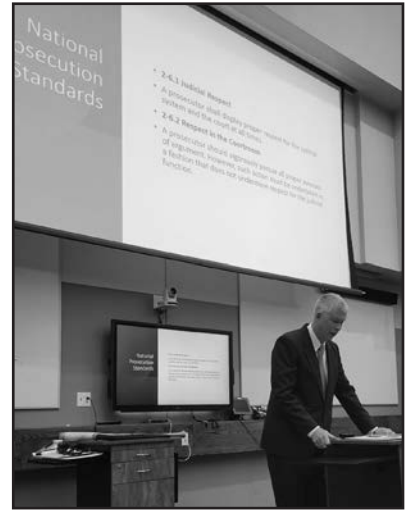
By Shannon Wilson, CLE Committee Chairperson

March 6, 7, and 8, 2024, the KCDA and KPTAI held a Basic Trial Advocacy School for newer prosecutors around the state. The KLETC was our host for the three-day event. Marc Bennett, Chris McMullin, Kevin O'Connor, Robert Short, Kimberly Rodebaugh, Tom Weilert, Sally Salguero, and Shannon Wilson were all on the faculty. Together the faculty has over 900 jury trials and 190 years' worth of experience in prosecution!

The training included general sessions on

analytical advocacy, jury selections, openings and closings, direct and cross examination, and ethics. There were also group exercises and one on one evaluation. The faculty enjoyed the opportunity to interact with the students and were very encouraged by some bright new talent in the field of prosecution.

Special thanks to the faculty, Melissa Munoz of Kearney and Associates, and Sedgwick County District Attorney's Trial Tech team. 



Member Highlights

By Amy L. Aranda, First Assistant Lyon County Attorney

As we start a new year, we like to highlight the new KCDAAs president and the new prosecutor joining the board. The KCDAAs Board of Directors filled two vacancies this year, so we will highlight all three of these prosecutors. KCDAAs President

is Sherri Schuck, Pottawatomie County Attorney; KCDAAs Director III is Andrew Davidson, Reno County Deputy District Attorney; and KCDAAs Director IV is Melissa “Missi” Schoen, Phillips County Attorney and Norton County Attorney.

Sherri Schuck

Sherri Schuck says she is a military brat and considers herself fortunate to grow up all over the United States and overseas in Germany. Her undergraduate degree is in English Literature from Kansas State University, and she went to Washburn Law School.

Schuck said, “I always knew that I would go to law school at some point, but I always wanted to be a police officer, so I did that first. While in law enforcement I knew that I might be able to be more effective on the ‘end game’ so to speak, so figured it was time to go to law school to become a prosecutor.”

After graduating law school, Schuck worked in Butler County as an assistant county attorney for about a month before being hired by Barry Wilkerson at Pottawatomie County. When Wilkerson decided to run for county attorney in Riley County, Schuck took the opportunity to run for county attorney in Pottawatomie County. Other than that short month in Butler County, her whole career has been in Pottawatomie County and she is currently in her fifth term as county attorney.

“Pottawatomie County is a small jurisdiction by some standards, so I have worked the gambit on cases from traffic offenses to homicides,” said Schuck. “Most recently, we got a conviction on our first Distribution of Fentanyl Causing Death. As the CA, I take most of the presumptive prison



cases, whether they be drugs, sexual assault offenses, or homicides.”

Schuck joined KCDAAs soon after joining the Pottawatomie County Attorney’s office and has been a member since April 2002. She has been a member of the KCDAAs Best Practices Committee since it was formed and has served in all positions on the board of directors leading to her current position of President. She has presented at KCDAAs conferences. Through KCDAAs, she was also referred to the Governor for a position on the KSCPOST Commission and is currently a Commissioner on KSCPOST.

She originally joined the KCDAAs board because she felt that she had enough experience and knowledge to add intelligent thought and discourse to the KCDAAs board and to the members. She has immensely enjoyed being a part of the organization in all aspects.

As for the future of KCDAAs, she has some goals. “I would like to see our membership increase. I would like to see more members get involved and not just members who have been around a bit...lol. I want people to be proud to be in this profession and advocate for each other. This organization is for us. It is an organization that can help advocate, nurture, teach, and make changes for all of us across the state.”

Schuck believes that associations such as the KCDAAs are very important. She explained that the network of



knowledge and experience you get cannot be garnered any other way as KCDAA is helpful for jurisdictions that do not have as many resources as a larger jurisdiction. Small jurisdictions can turn to other members for assistance on any issue.

Outside of her duties as a prosecutor, Shuck is a runner and has enjoyed doing multiple half marathons a year. She is hoping to do an ultra marathon soon. She also enjoys going to Vegas a couple times a year to play poker. Charli Angel is an 8-month-old 42 pound German shepherd mix puppy who is the light of her life. “I



never would have expected to be a dog mom...but she made it impossible not to be!!” said Schuck.

Andrew Davidson

Andrew Davidson, Deputy District Attorney in Reno County, was appointed to fill the Director III position for the 2023/24 year. Davidson has been prosecuting cases for over 15 years now and has been an active member in KCDAA.

Davidson grew up in Hutchinson, Kan. and received his undergraduate degree at the University of Kansas in U.S. History. Davidson found a way to apply his interest in research and writing when he decided on a career in law. Davidson attended Washburn Law School graduating in 2004.

After working for five years on the criminal defense side, Davidson made the change to prosecution. He worked in the McPherson County Attorney’s Office for two years before returning home to Reno County where he has worked as a Deputy District Attorney for the past 13 years. Davidson has worked his way through the typical trajectory of prosecutor case assignments while at Reno County, now having prosecuted everything from traffic, financial, drugs, and now person crimes.

Davidson has been a member of KCDAA since 2009 and has previously served on the KCDAA



Legislative Committee. When the board of director’s vacancy was created by former Miami County Attorney Elizabeth Sweeney-Reeder’s appointment to the bench, Reno County District Attorney Tom Stanton encouraged Davidson to seek appointment to the board. Davidson gladly accepted as he was looking for an opportunity to become more involved in the KCDAA organization. He looks forward to learning more and helping prosecutors across the state.

As to his future work with the board and KCDAA, one project Davidson envisions is for KCDAA to get more involved with recruiting future prosecutors to the profession, especially in rural areas of the state. Davidson notes the many rural and smaller offices across the state that currently have prosecutor vacancies to fill. Davidson further notes that many offices are seeing long standing vacancies with fewer qualified applicants for their positions. He would like to see KCDAA work with law schools and universities to find future prosecutors early on, and to assist with pairing students with internships and mentors in prosecutor offices across the state.

Melissa “Missi” Schoen

Melissa “Missi” Schoen was recently appointed to the KCDAA Director IV board position. She has been in prosecution for many years and is a long-time member of KCDAA.

Schoen has always had an interest in the law, whether she knew it or not. She attended undergraduate studies at the University of Kansas graduating with dual degrees in broadcast journalism and communication studies. While at KU, she interned for Dr. Barbara Ballard, State Representative from Lawrence. Following graduation, she thought she would work in the political campaign arena; however, when a campaign job fell through, she found herself returning to her interest in the law and applied to law school. Schoen attended Washburn Law School and was an active member of the Trial Ad Team. She also interned for State Representative Marty Crow during her 2L year.

Schoen never thought she’d return to her childhood home in Norton County, but did so following graduation from Washburn in 2007. Schoen’s interest was in criminal prosecution, but she opened a private practice while waiting for a prosecution opening to arise. In 2012, that opportunity came when she was encouraged to run for Phillips County Attorney and was elected. Schoen is now in her third term as Phillips County Attorney. In addition to her duties in Phillips County, Schoen has also served as the Norton County Attorney since 2020.

Current KCDAA Vice President and Smith County Attorney, Tabitha Owen, nominated Schoen for the vacant KCDAA Direct IV position last fall. Schoen is excited for her work with the board.

As with many rural offices across Kansas, Schoen is the sole prosecutor for Phillips County and also assumes the statutory duties of the county counselor. In Norton County, Schoen has one Assistant County Attorney Abigail Horn, who



prosecutes juvenile cases for the office. Schoen has seen many changes in rural prosecution during her time in office. She has experienced an increase in case filings, as well as a decrease in qualified attorneys willing to practice in rural communities. She further notes challenges of a solo or small prosecution office include the inability to create specialized prosecution units as she has to do it all. Schoen credits the resources and relationships she’s developed through KCDAA as being priceless to her practice.

Schoen believes strongly in the importance of having representation on the KCDAA board for rural prosecutors and gladly accepted the Director IV position. She notes the vast majority of Kansas counties are considered rural with seven or fewer prosecutors per office. With increasing workloads and other demands on prosecutors, keeping up to date on current statutes and legislative changes as well as remaining well rounded in all aspects of prosecution is a constant challenge. Schoen believes drawing upon the support and expertise of other prosecutors is not just helpful but a necessity. She has been a member of KCDAA for many years now and hopes her time on the board will served to benefit and support other KCDAA members across the state. 📍

We want to share your news!

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



Send your information and photos to:
Editor Mary Napier
mary@napiercommunications.com

Next Deadline: Summer - July 1, 2024

KCDAA Milestones - News from Across the State

Attorney General

On March 2, 2024, Jessica G. Domme was promoted to Associate Deputy Attorney General for the Criminal Division within the Attorney General's Office. In this position, she will have leadership responsibility for the Medicaid Fraud Control Unit, Major Crimes, Economic Crimes, and Victim Right Coordination. She started with the office in January 2013 and has worked primarily in Major Crimes prosecuting domestic violence and homicide cases across the state.



March conference. This award recognizes and honors a prosecutor who has been committed to the strong enforcement of Kansas narcotic laws. The award is based on a long-standing record of contributions or for extraordinary efforts as a prosecutor.



Douglas County

The Douglas County District Attorney's Office is pleased to announce the addition of Jenna Phelps to its Special Victims Unit. Previously a domestic violence prosecutor for the City of Kansas City, Mo., Phelps brings a victim-focused approach to serving Douglas County's most vulnerable populations that include intimate partners and children.



Phelps began her legal career serving as a law clerk at several prosecutor's offices serving the Kansas City-metro area and as a judicial law clerk for the 16th Circuit of Jackson County, Mo. A University of Missouri-Kansas City (UMKC) School of Law graduate, Phelps completed the Pro Bono Public Service Honors program and was a recipient of the Carolyn Fuller and Nancy Lovinelli Award for her commitment to helping women. She also participated in UMKC's Midwest Innocence Project Student Organization and law review. Phelps is also a board member for the Modern Family Alliance whose mission is to support LGBTQ+ parents and their children.

Ellis County

Aaron J. Cunningham, Assistant Ellis County Attorney, was recently awarded the 2023 Kansas Narcotics Officer's Association's Steven Wilhoft Memorial Prosecutor of the Year award at their



Leavenworth County

The Leavenworth County Attorney's Office and County Attorney Todd Thompson are pleased to announce Christen "Christy" Secrest joined the team in March. Secrest is a lifelong resident of Olathe, Kansas. She graduated from Washburn University, receiving a bachelor's degree in Criminal Justice and a bachelor's degree in Spanish before attending Washburn University School of Law, where she received her Juris Doctorate. She had previously worked in immigration law and as a public defender in Shawnee County from 2018 to 2021, when she joined the Douglas County District Attorney's Office as an Assistant District Attorney prosecuting various offenses.

Assistant County Attorney David Melton is leaving the Leavenworth County Attorney's Office to continue his career at the Pima County Attorney's Office in Tucson, Arizona, where he will be closer to his family, including his daughter and young grandchild. Born and raised in Shawnee, Kan., Melton attended the University of Kansas and received a bachelor's degree in English. Following college, he was a police officer in the city of Merriam. Following his service as a police officer, he attended the University of Kansas School of Law. While in law school, he interned at the Johnson County District Attorney's Office. Upon graduation from law school, he was hired as an

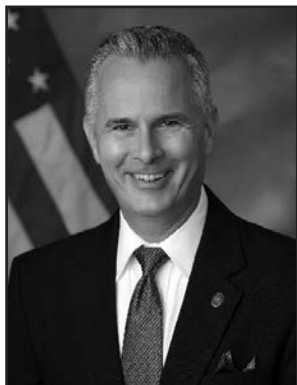
Assistant County Attorney by Saline County. In 2000, he joined the Leavenworth County Attorney's Office, where he established the county's first Domestic Violence Prosecution Unit. During his tenure, he was named the Advocate of the Year by the Alliance Against Family Violence. He then became the office's drug crimes prosecutor, prosecuting primarily felony drug crimes. While with Leavenworth County, he served on the Alliance Against Family Violence board. David eventually

left Leavenworth County in 2005 to become Chief Assistant Douglas County District Attorney. After 16 years with Douglas County, David returned to Leavenworth County. During KCDAA's 2023 Fall Conference, Melton was honored with the Lifetime Achievement Award.

With the birth of their first child, Assistant County Attorney Jose Guerra and his wife, Elizabeth Evers Guerra, welcomed a new addition to their family in August. 🇺🇸

Kansas Bureau of Investigation Re-Organization

The Kansas Bureau of Investigation (KBI) recently implemented a restructure of the organization, which includes several key staff promotions. At the agency's top is KBI Director Tony Mattivi. Second in command is now Associate Director Robert Jacobs.



Director Tony Mattivi



Associate Director Robert Jacobs

Since the reorganization, all agency programs and units are divided between three KBI Branches, in order to streamline operations and increase efficiencies.

The **Investigations Branch** is under the supervision of Assistant Director Tony Weingartner. The **Criminal Justice Services Branch** is managed by Assistant Director Kelly Ralston, and the **Administration Branch** is led by Assistant Director Bill Smith.

The *Investigations Branch* encompasses all investigative functions. This includes investigations such as major violent crimes, child crimes, and public integrity cases, as well as proactive operations including the investigation of organized criminal groups and narcotics distribution.

The KBI Forensic Science Laboratory and Information Services programs are now under the *Criminal Justice Services Branch*. This branch manages all of the functions the KBI provides as a service to its law enforcement partners - to include forensic testing of evidence, criminal history record checks, offender registration, incident based reporting and many more.

The *Administration Branch* oversees numerous internal KBI units, to include training, information technology, peer support, professional standards, and human resources. 🇺🇸



Asst. Director Tony Weingartner



Asst. Director Kelly Ralston



Asst. Director Bill Smith

Managing the Revolving Door of New Care and Treatment Cases

By Elizabeth L. Oliver, Anderson County Attorney

Care and treatments are not the most fun or even the easiest cases to do, but I believe that they are some of the most valuable cases a prosecutor can handle. Personally, I have prosecuted in three rural communities, including Sumner County, Montgomery County, and Anderson County. In doing so, I discovered that outpatient treatment orders were not commonly used by prosecutors or the courts in controlling care and treatment cases. In Anderson County, there was one person who had six care and treatment cases filed since 2019. The individual's cases were routinely dismissed, but currently, I have an outpatient treatment order in place, and it is my goal is to keep it in place.

One way to manage the revolving door of new care and treatment cases—with the same people over and over—is to use the outpatient treatment order found in K.S.A. 59-2967. To effectively be able to enforce an outpatient treatment order, the prosecutor, law enforcement, and the mental health provider must be on the same page. This article will address what an outpatient treatment order is, what is required to get one, and what is required to maintain one.

An outpatient treatment order is a court order, where an individual is ordered to participate in mental health treatment in the community and the court assesses, on a regular basis, the need for that individual to continue mental health treatment. The superseding outpatient treatment order negates the need for the hearing on the outpatient treatment order in two ways. First, by addressing it with the court at the temporary custody hearing, and second, in the temporary custody journal entry. Osawatomie State Hospital, or a similar entity, can release a person before the trial on the petition for a care and treatment in two ways: by either releasing the patient (and effectively causing the case to be dismissed) or an entity can request an outpatient treatment order based on the notice of discharge. The journal entry for temporary custody includes the following language to provide for the superseding outpatient treatment order:

- Whereupon, pursuant to K.S.A. §59-2974,

a superseding outpatient treatment order is hereby in effect.

That statement along with the notice of discharge—from a hospital or similar entity citing a need for an outpatient treatment order—is all you need to file an outpatient treatment order without a hearing.

Pursuant to K.S.A. 59-2967, at any time, a court can enter an outpatient treatment order in place of any order that would have required inpatient care and treatment. To get an outpatient treatment order (OTO), one must show all the following:

- the proposed patient is likely to comply with the order
- that the proposed patient is not a danger to the community or to self
- the head of the outpatient treatment facility has consented to treat the patient under the terms set out by the court (though a participating mental health center can't refuse)

In the OTO, the court can order specific conditions to monitor the patient's progress and compliance. Those can include ordering the mental health provider to provide a monthly update on the patient's progress, or the OTO can include things specific to the proposed patient (i.e., to wear clothes in public or not to call 911 or law enforcement unless there is an emergency).

When it comes to maintaining an OTO, there are two timeframes dictated in K.S.A. 59-2969(f). For the first outpatient treatment order, you must have a review hearing on the ongoing need of the patient to be on an OTO within three months. A second order continuing an outpatient treatment order can be set out for a review hearing in six months. Personally, I prefer to review the patient's progress every 90 days at a hearing.

One issue with care and treatment patients is they routinely stop taking his or her medications. A review hearing every six months does not readily address the patient who has stopped taking their medication. Your mental health facility should provide a letter or a notice for the ongoing need for

the care and treatment. In Montgomery County, the mental health professional for the OTO routinely shows up for the review hearing and has a one-page outline reflecting either the need for continuing the OTO or dismissing it. Currently, I must subpoena the mental health professional for court, and he or she provides a letter before court to my office. I file that letter with the court with a cover page under “information.”

If the patient fails to follow the OTO, you can then file a motion to revoke the OTO pursuant to K.S.A. 59-2967. This gives you a longer timeframe

to go before the court than if you file a new case—as long as you do not detain the individual. You will also need to screen your patient, if he or she heads to a hospital, because they will not take your patient with a court order alone. The screen is sufficient if it states revocation of OTO. A revocation of the OTO can result in a patient being in inpatient treatment up to six months, but I, once again, set mine for a review at 90 days.

Care and treatments are not easy but not having to file the entire case repeatedly saves everyone time. 🙏

When it it Too Late to Get my Stress Under Control?

By Kirsten Pabst, NDAA Prosecutor Wellbeing Committee Chair

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The other day, I had the honor of giving a presentation to a ballroom full of elected DAs about my favorite topic: prosecutor wellbeing. When I work directly with new prosecutors, we spend a lot of time learning actual stress-reduction techniques. With electeds, I tend to focus on ways leaders can help their employees thrive — intentional workloads, secondary trauma debriefing, and rolling-out local wellbeing programs. I was myopically skipping down this trail when a seasoned, successful district attorney raised his hand and asked me a question I was not expecting. It went something like this:

“Am I too old for this? The stress of this job seems to be getting to me more the longer I am here. You think it would be the other way around, that we’d get used to it and better cope with each trial. I did a murder trial a while back and the stress of it was almost unbearable — not sleeping, worrying, all of it. Is it too late for me?”

I didn’t pivot very well and my answer related back to the young ones and how important it is that

as leaders, we recognize how depleting the work can be for the ones we supervise. We need to take steps now so they can stay in the profession for the long haul and then, hopefully won’t end up like us, unable to find peace or solace in the midst of battle or even long after. I was also mindful of the data showing stress hormones can be toxic, especially if accumulated over time, and that the effects of that toxicity can have long-term if not permanent effects on our bodies and brains.

Later, after I rushed through the end of my presentation, the DA’s question was still rolling around my head.

“No,” I reminded myself. “It is never too late.”

I remembered a lesson from Buddha, beginning with his question, “When is the best time to plant a tree? Twenty years ago. The second-best time to plant a tree is today.”

In late 2016, in the middle of my first term as the elected county attorney, I was diagnosed with metabolic disease — a diagnosis often reserved

for special forces and war veterans — the result of poorly managed cumulative work-stress. I’d turned myself into “a big bowl of inflammation soup” — my naturopath’s unofficial diagnosis. By that point, I was fully aware there was a better way to do this business and I knew that I needed to reduce my stress levels, but I was a little short on the “how.”

The good news was that my naturopath could point me in the right direction. The bad news was that getting out of the metabolic hole I’d dug would require a lot of work — my work — and wouldn’t happen overnight. There was no single pill or task I could check off. It would require a crash course in the neurobiology of stress, making a deep commitment to doing things differently in every area of my life, forming new habits, and then being accountable. According to my provider, I didn’t have much of an alternative. On the current trajectory I was headed toward diabetes and heart disease, in addition to the constant anxiety and weight gain. I was desperate and, as a career prosecutor, I was not afraid of work, so I rolled up my sleeves and got busy . . . busier.

The first phase of the remodel was my physiological body. I started doing regular blood analysis, to measure how much over-the-legal-limit my stress hormones were and to gauge the extent of the damage. We began tracking levels of things like thyroid, insulin, glucose, leptin, and lots of other markers as I embarked on a graduated regime of supplements to address things that were fixable. Not everything was fixable; some of the damage is likely permanent.

Next, I did an overhaul of my diet, cut out most of the sugar, cut back on caffeine and alcohol, and infused a whole lot of vegetables. It took a while before I stopped feeling deprived but I kept reminding myself that this work was a necessary investment in better living.

Exercise was the next key piece. I’d always been active, but I used the opportunity to audit my workout plan and be more intentional about scheduling a better variety of resistance, cardio, HIIT, and circuit training.

Possibly the biggest challenge was figuring out how to chill TF out. My naturopath suggested I try meditation. I balked, explaining that I’ve never been much into touchy-feely or woo-woo. With

reassurances that meditation was scientifically proven to bestow many benefits, including less stress, better concentration, and even weight loss, I agreed to give it a try. I bought an audiobook called *Meditate Your Weight*, where the author, Tiffany Cruikshank, LAC, MAOM, teaches the listener how to meditate, a few seconds at a time. Before long, I was hooked. I started feeling better, more grounded, and more resilient in the face of the daily challenges. In fact, my daily meditation practice has been so helpful, that now, seven years later, I can’t imagine starting a day without my 10 to 20-minute recharge.

During phase one of my big remodel, I did a deep dive into science-y literature, articles, and podcasts on neurobiology, plasticity, and brain re-wiring, where I crossed paths with my celebrity mentor, Andrew Huberman, a professor of neurobiology at Stanford Medical School. Huberman hosts [hubermanlab.com](https://www.hubermanlab.com), a podcast dedicated to delivering cutting-edge science related to human health and longevity to the general public at no cost. I highly recommend that anyone interested in being a better, healthier human check out his easily digestible work.

As I devoured a gazillion sources and worked with Andrew Laue, the facilitator for my Secondary Trauma Program at the office, I noticed that the proven methods for actual stress-reduction and resiliency were falling into three main categories: 1) the ability to self-regulate; 2) the ability to connect with and glean support from others similarly situated; and 3) the ability to see purpose in using our skills to improve the lives of other humans. If you’ve had a chance to see my book, *Thriving Through Chaos — Survival Gear for Criminal Justice Professionals*, you’ll recognize these three themes as the three legs under the seat of resilience.

I started practicing — every single day — the regulation skills, to the point that keeping my stress levels within the window of tolerance, on most days, has become second nature. I became more intentional about reaching out for support from colleagues, friends, and family and, as importantly, have become better about reciprocating that same support for others, whether they ask or not. Prosecutors are blessed with built in purpose, so it was motivating to go back and re-live the inspirational stories behind our collective “why.”

Finally, I indulged in some traditional self-care

and took up painting again, spent more time with my horses, and baked a lot of pies.

How do I fit all of this new-found resiliency into my already packed schedule? I prioritize it, because my life depends on it, and then I get aggressive with my schedule and block it all into my calendar. For seven years now, I've been meditating, scheduling workout and deep work sessions, reaching out to loved ones even when I am too busy, getting out into nature, and planning weekly meals. I've invested a lot of time and resources into managing my stress. Some days I am *all hat, no cattle* — just ask my husband — and on some days it seems futile.

But when I look back to that miserable day all those years ago in the doctor's office that set me on this path toward a better me, I see a different person. I'm still a work-in-progress but the byproduct of all of this 'stress-management' was pretty unexpected: happiness. For me, happiness is knowing — and feeling — like everything is going to be OK — not perfect or glorious, but survivable — mid-trial, mid-brief, and mid-campout amongst bears.


Do I wish I'd planted this proverbial tree 20 ago? Absolutely. But I am grateful that I learned the

importance of stress-management, my little secret, even if it was way late in the game. I may not yet be sitting in its shade, but I see it taking root. I may not ever see the full grandeur but perhaps my team members, my kids, my future grandchildren, will be a little better off because I finally figured it out and got started . . . a little bit late. 🌱

About the Author


Kirsten Pabst is the elected prosecutor in Missoula County, Montana, chairs NDAA's Prosecutor Wellbeing Committee, and is the author of ***Thriving Through Chaos — Survival Gear for Criminal Justice Professionals***. She can be reached at kirstenpabst@missoulacounty.us.

Editor's Note: The NDAA is offering a 2024 Wellbeing and Resiliency Retreat & Conference in May 2024 in Bar Harbor, Maine. This event is already sold out, but plans are underway for another retreat in 2025 that is bigger and better. You can join the waitlist or learn more at <https://ndaa.org/training/ndaa-2024-wellbeing-resiliency-retreat-conference/>. Watch for details about the 2025 event.



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Wither Vehicular Homicide?

By Kendall Kaut, Assistant Johnson County District Attorney

In 2016, Judge Leben used a metaphor that's useful for this article. He noted, "On first glance, it might seem the attorneys in this case got their briefcases switched."¹

After reading this, maybe some of you will think I've switched briefcases, or worse, with the defense bar. But it's worth examining if the vehicular homicide statute has been a boon for prosecutions or if justice might be better served by simply removing the statute.

Vehicular homicide is defined as, "the killing of a human being committed by the operation of an automobile, airplane, motorboat, or other motor vehicle in a manner which creates an unreasonable risk of injury to the person or property of another and which constitutes a material deviation from the standard of care which a reasonable person would observe under the same circumstances."²

Vehicular homicide is a class A misdemeanor. The pattern instructions tell the jury, "The term 'material deviation' means conduct amounting to more than simple or ordinary negligence but not amounting to gross negligence."

Vehicular homicide creates three problems. First, it's difficult to figure out what meets the statute. Second, it becomes trying to sift through it with lesser-included offenses. And finally, the penalty is so low for some egregious conduct that might fit the statute. We'll address each in turn.

As any wordy statute can be, vehicular homicide has proven challenging to apply. In a seminal case for vehicular homicide, the Kansas Supreme Court held the defendant's, "actions of running a red light without more does not as a matter of law meet the 'material deviation' element required for a conviction of vehicular homicide..."³

Even though running a red light is not sufficient for vehicular homicide, speeding can be. Well, at least sometimes. As the Kansas Supreme Court

noted, "A driver of a vehicle exceeding the speed limit by 5 miles per hour would be in violation of the statute or ordinance establishing the same but would not be considered to be materially deviating from the standard. On the other hand, a violation of exceeding the limit by 30 miles per hour, under certain circumstances such as in a school zone, might be a material deviation."⁴

Hopefully these cases demonstrate how difficult it is to figure out what's a "material deviation" that amounts to more than ordinary negligence but can't be gross negligence. Figuring out the Venn diagram for that is difficult.

Second, the challenge of knowing what's vehicular homicide becomes even tougher when a jury must evaluate lesser-included offenses. The court has an "affirmative obligation to give an instruction on any lesser included offenses established by substantial evidence, regardless of whether the defendant requests such an instruction, so long as the defendant does not object."⁵

The three homicide statutes for vehicular crimes are difficult to analyze. Second degree murder is, "the killing of a human being committed unintentionally but recklessly under circumstances manifesting extreme indifference to the value of human life."⁶ While involuntary manslaughter is, "the killing of a human being committed recklessly."⁷

To add to the difficulty of figuring out the differences between those statutes, a jury is instructed that recklessness is, "when such person consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation."

Put those three statutes together, and the differences remain minor. Second degree murder

Footnotes

1. State v. Woolverton, 52 Kan. App. 2d 700, 700, 371 P.3d 941 (2016).
2. K.S.A. 21-5406
3. State v. Krovvidi, 274 Kan. 1059, 1075, 58 P.3d 687 (2002).

4. State v. Randol, 226 Kan. 347, 354, 597 P.2d 672 (1979).
5. State v. Coffman, 260 Kan. 811, 925 P.2d 419 (1996).
6. K.S.A. 21-5403(a)(2).
7. K.S.A. 21-5405(a)(1).

requires the killing show “extreme indifference to the value of human life.” While involuntary manslaughter means the killing is solely “reckless” without that extreme indifference. But then vehicular homicide looms as, “more than ordinary negligence but not gross negligence.” While maybe a robot could parse these down with percentages, a jury is left debating three close statutes.

Perhaps the worst component of vehicular homicide is that it’s a class A misdemeanor. That means the maximum someone can serve is one year in the county jail. And given how slight the differences are in those statutes, a jury could return a verdict on vehicular homicide then be shocked to find out they’ve convicted someone—of a statute dubbed, “homicide”—of a misdemeanor.

I can think of three objections to the suggestion this statute should go away. First, vehicular homicide does apply to some behavior. Not all actions rise to the level of reckless second degree murder or involuntary manslaughter. But some actions are in that narrow sliver of more than ordinary negligence. Maybe that conduct needs to remain criminal and not just civil.

Second, it may be difficult for the legislature to overturn a crime called “vehicular homicide.” Although there’s a nuanced case for removal, anyone voting—and heck, even myself writing this article—subjects themselves to a television

ad, “Can you believe your representative voted to legalize vehicular homicide?” While that’s not true, veracity in television advertisement has never been a cherished value.

Finally, maybe reform is a better option. If vehicular homicide’s penalties are too low, then the legislature could always make the crime a felony. Or if the statutes are too ambiguous, the legislature could add additional definitions or examples of what constitutes each crime. Complexity may not warrant elimination. Sometimes reform is the best bet, especially given the political considerations of removal.

Despite the above objections for keeping or reforming, removing remains the best option. The biggest miscarriage of justice is if a second degree murder case or involuntary manslaughter charge becomes a class A misdemeanor because the jury got confused or compromises in deliberations. Few victim’s families feel justice even if they get a vehicular homicide conviction.

While political considerations may necessitate reform, I feel obligated to make the best case for the best outcome. If the legislature must compromise to something else, it’s okay. But after prosecuting these cases for years, I remain steadfast: the statute has been a disaster, and it’s time on the books should come to an end. 🙏

Firearm Forensics Has Proven Reliable in the Courtroom. And in the Lab

By Raymond Valerio, Assistant District Attorney & Director of Forensic Sciences, Queens County District Attorney’s Office, Kew Gardens (NY) & Nelson Bunn, Executive Director, NDAA

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Despite criticism, a slate of new scientific studies show that forensic firearms analysis is a reliable scientific discipline that the criminal justice system should trust.

Over 10 days in early March 2022, five homeless men were shot in Manhattan and Washington, D.C.

Two died. With the extraordinary tool of firearms identification analysis, law enforcement linked every shooting to the same gun.

Firearms identification analysis involves the microscopic examination and comparison of fired ammunition samples (typically fired bullets and

spent cartridge cases recovered at crime scenes), in relation to each other and to test fires produced from recovered firearms. Qualified firearms examiners can identify a particular firearm as having fired a specific bullet or cartridge case. Investigators can then connect firearms to shootings, and even one shooting to another. From New York City to Los Angeles, hundreds of shooting investigations benefit every day from this analysis. As such, firearms identification evidence is critical to maintaining public safety and to holding shooters accountable.

Unknown to many, firearms identification analysis has a long scientific history. In 1925, Calvin Goddard, a physician, established the Bureau of Forensic Ballistics in New York City. At this independent laboratory, colleagues Charles E. Waite and Philip O. Gravelle adapted the comparison microscope for use in the identification of fired bullets and cartridge casings. As a result of his pioneering work, Goddard began the Scientific Crime Detection Laboratory at Northwestern University and was instrumental in the development of the FBI Technical Laboratory.

Nevertheless, firearms identification analysis has more recently faced criticism. A report from the President's Council of Advisors on Science and Technology (PCAST) in 2016 concluded that there was only one appropriately designed study, known as Ames I, that validated firearms examination. The report indiscriminately dismissed several other such studies. Two years later, PCAST's co-chair, Eric Lander, wrote in the *Fordham Law Review* that "PCAST judged that firearms analysis fell just short of the criteria for scientific validity, which requires reproducibility. A second study would solve this problem."

That second study has been done, as well as several others that meet PCAST's prescribed standards and vindicate firearms identification. The time has arrived for the scientific and legal communities to recognize its reliability in shooting investigations.

Building on the solid foundation of the Ames I study, the latest studies show remarkable accuracy for firearms identification. In fact, false positive error rates are less than 1 percent—and that is without technical review or verification to screen for errors. In other words, with a second set of trained

eyes examining the evidence—just what happens in casework—those study error rates would be vanishingly low.

And the recent studies were intentionally challenging. In the 2022 Ames II study, 173 trained firearm examiners compared a total of 8,640 fired cartridge cases and bullets. The firearms and ammunition were carefully chosen for their "propensity to produce challenging and ambiguous test specimens." Study ammunition, for example, had "steel cartridge cases and steel-jacketed bullets (steel, being harder than brass, is less likely to be marked)." With fewer microscopic markings, the comparison's difficulty increases. Even faced with these stacked odds, the overall false positive error rate was less than 1 percent.

A study with even more participants led by Arizona State University's Max Guyll, is noteworthy both for its results and its principal authors. They were nonpractitioners—not forensic examiners—who had no vested interest in the outcome. In the courtroom, we call those types of witnesses "independent" and "unbiased." They asked 228 trained firearm examiners from across the United States to perform 1,811 microscopic comparisons of fired cartridge cases. This broad swath of examiners worked in private, county, state, and federal laboratories. The authors concluded that "the results equally revealed a very low false-negative rate and a very low false-positive rate." Of some 1,429 conclusive decisions, they included just one false negative and five false positives. No single examiner made more than one error. Again, the overall false positive error rate was less than 1 percent.

Study after study demonstrates the same reality: examiners are remarkably accurate when they identify casings and bullets.

Worth noting, a measure of the field's integrity is its honesty about when it *cannot* link fired ammunition to a firearm. Inconclusive decisions are common both in the studies and in casework. This is a feature, not a bug, despite critics' complaints on this point. As the Ames II study explained: "As with any instrument (the examiner being the instrument), there are limits on their ability to the interpretation of the quality/quantity of the data/information presented." Obviously, fired bullets and cartridge cases do not always carry definitive marks

supporting inclusion or exclusion of a firearm.

But inconclusive decisions do not send people to jail—identifications do. Even PCAST judged error rates based on conclusive examinations. “When reporting a false positive rate to a jury, it is scientifically important to calculate the rate based on the proportion of *conclusive* examinations, rather than just the proportion of all examinations,” said the report. “This is appropriate because evidence used against a defendant will typically be based on *conclusive*, rather than inconclusive, examinations.” (Emphases in original.) In other words, when judging reliability, the false positive error rate is paramount.

Applying this rationale to firearms identification is reassuring. When an examiner opines that a fired casing came from a particular firearm, they are accurate more than 99 percent of the time. And firearms identification evidence never stands alone in a criminal case. It’s only one brick in a wall of evidence that may include eyewitness testimony, video surveillance, electronic locating data, DNA evidence, and more. Further, unlike some DNA analysis, ballistic evidence is never consumed and is, therefore, always available to be reexamined.

In the wake of PCAST’s report, a small number of critics have appeared. Some have testified in pretrial admissibility hearings attempting to preclude or dilute the opinion of firearms experts. These nonexperts are not firearms examiners, or even forensic science practitioners. They do not conduct any of their own studies. If these critics succeed where PCAST has failed—in convincing judges nationwide to exclude firearms identification evidence—countless homicide victims killed by firearms may be denied justice.

Nearly 100 years after Goddard’s work, there are over 200 accredited laboratories in the United States performing firearms identification analysis. Analysts must follow validated standard operating procedures framed around quality assurance systems and undergo rigorous training that includes regular proficiency testing.

As members of the National District Attorneys Association, we advocate for the use of reliable forensics to exonerate the innocent and inculpate the guilty. NDAA prosecutors, who are the “boots on the ground” in courtrooms throughout this country,

know from experience that firearms identification evidence is scientifically sound and withstands rigorous testing in the crucible of the courtroom.

As John Adams, both a U.S. president and a defense attorney, once said: “Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of the facts and evidence.” The facts, based on scientific studies, are that forensic firearms analysis is a reliable science that hones the accuracy of the justice system. 📍

Editor’s Note: This is an opinion and analysis article, and the views expressed by the author or authors are not necessarily those of Scientific American or The Kansas Prosecutor.

About the Authors

Raymond Valerio is an assistant district attorney and director of forensic sciences at the Queens County District Attorney’s Office overseeing all forensic science-based prosecutions. He is a member of the Firearms and Toolmarks Academy Standards Board, the Firearms and Toolmarks Subcommittee of the NIST Organization of Scientific Area Committees for Forensic Science, and the National District Attorneys Association Forensic Science Working Group.

Nelson Bunn is executive director of the National District Attorneys Association (NDAA), the largest association of local prosecutors in the country with over 6,000 members.

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