

# The Kansas Prosecutor



The official publication of the Kansas County and District Attorneys Association  
Volume VI, No. 1, Spring 2009



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*Our mission:*

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

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## About the Cover

The Sherman County Courthouse is located  
 at 813 Broadway in Goodland, KS. What is  
 now Sherman County, named after General  
 William T. Sherman, was, in its earliest history,  
 a part of the great grazing pasture of the huge  
 herds of American Bison. There is no evidence  
 of Indian Settlements before white men came  
 to settle. The early settlers in Sherman County  
 in 1885-1886 started towns in or near the center  
 of the county. Each of these small towns vied  
 for the title of county seat, but the coming of  
 the Rock Island Railroad across the center of  
 the county had much to do with the end of the  
 'county seat war'.

Photo by John D. Morrison, Prairie  
 Vistas Photography





# President's Column

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

## KCDAA Legislative Issues and Conference Update

Spring is upon us, and with it the end of another legislative session. There were many issues of importance to prosecutors raised in this session, and many others for which we were asked to comment. Here are some of the issues we addressed on behalf of the KCDAA this session.

Senate Bill 17 would have required the video recording of all felony interrogations. We opposed this legislation because of the burden it would have placed on law enforcement officers in the field. We also argued that a statutory requirement that all interrogations be videotaped could be used by defendants to suggest wrongdoing by officers when none was present. The requirement would have resulted in juries being left with an impression that any non-video-recorded statement was legally insufficient and unreliable.

Senate Bill 19 will allow prosecutors to carry concealed firearms upon fulfilling certain training requirements. Prosecutors will not be allowed to carry firearms in the courtroom, and we never suggested we should do so.

The substitute for Senate Bill 28, if passed, will accomplish several goals. First, it will amend K.S.A. 8-1568 (flee or elude a police officer) by defining several terms, and by redefining a violation of subsection (a) of the statute as a class B misdemeanor for the first offense, a class A misdemeanor for a second offense, and a level nine person felony for a third or subsequent offense. All violations of subsection (b) of the statute remained defined as level nine person felonies. The proposed statute would also expand K.S.A. 21-3419 (the criminal threat statute) to include not only causing the evacuation of a building, but also circumstances where the threat resulted in a lock down or disruption of regular, ongoing activities. This bill would also provide for the suspension of the driver's license of those convicted of possession of controlled substances if the jury makes a specific

finding that the controlled substance was transported within a motor vehicle.

The KCDAA submitted Senate Bill 67 to amend K.S.A. 21-3437 to address issues prosecutors had regarding the law on mistreatment of a dependant adult. Unfortunately, this bill died in committee. However, the legislation remains viable for next year.

The legislature established the Prosecutor's Training Fund in 1982, using fifty cents of every docket fee on cases handled by prosecutors. The amount was increased to one dollar in 1987. There has not been an increase in this fund since 1987. Senate Bill 68, which was one of our legislative priorities, will double that amount to two dollars, allowing us to provide better training programs to all prosecutors.

We took a position in opposition to Senate Bill 208, which would have eliminated the death penalty in Kansas. The proponents of the bill presented it as a cost-saving measure. However, there were many provisions in the legislation that were contrary to the safety of Kansas citizens. The bill has been referred to the Judicial Council. Any prosecutor wishing to weigh in on this legislation should contact the Judicial Council.

I proposed Senate Bill 281, which was designed to resolve the conflict between K.S.A. 21-4611(c) and K.S.A. 21-4729 regarding the length of probation for level four drug felonies, which was the subject of *State v. Holt*, 39 Kan.App.2d 741. The bill, which was later amended into House Bill 2097, increases the presumptive term of probation for defendants eligible for SB123 treatment to 18 months. The legislation will go into effect on July 1, 2009.

The legislature was faced with several bills intended to modify the DUI laws. The measure which passed (House Bill 2096) will create a DUI Commission to study these various proposals.

House Bill 2098, which has passed both houses, clarifies the language of K.S.A. 21-3523 to set two age classifications for the crime of electronic solicitation as between the ages of 14 and 16, and under the age of 14. The bill also adds the crimes of aggravated trafficking under K.S.A. 21-3447(a)(1)(B) and (a)(2), and electronic solicitation under K.S.A. 21-3523 to the list of crimes protected by the rape shield statute (K.S.A. 21-3525).

House Bill 2233, which has also passed both houses, creates a one-year statute of limitations for the withdrawal of a guilty plea, subject to an exception to prevent manifest injustice. This provision is similar to the limitation found in K.S.A. 60-1507(f). HB 2233 also addresses the selection of alternate jurors.

House Bill 2250 amends K.S.A. 60-455 to allow evidence of prior crimes in sex offenses to deal with the issues raised in *State v. Prine*. The statute would be considerably modified to allow introduction of prior crimes evidence in cases of sexual assault, and has passed both houses as of the writing of this article. Hopefully, there will be a short stay

in a conference committee before full passage of the measure. If passed, the new statute will go into effect as of its publication in the *Kansas Register*.

These are just a few of the measures we have worked on in this session. I wish to thank all the Board members, the Legislative Committee, and Kearney and Associates for all the hard work toward our goals this session.

### KCDAA 2009 Spring Conference

On another note, I would like to encourage all members of the KCDAA to attend the 2009 Spring Conference to be held Thursday and Friday June 18 and 19, 2009. The conference will feature Paul Greenwood, the head of the Elder Abuse Unit for The San Diego District Attorney's Office. Greenwood has been in practice for 29 years, and comes to our conference as a highly respected prosecutor. The conference promises to be interesting and educational.

Thank you again for giving me the opportunity to serve you. See you at the conference. 🍷



## Stay current by checking the KCDAA web site!

**New information is being updated regularly in the members only section.  
Just login and check out:**

- √ **Spring Conference Information**
- √ **Unpublished Opinions & Summaries of those Opinions**
- √ **The 2009 Legislative Agenda and a Bill Tracking Report**
- √ **Attorney General Opinions**
- √ **And much more...**

## [www.kcdaa.org](http://www.kcdaa.org)



# Legislative Introduction

by Representative Pat Colloton

## Meet Representative Pat Colloton, Chair of House Corrections and Juvenile Justice Committee

Representative Pat Colloton's legislative district covers parts of Leawood and Overland Park. She is an attorney who is a member of the bar and has practiced law in the states of Kansas, Illinois, New York, Massachusetts, and Wisconsin. Her legal career includes work in the Civil Rights Division of the Justice Department in Washington D.C., a Wall Street law firm in New York, and a large law firm in Milwaukee.

Representative Colloton received her undergraduate degree in chemistry and psychology and her law school degree from the University of Wisconsin. She worked for Eli Lilly in Indianapolis as a research organic chemist prior to attending law school. In the House of Representatives, Pat serves as Chair of the Corrections and Juvenile Justice Committee, a member of the Judiciary Committee, and is Chair of the Joint Committee on Corrections and Juvenile Justice Oversight. Representative Colloton is also a member of the Council of State Governments National Task Force on Justice and Safety, the Legal Task Force, and serves on the Executive Committee of the Board of Directors for the Justice Center in Washington D.C.

In her position on the board of the Justice Center, she collaborates with re-entry programs throughout the country. The Justice Center was instrumental in the drafting and passage of the federal Second

Chance Act, which will provide money to states for re-entry initiatives. Pat currently serves as a liaison between the Justice Center and the Kansas Re-entry Council and is a member of the Kansas Sentencing Commission.

The Kansas Sentencing Commission, in collaboration with the Kansas Recodification Commission, has recommended criminal sentencing changes in an effort to make penalties more proportional for various categories of crime. Following the original Legislative intent of the Kansas Sentencing Guidelines, and recommendations of a 2004 Vera Institute of Justice study, which identified areas in which sentencing is disproportionate, the Commission prioritized sentence severity in the following order of societal interests: protection from physical and emotional harm, protection of private and public property rights, and protection of integrity of government institutions, public peace, and public morals. In addition, the Commission's recommendations include one sentencing grid, additional presumptive imprisonment border (PIB) boxes, fewer presumptive probation areas, and underlying prison sentences of at least 12 months for all felonies.

In determining severity levels and length of sentence, the Commission considered the degree of harm to the victim as well as the

criminal history of the offender. To this end, crimes that result in loss of life and violent crime against persons would receive the greatest sentences. Overall, more crimes are in presumptive imprisonment or PIB areas of the grid, but some, at lower criminal history levels, may be for shorter periods of time. The drug grid has been folded into the non-drug grid and the number of months of incarceration reduced for first-time offenders. Drug quantity sold or distributed would be considered in severity, and rules for enhancement would be consistent with present non-drug enhancement rules. Drug sales, distribution, and manufacturing would be designated person felonies, and would result in more severe penalties for repeat violations. Recommendations for drug felony length of sentence have been made proportional to the quantity of drug involved in sale, cultivation, or manufacture. The proposed changes are contained in HB 2332.

It would be very helpful to the legislative process if county attorneys, district attorneys, and members of the judiciary or defense council would take the time to review HB 2332 and give comments or suggestions regarding the proposed changes to the Corrections and Juvenile Justice Committee. The bill can be accessed at [www.kslegislature.org](http://www.kslegislature.org) and comments can be e-mailed to [pat.colloton@house.ks.gov](mailto:pat.colloton@house.ks.gov). 

# KCDAA Member Highlights:

## New District Attorneys Steve Howe and Chad Taylor

by Mary Napier, Editor, Kansas Prosecutor

In 2008, two district attorney races received quite a bit of media coverage; the race for Johnson County DA and the race for Shawnee County DA. The Johnson County DA's office has about 120 paid and volunteer staff including 31 prosecutors. They handle approximately 7700-8000 cases a year. The Shawnee County DA's office consists of 60 employees - 23 attorneys, 29 staff members, and eight interns. In 2008, 1,943 cases were filed in the Shawnee County DA's office, but in 2009, the office is expecting to file 2,500-3,000 cases.

In January 2009, Steve Howe was sworn in as Johnson County DA, and Chad Taylor was sworn in as the Shawnee County DA. Since they are both KCDAA members, I wanted to share with you some information about their education, experience, and why they wanted to become district attorneys.

### Johnson County DA Steve Howe

As a child, Steve Howe moved around a lot because of his father's job, but he considers himself a Kansan as he spent eight years in Salina and graduated from Salina South High School. He then went on to attend Washburn University and graduated with degrees in criminal justice and political science in 1985. Halfway through college, Steve decided to focus on a career in law enforcement or prosecution. In order to decide which career he wanted to pursue, he took an internship in law enforcement. That helped him decide that becoming a prosecutor was a better match for his skill set.

"I enjoyed the idea of litigating cases in court and the arguments associated with it," said Steve.

"Also, as a prosecutor, I still got to work with the law enforcement community and be a cop in a way."

So, after college, his next step was Washburn's School of Law, where he graduated in 1988. During law school, he interned

with the Attorney General's office and the Shawnee County District Attorney's office. Upon graduation, he was hired by the Shawnee County DA and worked there for two and a half years before moving to the Johnson County DA's office. After 15 years in the Johnson County DA's office, he took a two-year hiatus and worked at the Jones Law Firm doing civil litigation before deciding to run for the DA position in Johnson County.

"After leaving, I was amazed how much I missed the job," said Steve. "Being a prosecutor makes you feel like you can make a difference in the community. I have a passion to make a difference, so putting away the bad guys is part of that passion."

This was Steve's first time campaigning, and he had to go through a primary and general election. The main strategies of his campaign included professionalism, public safety, and public trust. He thought citizens in Johnson County had lost faith and trust in the DA's office, so those issues were very important to him. During the campaign, Steve particularly enjoyed meeting people and discussing issues they thought were important.

"It was a lot of hard work, but I met a lot of friendly people going door-to-door and engaging in discussions," said Steve. "Going door-to-door was really energizing for me."

After a long continuous campaign, Steve won the election and was sworn in on January 12.



Steve Howe



Steve Howe on the campaign trail.

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Since taking the position, he has been filling staff positions, trying to change the atmosphere in the office, reviewing policies and procedures, and trying to restore trust in the DA's office.

"I have been warmly received by all the entities we work with including the county government and law enforcement, so it is very rewarding to get that type of response," said Steve.

As the Johnson County DA, Steve will handle high profile cases, some abusive dependent elder adult cases, and he will target career criminals and gang violence. He thinks the biggest challenge with his job is juggling a busy schedule. He explained that it forces you to be really organized, which he learned a lot about during his campaign. Steve thinks the best thing about his position is the sense of satisfaction from working with other community groups within the criminal justice system to make a difference in the community and provide direction in combating crime.

In the future, Steve's goals include working with law enforcement, community outreach, seeking community and public comments, and always acting professionally. While working with law enforcement, he will target career criminals and gang violence, which are the biggest threat to community and public safety. Through community outreach and speaking to the public, Steve hopes to educate them on crime prevention. By seeking community and public comments regarding issues and concerns, Steve hopes to rebuild some trust and continue to strengthen it. Steve takes acting professionally very seriously, so that will always be one of his goals.

Steve has been a member of the KCDAA for a number of years as an assistant DA and now as DA. He believes that the KCDAA plays an active role in helping prosecutors around the state, and he believes that the KCDAA is very important in coordinating efforts for and against legislation. Steve looks forward to establishing relationships with experienced and new prosecutors throughout the state through the KCDAA.

Steve is married to his wife, Cyndi, and they have four kids. When he is out of the office, he is active in sports and in his church. If he ever has any free time, he likes to go fishing with his friends.

## **Shawnee County DA Chad Taylor**

Chad Taylor has lived in Kansas most of his life. He grew up on a family farm in Silver Lake and graduated from Silver Lake High School. After high school, he attended the University of Kansas and received a Bachelors of Science in Accounting and Business Administration. He then went on to receive his law degree from the Chicago-Kent College of Law.

While attending law school, Chad was focused on tax law. He didn't have any interest in criminal law or being a prosecutor until he signed up for a criminal law clinic. During the clinic, he was able to work on criminal cases and square off against Cook County prosecutors. That experience made him realize that he wanted to make his living practicing law in a courtroom.

After law school, Chad soon returned to Kansas and started his own practice in Topeka in December 2001. While having his own practice, he handled a diverse caseload that included corporate law, estate and trust planning, and more and more criminal law.

"Being a solo practitioner is demanding, but I will be forever grateful for the experience," said Chad. "Running my own practice forced me to be disciplined and appreciate the importance of accountability and self-reliance; lessons that have served me well since becoming the Shawnee County DA."

Chad decided to run for the DA position because it seemed like the best way he could help the county. As he grew up, set up his law practice, got married, and made a home in Shawnee County, he watched as the county struggled with crime, drugs, and gangs. He became concerned about where the county was headed, and he wanted to do something before the challenges facing the community became unmanageable. So, he took direct action to combat the problems by running for Shawnee County DA.

Throughout Chad's campaign, his goal was to build trust. He thought the best way to build trust was through honesty and hard work, so he knocked on doors, met with community and neighborhood associations, raised money, spoke at forums, etc. He wanted people to watch him during his campaign and believe that he "would bring the same level of integrity and hard work to the District Attorney's



**Chad Taylor**

office.” One of the things Chad enjoyed about the campaign was meeting new people.

“Going door-to-door in Shawnee County cemented my connection with the community that I am now representing and opened my eyes to the problems people here in Shawnee County face on a

daily basis,” said Chad. “Those experiences and conversations have stuck with me.”

So far as Shawnee County DA, Chad’s experience has been very positive, even though his office has challenges both internally and externally. He has been encouraged by the reception he has received from law enforcement and other state and local agencies that his office works with. And, he feels confident that the relationships between his office and those agencies will continue to be strengthened each day.

As Shawnee County DA, Chad’s main focus will be on restoring professionalism and accountability to the office, while he assumes responsibility for appellate cases that go before the Kansas Supreme Court and some homicide cases.

“I’ve got an office full of talented prosecutors, but without leadership and structure, my prosecutors can’t do their job,” said Chad. “At this moment, my primary responsibility is to make sure that my staff has the necessary resources to do their job and that nothing is preventing them from seeking justice in Shawnee County.”

Chad is a member of the Topeka Bar Association, Kansas Bar Association, and the American Bar Association, and now he is a member of the KCDA. He believes that associations like the KCDA are important because they have a wealth of institutional knowledge, and associations can watch issues in the legislature that are important to prosecutors. In addition, he finds it immeasurably helpful to be able to discuss problems, solutions, and strategies with other county and district attorneys.

Chad lives in Topeka with his wife, Karily, and their three dogs and four cats. In his spare time, he enjoys riding his motorcycle, working on his family farm in Silver Lake, fishing, and shooting. 



**Chad and his wife Karily**

**Do you have an article idea for the Kansas Prosecutor?  
Do you want to submit an article?**

If so, send an e-mail to Mary Napier, editor, at [mary@napiercommunications.com](mailto:mary@napiercommunications.com).

Next submission deadline: June 26, 2009.



## New Attorneys

### 18<sup>th</sup> Judicial District District Attorney's Office

Tyler J. Roush has joined the staff effective January 5, 2009 as an Assistant District Attorney assigned to the Traffic Division. Tyler was formerly an associate with Brown & James, P.C. in St. Louis, Missouri.



*Tyler Roush*



Sarah Foster Tracy has joined the staff effective January 5, 2009 as an Assistant District Attorney assigned to the Traffic Division. Sarah has prosecutorial experience with the City of Overland Park, Kansas and most recently was with the Law Offices of Eldon L. Boisseau in Federal and State court insurance defense litigation.



*Sarah Tracy*



Justen P. Phelps has joined the staff effective January 5, 2009 as an Assistant District Attorney assigned to the Juvenile Division. Justen was formerly an Assistant County Attorney with the Crawford County Attorney's office in Pittsburg, Kansas.



*Justen Phelps*

### Ford County Attorney's Office

Kevin O'Keefe joined the office of the Ford County Attorney as an assistant county attorney in January 2009. Kevin graduated with a Bachelor of Arts in political science and history from Rutgers University in 2005. He then received his law degree from the Washburn University School of Law. He was admitted to the Kansas Bar in 2008. He has since taken the New Jersey state bar exam and is awaiting admittance.



*Kevin O'Keefe*



### Franklin County Attorney's Office

Catherine Decena has joined the Franklin County Attorney's Office as Assistant County Attorney. Catherine is a 2008 graduate of KU Law.



### Johnson County District Attorney's Office

New attorneys in the Johnson County District Attorney's office include:

DA Stephen Howe  
Megan Fisher  
Ann Henderson  
Amory Lovin

Vanessa Riebli (returned to the office after a 2-year hiatus)



### Leavenworth County Attorney's Office

Todd Thompson has taken over the position of County Attorney for Leavenworth County after winning in the last election. Todd hired John Bryant as Deputy County Attorney. John left the Wyandotte County District Attorney's Office after nearly eight years of service to take the position.



### Pratt County Attorney's Office

Gaten Wood has joined the office of the Pratt County Attorney. He received his



*Gaten Wood*

undergraduate degree at Kansas State University and his Juris Doctorate from Oklahoma City University School of Law in December 2008.



### Shawnee County District Attorney's Office

New attorneys in the Shawnee County DA's office include:

DA Chad Taylor  
Jess Hoeme  
Stephen Hunting  
Christine Ladner  
Mary Mattivi  
Kelly McPherron  
Matt Patterson  
Jacqie Spradling  
Cynthia Waskowiak



## Wyandotte County District Attorney's Office

Shawn Boyd is a new Assistant District Attorney in the Wyandotte County District Attorney's Office. He started in March 2009. He received his undergraduate degree from Baker



Shawn Boyd



University and graduated from Washburn Law in May 2008. He was previously employed by Ruskin in the Accounting Department.

Mark Menefee is a new Assistant District Attorney in the Wyandotte County District Attorney's Office. He started in March 2009. He received his undergraduate degree at Kansas University in 2003 and graduated

from Kansas University School of Law in May 2008. He was previously employed by the Johnson County District Attorney's office as an intern.



Mark Menefee

## On the Move

Victor Braden, an Assistant Attorney General for the State of Kansas deployed to Afghanistan for one year. Vic is a Colonel in the Kansas Army National Guard.



At the end of May 2009, Kevin Graham will be leaving the Kansas Attorney General's Office after almost nine years

of service in the AG's Criminal Division. He will be relocating to Rio Rancho, New Mexico, where his wife accepted a position with the federal courts. He hopes to continue his criminal justice career in his new location.

Kevin said, "It has been a great honor to have served as a Kansas prosecutor on the staff of the past four Kansas Attorney Generals, and both an honor and a pleasure to have had the opportunity to work with so many terrific prosecutors and law enforcement officers across the state of Kansas. From the professionalism and hard work I have seen displayed by so many of you over the years, I know Kansas will be in good hands. The best of luck to all of you and keep fighting the good fight."



*We want to share your news!*



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

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

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

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or e-mail:  
mary@napiercommunications.com

Feel free to submit digital photos with your announcement!

**Next Deadline:  
June 26, 2009**



# K.S.A. 60-455 Changes Rules of Admissibility for Evidence of Prior Crimes or Civil Wrong

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

During the current legislative session, the Kansas Legislature enacted significant changes to K.S.A. 60-455, which sets forth the rules of admissibility for evidence of prior crimes or civil wrongs (commonly referred to as “prior bad acts”). These changes were a direct response to the Kansas Supreme Court’s consistent limiting of admissibility of prior bad acts evidence that began with *State v. Gunby*<sup>1</sup> and culminated with the “strikingly similar” requirement articulated in *State v. Prine*.<sup>2</sup> The new K.S.A. 60-455 counters the Supreme Court’s trend and significantly broadens the parameters for admissibility of prior bad acts evidence, making relevance and probative value the test for admission of evidence of prior sexual misconduct in sex crime prosecutions, and a reasonable similarity to the touchstone in all other criminal cases to show modus operandi or general method.

## The New K.S.A. 60-455

As a result of these recent legislative changes, K.S.A. 60-455 now reads (changes in italics):

60-455. (a) Subject to K.S.A. 60-447, and amendments thereto, evidence that a person committed a crime or civil wrong on a specified occasion, is inadmissible to prove *such person’s* disposition to commit crime or civil wrong as the basis for an inference that the person committed another crime or civil wrong on another specified occasion.

(b) Subject to K.S.A. 60-445 and 60-448, and amendments thereto, such evidence is admissible when relevant to prove some other material fact including motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.

(c) Subject to K.S.A. 60-445 and 60-448, and amendments thereto, in any criminal action other than a criminal action in which the defendant is accused of a sex offense under articles 34, 35 or 36 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto, such evidence is admissible to show the modus operandi or general method used by a defendant to perpetrate similar but totally unrelated crimes when the method of committing the prior acts is so similar to that utilized in the current case before the court that it is reasonable to conclude the same individual committed both acts.

(d) Except as provided in K.S.A. 60-445, and amendments thereto, in a criminal action in which the defendant is accused of a sex offense under articles 34, 35 or 36 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto, evidence of the defendant’s commission of another act or offense of sexual misconduct is admissible, and may be considered for its bearing on any matter to which it is relevant and probative.

(e) In a criminal action in which the prosecution intends to offer evidence under this rule, The prosecuting attorney shall disclose the evidence to the defendant, including statements of witnesses, at least 10 days before the scheduled date of trial or at such later time as the court may allow for good cause.

(f) This rule shall not be construed to limit the admission or consideration of evidence under any other rule or to limit the admissibility of the evidence of other crimes or civil wrongs in a

## Footnotes

1. 282 Kan. 39, 144 P.3d 647 (2006).
2. 287 Kan. 713, 200 P.3d 1 (2009).

criminal action under a criminal statute other than in articles 34, 35 or 36 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto.

(g) As used in this section, an “act or offense of sexual misconduct” includes:

- (1) Any conduct proscribed by article 35 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto;
- (2) the sexual gratification component of aggravated trafficking, as described in subsection (a)(1)(B) and (a)(2) of K.S.A. 21-3447, and amendments thereto;
- (3) exposing another to a life threatening communicable disease, as described in subsection (a)(1) of K.S.A. 21-3435, and amendments thereto;
- (4) incest, as described in K.S.A. 21-3602, and amendments thereto;
- (5) aggravated incest, as described in K.S.A. 21-3603, and amendments thereto;
- (6) contact, without consent, between any part of the defendant’s body or an object and the genitals, mouth or anus of the victim;
- (7) contact, without consent, between the genitals, mouth or anus of the defendant and any part of the victim’s body;
- (8) deriving sexual pleasure or gratification from the infliction of death, bodily injury or physical pain to the victim;
- (9) an attempt, solicitation or conspiracy to engage in conduct described in paragraphs (1) through (8); or
- (10) any federal or other state conviction of an offense, or any violation of a city ordinance or county resolution, that would constitute an offense under article 35 of chapter 21 of the Kansas Statutes Annotated, and amendments thereto, the sexual gratification component of aggravated trafficking, as

described in subsection (a)(1)(B) and (a)(2) of K.S.A. 21-3447, and amendments thereto; incest, as described in K.S.A. 21-3602, and amendments thereto; or aggravated incest, as described in K.S.A. 21-3603, and amendments thereto, or involved conduct described in paragraphs (6) through (9).

(h) If any provisions of this section or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this section which can be given effect without the invalid provisions or application. To this end the provisions of this section are severable.

## Historical Background

Historically, courts have taken a dim view of evidence of prior bad acts. The general ban on such evidence dates back centuries.<sup>3</sup> The reason behind this is not because such evidence is viewed as irrelevant, but rather the contrary: “it is said to weigh too much with the jury and to so over-persuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.”<sup>4</sup> Nevertheless, common-law and the rules of evidence have allowed admission of such evidence when the purpose is not to prove propensity, but some other relevant, material fact.<sup>5</sup>

Prior to the enactment of K.S.A. 60-455 in 1963, the common-law rule in Kansas was that evidence of a prior, unrelated crime was inadmissible in a criminal prosecution.<sup>6</sup> The prosecution could not “prove one crime by proving another.”<sup>7</sup> There were, however, exceptions to this general rule. Proof of a prior crime was deemed admissible “in the discretion of the court . . . to prove identity of person or crime, to prove *scienter* or guilty knowledge, to prove intent, to show inclination or motive, to prove plan, scheme or system of operation, to prove malice

3. The Tenth Circuit noted in *United States v. Castillo*, 140 F.3d 874, 881 (10<sup>th</sup> Cir. 1998), that “[t]he ban on propensity evidence dates back to English cases of the seventeenth century,” and cites *Hampden’s Trial*, 9 How. St. Tr. 1053, 1103 (K.B. 1684).

4. *Michelson v. United States*, 335 U.S. 469, 475-76, 69

S.Ct. 213, 93 L.Ed. 168 (1948).

5. See *State v. Myrick*, 181 Kan. 1056, 1058-59 (1957); *United States v. Enjady*, 134 F.3d 1427, 1430-31 (10<sup>th</sup> Cir. 1998).

6. *Myrick*, 181 Kan. at 1058.

7. *Id.*

and to rebut special defenses.”<sup>8</sup> Such evidence was also admissible to impeach a defendant on cross-examination if he chose to testify.<sup>9</sup>

In the view of the Kansas courts, the enactment of K.S.A. 60-455 did not materially change the rule and the case law as it had developed in Kansas.<sup>10</sup> However, two problems arose with the interpretation of K.S.A. 60-455 that “set the stage for rapid and enthusiastic development of various avoidance techniques.”<sup>11</sup> First was the misinterpretation of the statute’s exemplary list of material facts for which prior bad acts evidence could be considered relevant, as an exclusive list.<sup>12</sup> Second, was the “unnecessarily harsh automatic reversal rule for cases in which a limiting instruction was erroneously omitted.”<sup>13</sup> As the Kansas Supreme Court noted and laid out in detail in *State v. Gunby*, this led to an expansive array of case law providing for the admission of prior bad acts evidence independent of K.S.A. 60-455.<sup>14</sup> In *Gunby*, the Court put an end to that.

The *Gunby* Court held that the admissibility “of any and all” evidence of prior crimes or civil wrongs is governed by K.S.A. 60-455.<sup>15</sup> The Court also held that erroneous admission of such evidence or the failure to give a limiting instruction to the jury “is not inevitably so prejudicial as to require automatic reversal,” but rather, is subject to harmless error analysis.<sup>16</sup> While the *Gunby* decision represented a significant break with decades of case law, it did not necessarily serve as a call for legislative action. After all, it was logically sound, and in truth, corrected decades of misinterpretation and unnecessary exceptions and exceptions to exceptions.

Then came *State v. Prine*.<sup>17</sup> *Prine* involved a different aspect of K.S.A. 60-455. Whereas *Gunby* essentially hit the reset button and returned the statute to its original meaning, *Prine* solidified misinterpreted dicta as a heightened standard for

admissibility of prior crimes evidence to prove plan or modus operandi. *Prine* held that evidence of a prior crime or civil wrong, to be admitted under K.S.A. 60-455 to prove plan, must be so “strikingly similar” to the crime charged as to amount to a “signature” pattern or method of operation.<sup>18</sup>

The Court did this in order to achieve “analytical consistency” by settling on “uniform language to describe the degree of similarity that must exist” before such evidence is admitted.<sup>19</sup> This was driven by its recognition that the subject was plagued by contradicting and irreconcilable case law.<sup>20</sup>

Chief Justice McFarland filed a vigorous dissent. She acknowledged that some of the case law regarding K.S.A. 60-455 was irreconcilable, but noted that it was not because the standard had proven to be unworkable as the majority suggested, but because “there have been a series of decisions by this court and the Court of Appeals that have misinterpreted and confounded the original relevancy standard for admission of plan evidence.”<sup>21</sup> According to the Chief Justice, the problem started in *State v. Damewood*,<sup>22</sup> where the court commented that the prior crimes evidence was strikingly similar to the crime charged.<sup>23</sup> That comment “was not a standard for admission, only a comment on the quality of the evidence at issue in that particular case.”<sup>24</sup> Nevertheless, subsequent courts latched onto that comment and it evolved over time into a standard of admissibility that the *Prine* Court ultimately made *the* standard. In Chief Justice McFarland’s opinion, the proper standard, as set out in *Damewood*, should be “that prior crimes evidence is relevant to prove plan where the method of committing the prior acts is so similar to that utilized in the case being tried that it is reasonable to conclude the same individual committed both acts.”<sup>25</sup>

8. *Id.* at 1059.

9. *Id.*

10. *State v. Wright*, 194 Kan. 271, 274, 398 P.2d 339 (1965).

11. *State v. Gunby*, 282 Kan. 39, 54, 144 P.3d 647 (2006).

12. *See Id.* at 53.

13. *Id.* at 53-54.

14. *Id.* at 52-56.

15. *Id.* at 57.

16. *Id.*

17. 287 Kan. 713, 200 P.3d 1 (2009).

18. 287 Kan. at 735.

19. *Id.*

20. *Id.* at 729-35.

21. *Id.* at 740 (McFarland, CJ., dissenting).

22. 245 Kan. 676, 783 P.2d 1249 (1989).

23. 287 Kan. at 740 (McFarland, CJ., dissenting) (citing *Damewood*, 245 Kan. at 682.)

24. *Id.* at 741 (McFarland, CJ., dissenting.)

25. *Id.* at 747 (McFarland, CJ., dissenting).

The majority, of course, disagreed, and after ruling that the appropriate standard of similarity is “strikingly similar,” held that admitting evidence of *Prine*’s prior misconduct was reversible error because it did not meet that standard. Finally, the Court noted:

We are compelled to make one final set of brief comments on the K.S.A. 60-455 issues raised by this case.

Extrapolating from the ever-expanding universe of cases that have come before us and our Court of Appeals, it appears that evidence of prior sexual abuse of children is peculiarly susceptible to characterization as propensity evidence forbidden under K.S.A. 60-455 and, thus, that convictions of such crimes are especially vulnerable to successful attack on appeal. This is disturbing because the modern psychology of pedophilia tells us that propensity evidence may actually possess probative value for juries faced with deciding the guilt or innocence of a person accused of sexually abusing a child. In short, sexual attraction to children and a propensity to act upon it are defining symptoms of this recognized mental illness. [citation omitted] And our legislature and our United States Supreme Court have decided that a diagnosis of pedophilia can be among the justifications for indefinite restriction of an offender’s liberty to ensure the provision of treatment to him or her and the protection of others who could become victims. [citations omitted] It is at least ironic that propensity evidence can be part of the support for an indefinite civil commitment, but cannot be part of the support for an initial criminal conviction in a child sex crime prosecution.

Of course, the legislature, rather than this court, is the body charged with study, consideration, and adoption of any statutory change that might make K.S.A. 60-455 more workable in such

cases, without doing unconstitutional violence to the rights of criminal defendants. It may be time for the legislature to examine the advisability of amendment to K.S.A. 60-455 or some other appropriate adjustment to the statutory scheme.<sup>26</sup>

These comments by the Court virtually invited the legislature to change K.S.A. 60-455. Coupled with the holding, they certainly stimulated the prosecution community to seek legislative changes.

## Efforts to change K.S.A. 60-455

Shortly after *Prine* was released, the Attorney General’s Office began working on proposed changes to K.S.A. 60-455.<sup>27</sup> We fairly quickly decided to model our proposed changes on Federal Rules of Evidence 413 and 414. We chose this approach for two reasons: (1) the federal rules dealt with evidence of similar crimes in sex cases and the *Prine* Court had specifically identified sex crime prosecutions as an area where it would look favorably on changes to the rules, and (2) the federal appellate courts had already held that the federal rules were constitutional and we therefore had existing case law to guide us in applying the changes.

Essentially, we copied the language of the federal rules, with minor modifications to fit Kansas law. These changes would make evidence of prior acts of sexual misconduct admissible in sex crime prosecutions so long as the trial court found the evidence to be relevant and more probative than prejudicial. Basically, the intent was to discard the “strikingly similar” standard and return to a relevancy standard in sex crimes cases.

Unlike the federal rules, however, we did not separate out individual rules for adult sexual assaults and child molestation, choosing instead to have a single rule applicable to all sex offenses.<sup>28</sup> Further, we did not include a rule comparable to Federal Rule of Evidence 415, which relates to admission of

26. 287 Kan. at 737.

27. Several other prosecutors around the state, as well as the KCDAA, and Senator Terry Bruce, also drafted proposed changes to K.S.A. 60-455, and while some elements of these proposals made it into the final text of the new law, it was the Attorney General’s proposal, submitted to the legislature through Representative Raj Goyle, that formed the basis of

House Bill 2250, which ultimately became the law.

28. Other than referencing offenses of “sexual assault” and “child molestation,” the two federal rules are essentially the same. Indeed, Judge Holloway of the Tenth Circuit, concurring in *Castillo* observed, “no principled distinction may be drawn between the two Rules.” 140 F.3d at 889 (Holloway, J., concurring in part and dissenting in part).

evidence of prior sexual assault or child molestation in civil cases, because, quite simply, as prosecutors we were primarily concerned with criminal prosecutions.<sup>29</sup> Thus, House Bill 2250 was born.

The bill made it through the House relatively intact, but in the Senate, several amendments were made to the original bill. The most significant of these was proposed by Senator Terry Bruce. This amendment, which ultimately became section (c) of the new K.S.A. 60-455, was drawn directly from Chief Justice McFarland's dissent in *Prine*. Its objective was to overrule the "strikingly similar" standard articulated in *Prine* and replace it with a "reasonably similar" standard for admission of prior crimes evidence to show plan or modus operandi in all criminal prosecutions other than sex crime prosecutions. A severability provision was added as well, and the bill was then passed as amended by the Senate. A conference committee worked out the differences between the House and Senate bills; it was then passed by both houses and enacted into law.

Now, the new K.S.A. 60-455 awaits review and interpretation by the appellate courts. Fortunately, we have existing case law to guide us and our courts in interpreting and applying the new evidentiary rule.

## Case law

### (A) New K.S.A. 60-455(c)

The language of the new section (c) was drawn from Chief Justice McFarland's dissent in *Prine*. The Chief Justice stated quite clearly that in her view, the proper standard is "the original standard set out in *Damewood*."<sup>30</sup> A review of *Damewood*

shows that the court employed almost the exact language set forth in the new K.S.A. 60-455(c), not the "strikingly similar" standard that was later attributed to *Damewood*.<sup>31</sup> Moreover, the *Damewood* Court recognized earlier decisions where prior crimes evidence was admitted under K.S.A. 60-455 where the evidence was merely "somewhat similar" or bore "a marked similarity."<sup>32</sup> Thus, the new section (c) is a clear repudiation of *Prine*'s "strikingly similar" standard and affects a return to the "reasonably similar" standard of *Damewood* and its predecessors.

### (B) New K.S.A. 60-455(d) – (g)

The new sections (d) through (g) are an adaptation of Federal Rules of Evidence 413 and 414, and for the most part, mirror those rules. Accordingly, the case law of the federal courts regarding those rules provides guidance and persuasive authority for interpreting and applying the new Kansas rules.

The good news is that the federal rules have withstood constitutional challenges. The Eighth, Ninth, and Tenth Circuits have all upheld the constitutionality of the rules.<sup>33</sup> In *United States v. Enjady* and *United States v. Castillo*, the Tenth Circuit upheld rules 413 and 414 respectively in the face of due process, equal protection, and in *Castillo*, Eighth Amendment challenges.

Significant in the Tenth Circuit's rationale was application of the balancing test of Federal Rule of Evidence 403 to prior crimes evidence. Rule 403, analogous to K.S.A. 60-445, gives the trial judge the discretion to exclude evidence if its probative value is outweighed by its prejudicial effect.<sup>34</sup> The court

29. Whether or not this was shortsighted remains to be seen. It may very well be that as case law develops in the civil arena that the legislature may need to revisit this issue.

30. 287 Kan. at 747 (McFarland, CJ., dissenting).

31. 245 Kan. at 682 ("The rationale for admitting evidence of prior unrelated acts to show plan under K.S.A. 60-455 is that the method of committing the prior acts is so similar to that utilized in the case being tried that it is reasonable to conclude the same individual committed both acts."). And while the *Damewood* Court did note that the evidence of *Damewood*'s prior conduct was "strikingly similar" to the charges in the case before it, 245 Kan. at 682, as Chief Justice McFarland observed in *Prine*, this "was not a standard for admission, only a comment on

the quality of the evidence at issue." 287 Kan. at 741.  
32. 245 Kan. at 682 (citing *State v. Morgan*, 207 Kan. 581, 582, 485 P.2d 1371 (1971) and *State v. Hampton*, 215 Kan. 907, 910, 529 P.2d 127 (1974)).

33. *United States v. Mound*, 149 F.3d 799 (8<sup>th</sup> Cir. 1998); *United States v. Lemay*, 260 F.3d 1018 (9<sup>th</sup> Cir. 2001); *United States v. Castillo*, 140 F.3d 874 (10<sup>th</sup> Cir. 1998); *United States v. Enjady*, 134 F.3d 1427 (10<sup>th</sup> Cir. 1998).

34. While K.S.A. 60-445 only explicitly refers to surprise as a grounds for excluding relevant evidence, it has been interpreted to embody, as a rule of necessity, the general rule that a judge may exclude any evidence that may cause unfair prejudice. *State v. Davis*, 213 Kan. 54, 57-58, 515 P.2d 802 (1973).

stated that “without the safeguards embodied in Rule 403 we would hold the rule [Fed.R.Evid. 413] unconstitutional.”<sup>35</sup>

The *Enjady* court specifically articulated that in conducting Rule 403 balancing in a sex crime context, the trial court must consider:

- 1) how clearly the prior act has been proved; 2) how probative the evidence is of the material fact it is admitted to prove; 3) how seriously disputed the material fact is; and 4) whether the government can avail itself of any less prejudicial evidence. When analyzing the probative dangers, a court considers: 1) how likely is it such evidence will contribute to an improperly-based jury verdict; 2) the extent to which such evidence will distract the jury from the central issues of the trial; and 3) how time consuming it will be to prove the prior conduct.<sup>36</sup>

Accordingly, when attempting to introduce evidence of prior sexual misconduct under the new K.S.A. 60-455, prosecutors would be well advised to ensure that the trial court addresses these factors on the record. While at first blush, it may seem like an excessive laundry list of factors, in reality, it is nothing more than the probative vs. prejudicial analysis that the trial court must undertake anyway.<sup>37</sup> To have it on the record that the trial court considered these matters prior to admitting evidence under this section will certainly pay dividends on appeal.

The Tenth Circuit also held that the trial court “must make a preliminary finding that a jury could reasonably find by a preponderance of the evidence that the ‘other act’ occurred.”<sup>38</sup> It is reasonable to conclude that the Kansas Supreme Court will take the same view, so again, when attempting to introduce evidence under this section, prosecutors should ensure that they can meet this hurdle and that the trial judge make such a finding. In the case

of prior convictions, this should be relatively easy, but in the case of prior uncharged conduct, it will be more difficult, but certainly not unachievable.

## Is a limiting instruction still necessary?

Prior to these changes, whenever evidence of prior bad acts was admitted under K.S.A. 60-455, the trial court was required to give the jury an instruction regarding the limited purpose for such evidence.<sup>39</sup> It has been asked whether such a limiting instruction is necessary with the new rules. To be sure, the requirement for a limiting instruction has not changed with respect to evidence admitted under either section (b) or (c). It is perhaps arguable whether such an instruction is necessary with respect to evidence admitted under section (d), but the better practice would be to ask for a limiting instruction tying the evidence to the specific matter for which it was introduced.<sup>40</sup>

## Conclusion

*Gunby* and *Prine* effected significant changes with respect to the admission of evidence of prior bad acts, raising extreme hurdles in the way of prosecutors seeking to admit such evidence. Fortunately, the legislature responded swiftly to the Supreme Court’s invitation in *Prine* to re-assess and change K.S.A. 60-455. Thanks to the recent changes, the 60-455 playing field, recently tilted steeply in favor of criminal defendants, has now been leveled.



35. *Enjady*, 134 F.3d at 1433.

36. *Id.*

37. *See Davis*, 213 Kan. at 57-58.

38. *Enjady*, 134 F.3d at 1433.

39. *State v. Bly*, 215 Kan. 168, 176, 523 P.2d 397 (1974).

40. To this end, the federal courts have recognized assessing the credibility of the victim as a valid issue render-

ing prior sexual misconduct evidence both relative and probative. *Enjady*, 134 F.3d at 1431 (“Knowledge that the defendant has committed rapes on other occasions is frequently critical in assessing the relative plausibility of [a victim’s] claims and accurately deciding cases that would otherwise become unresolvable swearing matches.”).



# Charging Traffic Fatalities

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According to recent numbers provided by the Kansas Department of Transportation, approximately 450 people die annually on our state's roadways, with approximately 30 percent of those crashes being alcohol-related. Regardless of where you prosecute, there is an almost certainty that you will be presented with a recurring choice of whether or how to charge someone for killing another while operating a motor vehicle.

The following is my brief attempt to aid fellow prosecutors in determining whether and to what extent criminal liability exists in a given case. These cases often take us out of our comfort zone of prosecuting intentional acts and into the less familiar, nearly "civil," realms of "reckless or wanton conduct" and "material deviations" from the standard of care.

## Premeditated and Intentional Conduct:

A motor vehicle is a deadly weapon and is often used in intentional or even premeditated efforts to take another's life. First degree premeditated murder and second degree intentional murder are always available charges when supported by sufficient evidence.

## Conduct during the Commission of an Inherently Dangerous Felony:

K.S.A. 21-3436 includes violation of K.S.A. 8-1568(b), fleeing or attempting to elude an officer, as an inherently dangerous felony. Accordingly, deaths which occur in crashes caused by attempts to flee law enforcement can be charged under the Felony Murder statute, K.S.A. 21-3401(b).

## Reckless Conduct which Manifests an Extreme Indifference to the Value of Human Life:

Second degree reckless murder, K.S.A. 21-3402(b), is the appropriate charge when a driver's conduct is so patently dangerous that death or serious injury to others is a near certainty to occur. "Recklessness that can be assimilated to purpose or knowledge is treated as depraved heart second-degree murder. [...] This language describes a kind of culpability that differs in degree but not in kind from the ordinary recklessness required for manslaughter." State v. Doub, 32 Kan.App.2d 1087 (2004).

Akin to obscenity, you know it when you see it. In Doub, the Court noted the following list of facts, which would be evidence of

this degree of recklessness: (1) Intoxication (though this factor alone would not be evidence of recklessness, See State v. Huser, 265 Kan. 228 (1998)); (2) Speeding; (3) Near or additional collisions shortly before the fatal crash; (4) driving on the wrong side of the roadway; (5) Failure to render aid; (6) Failure to heed traffic signs/signals; (7) Failure to heed warnings about reckless driving (or intoxication); and (8) history of prior driving offenses (although the admissibility of prior bad acts such as these have not been discussed since the Gunby case).

## Reckless or Wanton Conduct:

K.S.A. 21-3404(a), involuntary manslaughter, and K.S.A. 21-3405, vehicular homicide, are the charges that are appropriate when dealing with a lesser degree of reckless or wanton conduct than demonstrated above. Although vehicular homicide's "material deviation from the standard of care" appears to address a mens rea short of recklessness, the many cases which have interpreted these statutes have blurred that distinction. See State v. Remmers, 278 Kan. 598 (2004); State v. Krovvidi, 274 Kan. 1059 (2002); State v. Trcka,

20 Kan.App.2d 84 (1994); and State v. Burrell, 237 Kan. 303 (1985). In short, if someone commits a moving violation in a construction zone or after being warned by another that he/she is acting out of compliance with apparent speed limits or traffic signals, there's something more than simple negligence, and he/she is now exposed to criminal liability. What the appropriate charge should be is a fact-specific question.

**Involuntary Manslaughter while DUI:**



K.S.A. 21-3442 is a unique law that provides strict or absolute criminal liability for causing the death of another. State v.

Creamer, 26 Kan.App.2d 914, 916 (2000).

As we all know, however, no defense attorney believes in a crime without a defense. Accordingly, charging and prosecuting these cases can require investigation and litigation of defenses such as contributory negligence or other intervening causes (such as medical malpractice or pre-existing medical conditions). Effort should be made to limit such defenses through motions in limine, but there is some support in the law for these defenses. In State v. Collins, 36 Kan.App.2d, 368-72 (2006), the Court found that a motorcyclist parked in the middle of a road, near a bend in the road, at night, and who failed to use any efforts to warn potential on-coming drivers (intoxicated or not) created conditions that may have posed a potential intervening or superseding cause and warranted a proximate cause instruction to the jury. The Court of Appeals further refined its analysis in

State v. Bale, No. 96,929 (May 16, 2008), where an intoxicated mother backed her van over a handicapped 11-year-old child who was attempting to crawl near and into the back of the van. Although the Court again found that a "Defendant's actions must be the proximate cause of the victim's death," it stressed that "contributory negligence is not a defense to involuntary manslaughter. [. . .] Nevertheless, a victim's own conduct may be so substantial a factor so as to be the direct cause of death." In that case, the Court found insufficient evidence of negligence on the part of the victim/child to warrant a proximate cause instruction.

Whatever decision a prosecutor makes in a case involving a death, there are bound to be charged emotions for any number of individuals or community groups. As always, we must do our best to ensure that our laws are applied fairly and equally according to the facts of each case. 



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# HGN: The Eyes Have IT

by Karen C. Wittman, Assistant Attorney General  
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Standardized Field Sobriety Tests (SFSTs) are designed to determine if a person's ability to operate a motor vehicle is compromised. "Police officers and lay witnesses have long been permitted to testify as to their observations of a defendant's acts, conduct, and appearance, and also to give an opinion on the defendant's state of impairment based on those observations. [Citations omitted.] Objective observations based on observable signs and conditions are not classified as 'scientific' and thus constitute admissible testimony." *Williams v. State* 710 So.2d 24, 28-29 (Fla.App. 3 Dist., 1998).<sup>1</sup>

The SFSTs consist of: the Horizontal Gaze Nystagmus test (HGN), the walk and turn test, and the one-leg stand test. With regard to the "walk and turn," and "leg lift" field sobriety tests ... these are physical dexterity exercises that common sense, common experience, and the "laws of nature" show are performed less well after drinking alcohol.<sup>2</sup> As for the HGN test, ask any officer-- the most accurate of these tests is the HGN test. The State of Ohio went so far as to state the HGN test is the "single most accurate field test to use in determining whether a person is alcohol impaired."<sup>3</sup>

So what is HGN and what is the HGN test?

## HGN

Alcohol is a central nervous system depres-

sant affecting many of the higher as well as lower motor control systems of the body. This results in poor motor coordination, sluggish reflexes, and emotional instability. The part of the nervous system that fine-tunes and controls hand movements and body posture also controls eye movements. When intoxicated, a person's nervous system will display a breakdown in the smooth and accurate control of eye movements. This breakdown in the smooth control of eye movement may result in the inability to hold the eyes steady, resulting in a number of observable changes of impaired oculomotor functioning.<sup>4</sup>

"Nystagmus" is a term used to describe a "bouncing" eye motion that is displayed in two ways: (1) pendular nystagmus, where the eye oscillates equally in two directions, and (2) jerk nystagmus, where the eye moves slowly away from a fixation point and then is rapidly corrected through a "saccadic" or fast movement.<sup>5</sup> HGN is a type of jerk nystagmus with the saccadic movement toward the direction of the gaze. An eye normally moves smoothly like a marble rolling over a glass plane, whereas an eye with jerk nystagmus moves like a marble rolling across sandpaper. Most types of nystagmus, including HGN, are involuntary motions, meaning the person exhibiting the nystagmus cannot control it.<sup>6</sup> In fact, the subject exhibiting the nystagmus is unaware that it is happening because

## Footnotes

1. *State v. McHenry* 2006 WL 1816305, 7 (Kan. App.) (Kan.App., 2006) See also *City of Dodge City v. Hadley* 262 Kan. 234 (1997)
2. *Hawkins v. State*, 223 Ga. App. 34, 476 S.E.2d 803 (1996).
3. *State v. Bresson* 51 Ohio St.3d 123, 125, 554 N.E.2d 1330, 1332 (Ohio, 1990)
4. Jack E. Richman & John Jakobowski, *The Competency and Accuracy of Police Academy Recruits in the Use of the Horizontal Gaze Nystagmus Test for Detecting Alcohol Impairment*, 47 New Eng. J. Optometry 5, 6 (Winter 1994).
5. Raymond D. Adams & Maurice Victor, *Principles of Neurology*, ch.13, "Disorders of Ocular Movement and Pupillary Function," 117 (4<sup>th</sup> ed. 1991).
6. C.J. Forkiotis, *Optometric Exercise: The Scientific Basis for Alcohol Gaze Nystagmus*, 59 Curriculum II, No. 7 at 9 (April 1987); Gregory W. Good & Arol R. Augsburger, *Use of Horizontal Gaze Nystagmus as a Part of Roadside Sobriety Testing*, 63 Am. J. of Optometry & Physiological Optics 467, 469 (1986).

the bouncing of the eye does not affect the subject's vision.<sup>7</sup>

## HGN TEST

According to U.S. Department of Transportation, National Highway Safety Administration (NHTSA), Improved Sobriety Testing<sup>8</sup>:

The HGN test requires only an object (stimulus) for subjects to follow with their eyes, such as a pen or the tip of a penlight.

1. The officer places the object approximately 12 to 15 inches from the subject's face and slightly higher than eye level. The officer instructs the subject to follow the object with the eyes and the head should remain still.
2. The officer then asks if the subject understands all the instructions. After positioning the object, but before conducting the test, the officer checks for signs of medical impairment.
3. First, the officer checks for "equal tracking" by moving the object quickly across the subject's entire field of vision to see whether the eyes follow the object simultaneously.
4. The officer then checks for equal pupil size. Lack of equal tracking or equal pupil size may indicate blindness in one eye, a glass eye, a medical disorder, or an injury.

5. If the subject exhibits these characteristics, the officer should discontinue the HGN test and may need to seek medical assistance for the individual if a medical disorder or injury appears to exist.

While conducting the test, the officer looks for six "clues," three in each eye that indicate impairment. The officer should record the clues on the HGN Guide. The left eye is checked for the clues, and then the right eye. The clues are<sup>9</sup>:

Sign	Appearance	Standardized Procedures
Lack of smooth pursuit (LSP)	Eye does not follow a moving stimulus smoothly	Stimulus rate (speed of pass) is 2 seconds.
Distinct and Sustained Nystagmus at maximum deviation (MAX)	With the eye gazing as far to the side as possible, jerking is distinct.	Stimulus is moved laterally to the extreme gaze possible and is held at that position for >4 seconds.
Onset of nystagmus prior to 45° angle of gaze (AOG)	As the eye moves to the side, jerking occurs before the eye reaches 45° angle of gaze (AOG).	Stimulus is moved slowly to determine the AOB where jerking first occurs.

The officer also checks for vertical nystagmus. The officer checks for vertical nystagmus by raising the object several inches above the subject's eyes. Vertical Nystagmus is performed with the same procedure for Distinct and Sustained Nystagmus at maximum deviation except the stimulus is moved upward rather than to the side. Vertical nystagmus is not one of the HGN clues nor is it a part of the SFSTs battery. However, vertical nystagmus is a good indicator of high doses of alcohol, other central nervous system (CNS) depressants or inhalants, and the consumption of the drug phencyclidine (PCP).<sup>10</sup> The officer should note the result and take precautions if vertical nystagmus is evident.

7. There have been some studies that suggest that HGN due to alcohol impairment may affect the ability of a person to see clearly. See June M. Stapleton, et al., Effects of Alcohol and Other Psychotropic Drugs on Eye Movements: Relevance to Traffic Safety, 47 Q.J. Stud. on Alcohol 426, 430 (1986).

8. US Dept. of Trans. NHTSA DWI Detection and Standardized Field Sobriety Testing (1984)

9. The Robustness of HGN Test, US-DOT; NHTSA DOT HS 810831 September 2007

10. Evaluation and Management of Psychotic Patients in the Emergency Department; Ulrich A. Reischel, MS, MD, FACP Richard D. Shih, MD, FACEP Hospital Physician Turner White Communications Inc., Wayne, PA October 1999

Traditional field sobriety tests such as the one-leg stand and walk-and-turn tests give the officer an indication of the suspect's condition. However, to some degree the results of these tests can be controlled voluntarily by the suspect. Performance can improve with practice and the test results may vary depending upon the suspect's drinking habits, physical stature, and natural coordination.<sup>11</sup> The HGN test is an involuntary movement of the eye and cannot be manipulated or controlled by a person.

Police officers routinely use this test in their quest to evaluate a person who they suspect of DUI. However, at the present time the HGN test has not been found to meet the Frye standard<sup>12</sup> in Kansas and is not presented as evidence in court.

## Case Law in Kansas

The two cases that are cited routinely when dealing either with the Frye standard or HGN is State v. Witte<sup>13</sup> and State v. Chastain.<sup>14</sup>

### The Witte Case

The prosecution's position in Witte was the test was not scientific and did not have to meet the Frye Standard. This was not a novel approach since a number of states have been successful in making that argument.<sup>15</sup> The State also argued that because other jurisdictions have recognized HGN evidence as reliable under the Frye test, the State was not required to establish the reliability of such evidence through expert testimony. The State contended that because HGN evidence has been established as reliable, an officer, who has been trained properly and who has administered correctly the test to the defendant, can testify about the defendant's test

results. The State presented no scientific expert witnesses at trial. The Kansas Supreme Court disagreed. After an extensive review of numerous articles and studies, the Kansas Supreme Court stated:

This court holds that HGN evidence requires a Frye foundation for admissibility. If the Frye foundation is established to this court's satisfaction, HGN evidence will be admitted in other cases without the need to satisfy the Frye test each time. Before this court rules on whether HGN evidence satisfies the Frye admissibility requirements, a trial court first should have an opportunity to examine, weigh, and decide disputed facts to determine whether the test is sufficiently reliable to be admissible for any purpose in Kansas.<sup>16</sup>

The State of Oregon also did a review of articles and studies and noted the Kansas Supreme Court got it wrong:<sup>17</sup>

Our review of the record in this case, the legal and medical literature on the HGN test, including various publications and research studies concerning the HGN test, and our own research led us to conclude that scientific disciplines of pharmacology, ophthalmology, and to a lesser extent optometry should be included with behavioral psychology, highway safety, neurology and criminalistics in the relevant scientific community. Each of those disciplines has been involved in the study of alcohol-induced nystagmus.

...Our research also led us to conclude that the following propositions have gained general

11. State v. Superior Court In and For Cochise County 149 Ariz. 287, 289, 718 P.2d 189, 191 (Ariz.App.,1985)

12. 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."

13. 251 Kan. 313 (1992)

14. 265 Kan. 16 (1998)

15. Whitson v. State, 314 Ark. 458, 863 S.W.2d 794, 798 (1993); People v. Ojeda, 225 Cal.App.3d 404, 275 Cal. Rptr. 472, 474 (1990); State v. Edman, 452 N.W.2d 169, 170 (Iowa 1990); State v. Murphy, 451 N.W.2d 154, 157 (Iowa 1990); State v. Garris, 603 So.2d 277, 282 (La. Ct.App.1992); State v. Nagel, 30 Ohio App.3d 80, 506 N.E.2d 285, 286 (1986); State v. Sullivan, 310 S.C. 311, 426 S.E.2d 766, 769 (1993).

16. Witte at 330.

17. State v. O'Key 321 Or. 285, 899 P.2d 663 (1995)

acceptance within the relevant scientific community.

1. HGN occurs in conjunction with alcohol consumption.
2. Its onset and distinctness are correlated to BAC.
3. In conjunction with other field sobriety tests officers can be trained to observe these phenomena sufficiently to detect alcohol impairment.

In all fairness to the Kansas Supreme Court, the Oregon Court had two more years of research to study.

In 1993, a year after the Witte decision, the American Optometric Association House of Delegates, issued a resolution concerning the HGN test as a field sobriety test. The resolution stated:

WHEREAS drivers under the influence of alcohol pose a significant threat to the public health, safety, and welfare; and

WHEREAS optometric scientists and the National Highway and Traffic Safety Administration have shown the Horizontal Gaze Nystagmus test to be a scientifically valid and reliable tool for trained police officers to use in field sobriety testing; now therefore be it

RESOLVED that the American Optometric Association acknowledges the scientific validity and reliability of the HGN test as a field sobriety test when administered by properly trained and certified police officers; and be it further

RESOLVED that the American Optometric Association urges doctors of optometry to become involved as professional consultants in the use of HGN field sobriety testing.

### The Chastain Case

In 1998 the Kansas Supreme Court was once again faced with the HGN test. In this case the State did present evidence from expert witnesses. Dr. Marcelline Burns<sup>18</sup> testified. The Supreme Court made the following observations:

1. Since the Witte opinion four other jurisdictions found the HGN test was admissible.<sup>19</sup>
2. Dr. Burns credentials were impressive.

The Supreme Court's opinion, however, reiterated Witte, stating:

State v. Witte, raises a number of questions, none of which have been answered here today. There are a number of medical conditions which this witness has testified that she is not qualified to answer regarding, and these issues that were

as a result of 450 administrations of the test. They found that they were able to distinguish above and below .10 per cent blood alcohol at an accuracy level of 80 per cent. Researchers in Finland had also been studying and using the HGN test and their results were the same as these of the Institute.

19. See People v. Buening, 229 Ill.App.3d 538, 545-46, 170 Ill.Dec. 542, 592 N.E.2d 1222 (1992); Schultz v. State, 106 Md.App. 145, 164-65, 664 A.2d 60 (1995); City of Fargo v. McLaughlin, 512 N.W.2d 700, 706 (N.D.1994); State v. O'Key, 321 Or. 285, 316, 899 P.2d 663 (1995) (applying standard from Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 [1993] and determining as part of that standard that horizontal gaze nystagmus testing is generally accepted within the relevant scientific community). However, we are not satisfied that such testing has achieved general acceptance within the relevant scientific community.

18. Cochise County at 191; Marcelline Burns has a Ph.D. from the University of California at Irvine and is a research psychologist. She is also the director of the Southern California Research Institute. The Institute is a non-profit organization incorporated by a group of researchers from UCLA, including Dr. Burns. In 1975 the United States Department of Transportation, the National Highway Safety Administration, awarded a research contract to the Southern California Research Institute to investigate and to develop the best possible field sobriety tests. Dr. Burns was the project director and conducted the research. As a result of the research the Institute recommended a three-test battery, one of which was the HGN test. Their research found a correlation between blood alcohol content and HGN and they developed the following formula: Fifty degrees minus the angle of the gaze of the onset of eye oscillation equals the BAC. This formula was validated in the field

specifically addressed in State v. Witte. And questions that were addressed make this appear to be a bootstrapped-type of testing procedure that has not been shown properly, and there are a number of other matters that need to be addressed before the scientific reliability of this testing will be allowed.

Since Chastain, which was decided in 1998, Frye still has not been met in Kansas.

## New Study

The Robustness of the Horizontal Gaze Nystagmus Test in Standardized Field Sobriety Tests<sup>20</sup> was published in late 2007. This study was sponsored by NHTSA and authored by Dr. Marcelline Burns. This study was devised on the premise that Courts when faced with variations from standard procedures in HGN administration and its validity may be affected and as a result render HGN testimony inadmissible. This is not a new concept. Kansas courts are constantly being challenged when there are “variations” in the other tests i.e. the walk and turn and one-leg stand.

## The Experiments

In this study, there were three experiments. The first experiment looked at the speed in which the stimulus was passed in front of the subject’s eyes, the elevation of the stimulus relative to the eye-level gaze, and the distance the stimulus was placed in front of the face.

The second experiment looked at the subject’s posture during the HGN test. When performing the test, the subject is to keep his feet together, hands at his side and keep his head still and follow the stimulus. Sometimes the subject is unable to stand and the test is administered with the subject sitting or lying down.

The third experiment was to access when the person has monocular vision. Monocular vision is

vision in which each eye is used separately or there is a loss of one eye. By using the eyes in this way, as opposed to binocular vision, the field of view is increased, while depth perception is limited.<sup>21</sup>

## The Results

Overall, these experiments revealed the officer did not err when participants’ BACs were 0.10 or greater and rarely erred when participants’ BACs were 0.08 regardless of variations in stimulus presentation, participant position, or when participants had monocular vision.

### *Stimulus Speed*

Specifically with respect to stimulus speed i.e. if the officer went too fast (4 seconds) or too slow (1 second) than the recommended 2 second pass--there was an increased score of no alcohol impairment when the participant was in fact impaired; a false negative error.

### *Stimulus placement-eye-level*

Varying the level at which the stimulus is placed in front of the subject--too high (4 inches above eye-level) or too low (at eye level) of the recommended 2 inches above eye-level--there was no difference in the interpretation of results at all.

### *Stimulus Placement-away from face*

When the stimulus was placed too far (20 inches) or too close (10 inches) to the recommended 12-15 inches--this did not alter the HGN signs but holding the stimulus 10 inches from the subject’s face increased the number of HGN signs the officer correctly observed.

### *Participant’s position*

With respect to the participant’s position, it again increased the score of no alcohol impairment when the participant was impaired; a false negative error.

20. For a copy of the *Robustness of the HGN test*, write to the Office of Behavioral Safety Research, NHTSA, NTI-130, 1200 New Jersey Avnue SE., Washington, DC 20590 or for an electronic copy--contact Karen Wittman, KS-TSRP

21. Coday MP, Warner MA, Jahrling KV, Rubin PA. Acquired monocular vision: functional consequences from the patient’s perspective. *Ophthal Plast Reconstr Surg*. 2002;18(1):56–63.

## Monocular Vision

There was no indication the subject's non-functioning eye affected HGN in the eye that was functional. There also was no evidence that HGN signs in monocular individuals will lead to false arrests. The study did note the subjects tested were limited.

## Conclusion of the Study

The robustness of the HGN test or more aptly put, the capacity of performing without failure under a wide range of conditions, did not compromise the validity of the HGN test. If any error was made it was to the benefit of the suspect.

## Final Thoughts

HGN has been used in determining impairment for more than 30 years. Officers believe it is the best test in the battery of tests to indicate impairment. HGN is the only test that cannot be manipulated by a suspect or be influenced by a subject's physical infirmities. None of the field sobriety tests give perfectly accurate predictions of BAC. A number

of states as well as the American Optometric Association, have recognized this test as being a viable tool when used in conjunction with the other field sobriety tests. It has been 17 years since Witte and science has come a long way. It is time for prosecutors to examine cases they

have to review for charging to determine if it is the case that will challenge the Kansas Supreme Court's decision in Witte and Chastain. Please know the State can prevail. In 1997, in a Frye hearing in Atchison county, experts were called (Jeff Collier, Dr. Marcel-line Burns, and Dr. Thomas Whittaker) and the HGN test was found to be admissible in district court. Unfortunately due to an error in the complaint, the case could not proceed. Just know--It can be done!!!

## What is Needed

The case we need must have the following:

1. Clearly the first thing is a good stop with appropriate probable cause.
2. The HGN test must be performed on video and audio must be good. This is so the testing can be reviewed by experts to determine if the officer performed the test exactly according to NHTSA guidelines. The other SFSTs must also be performed on video. (It is imperative for the officer to be cognizant of the location of the video cameras to capture everything.) Also, the officer must be credentialed with the latest SFST training.
3. There must be a BAC determination either with breath or blood i.e. suspect took the evidentiary blood or breath test (Need to make sure the officer followed all protocols of the Kansas Department of Health and Environment to ensure admissibility of the test).
4. A very detailed, descriptive, narrative DUI report.
5. We need an officer who has experience testifying and can "hold his own" on the stand...you know what I mean!

In other words, we need everything! Once you find the case, contact Jeff Collier, Kansas State Coordinator for both the Drug Recognition Expert (DRE) and SFST Programs or myself. You must submit the video and all police reports to us for review. Once the case is found and it passes muster with the experts-- money and technical assistance to present the case will be provided. So you have your assignment-- Find the case and let's move into the twenty-first century of DUI prosecution. 🏠

### County Courthouse Portraits



Sherman County Courthouse

*John D Morrison*

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# No Minor Matter: One Practitioner's Look at Juvenile Jury Trials

by Lara Blake Bors, Assistant Finney County Attorney

On June 20, 2008, many a juvenile prosecutor's world was turned upside down. On that day, the Kansas Supreme Court reversed decades of juvenile law holding that a juvenile's ability to have a jury trial was within the sole discretion of the judge. In *In re L.M.*, 286 Kan. 460, 186 P.3d 164 (2008), the Kansas Supreme Court found K.S.A. 38-2357 unconstitutional and declared that juveniles have an absolute right to a trial by jury.

How as prosecutors do we react? Without much guidance from the Supreme Court or the legislature, each individual judicial district has been forced to deal with the exigencies of this decision in an *ad hoc* manner. Some jurisdictions have decided that in addition to a jury trial right, juveniles also have a right to a preliminary hearing. Others believe the right extends only to felonies and not to misdemeanors. No matter how your particular district has decided to proceed, there are a few practical matters that we should look at to assist us in the prosecution of these matters.

- 1. How to charge?** Let's face it: a lot of juvenile crime is, well, juvenile. "He was 'maddogging' me so I kicked him in the head." "She was flirting with my boyfriend, so I keyed her car." A lot of these crimes are symptoms of larger problems that if not dealt with could lead to something much more serious. Juries may not be ready for this. When charging, we need to balance what has occurred and what we can prove with what a jury may be willing to impose upon a juvenile. It is fruitless to imagine that some jurors will not see themselves, or their own children, in the juveniles we are prosecuting.
- 2. To Certify or Not to Certify?** Given a juvenile's criminal history and the crime he or she is charged with, if over the age of 14, the presumption is in the State's favor for prosecution as an adult. K.S.A. 38-2347. When using this tool, we must, as always, carefully balance our duty to the State, the impact on our own community, and the interests of the victim with the need for

rehabilitation or punishment of the juvenile offender. In some instances, it may actually benefit a juvenile to be sentenced as an adult. An older juvenile who may be eligible to go to the JCF may get presumptive probation as an adult. While it may seem odd, depending on the juvenile's history and current charges, a juvenile may actually want to be certified.

- 3. Voir Dire.** Debate continues about how important *voir dire* is in a jury trial. Some say it does not matter; others believe the case is won or lost here. No matter on which side you fall, in juvenile jury trials, *voir dire* presents your first, and possibly best, opportunity to educate your jury. The ever-expanding number of crime dramas on television may have given your veniremen the impression that all juveniles charged with a crime are treated as adults. As with the "CSI" effect, successful juvenile prosecutors need to educate their juries that this is not the case in juvenile matters, that juveniles are simply facing adjudication rather than conviction. This belief is extremely prevalent with our veniremen. Even after the veniremen were instructed that this was a juvenile jury trial, one veniremen sitting on a Finney County juvenile trial was convinced the State was trying this juvenile as an adult and she did not believe she could sit on the jury. It will take repeated statements throughout this process to ensure that the jury understands and is convinced that this is a juvenile matter. Juvenile prosecutors need to ensure potential jurors understand that punishment will not be something they need to worry about – the sole extent of their service is taking the facts as they are and applying the law.
- 4. Jury Instructions.** Either through a formal jury instruction or a more informal introduction from the judge, introducing the fact that this is a *juvenile* jury trial is also beneficial. The jury instruction explicitly state to the jury that this is a juvenile trial and the Court

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will be dealing with him or her as a juvenile. This will counter-act the generic mindset of the jurors that “we’re treating him as an adult.”

- 5. Closing Arguments.** Your chance to get the final word. The education process that began in *voir dire* will need to continue here. Refrain from saying words like “defendant” or “conviction,” in favor of “juvenile” and “adjudication.” Jurors want to do a good job, but it is up to us to guide them. The instructions need to be addressed as thoroughly as possible. Jurors swear an oath to apply and uphold the law. Whether they like it or not, they need to take the facts and apply the instructions to the case. Defense counsel will likely choose to focus on the idea of youthful indiscretions and “kids being kids” rather than the actual facts of the case. A prosecutor’s best counter-attack will be to highlight that the instructions are the law that the juror swore to uphold them to take each piece of evidence and fit it within the context of the instructions. By so doing, you will be able to remove the sympathy vote for the juvenile and focus the jury on what occurred.

Finney County’s first juvenile jury trial involved a schoolyard fight. One juvenile, T.D., stomped on the face of the other individual. Some jurors felt that the case should never have reached the courtroom; rather it should have been dealt with by the parents or the school. Some jurors were hesitant to convict a juvenile of a felony crime. Yet, the jurors kept going back to the jury instructions and put the pieces of the evidence into the instructions as was discussed during the State’s closing arguments and finally returned a verdict of guilty of Aggravated Battery.

- 6. The Juvenile and the Victim.** The neatly pressed child that the jury sees in front of them is not the same person who committed the crime. It is critical to show the juvenile

as he or she was at the time of the crime.

For example, in Finney County’s trial, T.D., was charged with Aggravated Battery after stomping on another juvenile’s face behind a middle school. A friend of T.D.’s videotaped the fight and uploaded it to YouTube. The State was able to show the jury exactly who T.D. was, not the soft-spoken child wearing khaki pants and a button down shirt, but the tough, in your face, shoulders hunched, ready-for-a-fight juvenile offender who was prepared to end the fight in his own fashion. The jury needs to see this kind of imagery, either literally or figuratively, to neutralize the sympathy that defense counsel will be attempting to garner.

Along those same lines, we must place a human face on the victim. The victim could very well be another child who should engender equal, if not more, sympathy. The victim could be their next-door neighbor whose house was burglarized and vandalized. By humanizing the victim, sympathy for the juvenile will hopefully be muted when the jury deliberates.

Until there is more guidance from the Courts and/or the Legislature, juvenile prosecutors will continue to muddle through and avoid many of the pitfalls that exist. It could very well be that in the coming months, we will have more direction – knowing whether or not preliminary hearings will be a right; whether all trials, misdemeanor and felony, should be given jury trial rights. Until such a time, the juvenile prosecutor will provide juries with as much information as possible about the situation of juvenile offenders and the role that the jury member plays with that juvenile offender. Also, as time goes on and more of these trials are put to a jury, prosecutors should share information gleaned from their experiences to assist others throughout the state.

Ironically, we’ll never know if any of these things would work in the case of L.M. given that he faces deportation for crimes he committed as an adult. 🇺🇸



by **Kim T. Parker, Chief Deputy District Attorney,  
NDA Vice President/Associate Director**

## NDA Visits Congress, Selects New Executive Director

The 2009 Spring board meeting was held in Baltimore, Maryland in combination with the annual Capitol Conference. Several NDA board members arrived early, and made the short trip to Washington D.C. to meet with members of Congress on behalf of our nation's prosecutors. A productive four-day board meeting followed. The meeting included a visit from newly appointed United States Attorney General Eric Holder.

### Baltimore, Maryland - Prosecutor's seek Funding from Congress

As a representative of state prosecutors, I joined with members of the NDA board for an early morning meeting in the Hart Senate office building March 18. We prepared to spend the day visiting state Congressional Delegations, to advocate for funding of the National Advocacy Center (NAC) and the John R. Justice Prosecutors and Defenders Incentive Act of 2008 (JRJ). I met with receptive staff members from the offices of Senator Pat Roberts, Senator Sam Brownback, and Representative Jerry Moran. Representative Todd Tiahrt and Representative

Dennis Moore, former Johnson County District Attorney were able to meet with me. My discussions with Representative Tiahrt and Representative Moore were encouraging. Both Tiahrt and Moore have been supportive of prosecutors and their concerns in the past and indicated support for the funding requests.

As members of KCDAA, you should make an effort to contact your representatives in Congress to follow up on these important funding requests:

#### **John R. Justice Act (JRJ)**

Last August, the JRJ was enacted as part of the Higher Education Opportunity Act of 2008, to encourage individuals to enter into and remain in criminal justice careers as prosecutors and public defenders. The JRJ establishes a system of loan repayment benefits to relieve the high cost of law school debt.

Authorization of the act allowed for funding of \$25 million in the initial year. However, due to the late date of authorization, no funding has yet been provided for the JRJ. NDA communications with leadership in the Justice Department indicate that the funding for JRJ will be included in the 2010 Presidential Budget. Congressional funding support for the Act is critical.

The basic requirement for eligibility for the program is a commitment of service of three

years in a state, local, federal prosecutor, or public defender office handling criminal cases. The commitment makes the applicant eligible for as much as \$10,000 per year in debt reduction of eligible student loans. After the initial three year commitment, recipients have the ability to renew their contract for as much as three years and an additional \$10,000 per year for a total lifetime payment of \$60,000.

#### **National Advocacy Center (NAC)**

The NDA mission at the NAC is to promote community safety by equipping the nation's prosecutors with advocacy skills to effectively represent their communities and constituents in the courtroom.

State and local prosecutors handle approximately 95 percent of all criminal cases in the United States. Limited budgets and prosecutors in need of specific training are a major concern.

Since its inaugural class, the NDA has provided over 23,000 state and local prosecutors with critical legal education at no cost to the local offices. That number includes 376 prosecutors from the state of Kansas.

Appropriate funding is essential if the NAC is to function as originally intended. Accordingly the NDA is requesting \$6.5 million through the Department of Justice Office of Justice Programs Edward Byrne Justice Assistance Grants for fiscal year 2010.

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## Attorney General Eric Holder addresses NDAA Board of Directors

U. S. Attorney General Eric H. Holder Jr. stated, "We will be partners... Your problems are our problems." Holder acknowledged the increased difficulty of a prosecutor's responsibilities in a down economy and encouraged cooperation between federal, state and local offices. Holder highlighted the \$4 billion in stimulus money.

He stated, "It's our priority to get our funding out the door as soon as possible." NDAA president Joe Cassilly and other members of the executive committee met with General Holder before his address to discuss funding necessary to keep the National Advocacy center running as intended. In Holder's later comments to the full board, Holder indicated his support for NAC funding to train state and local prosecutors as well as funding for the JRJ.

## New Executive Director Selected

The executive committee submitted four individuals to the NDAA board of directors as final candidates for the open executive director position. Each candidate was provided an opportunity to present their qualifications and answer questions from the board.

Scott M. Burns was selected by an overwhelming majority vote, and his contract will be finalized by the executive board in the next several days. Scott has been the Deputy Director of State,

Local, and Tribal Affairs in the White House Office of National Drug Control Policy, for the last five years. Scott was nominated by President George Bush, and he was confirmed by the Senate. Prior to his work in D.C., Scott was the county attorney for 16 years in Cedar City, Utah. Scott has strong connections in Washington and experience as a county attorney and prosecutor.

Scott replaces Interim Executive Director Tom Sneddon. Tom deserves our gratitude for he has done a yeoman's work in providing stability for our association during difficult times.

## NDAA Financial Picture

The financial picture of the NDAA has "turned the corner and is headed up the street in the right direction" according to a report by Interim Executive Director Tom Sneddon. The NAC is scheduled to receive \$1.6 million dollars out of the stimulus package recently signed by President Obama. The stimulus dollars are in addition to the \$1 million received last year. This will allow the NAC to initiate fully funded and free training for all the courses currently on the NAC schedule for this year and into 2010.

We are currently in the black with a welcome surplus. Over the last several months, NDAA has recouped over \$225,000 of an estimated \$400,000 in federal grant funds owed to NDAA.

## National Research Council Report

Recently the National

Research Council, a division of the National Academy of Sciences, (NAS) issued a report, titled "Strengthening Forensic Science in the United States: A Path Forward." The media has mistakenly portrayed the report as being extremely critical of various forensic sciences. Actually, the report available on the NAS website makes a number of recommendations that can be supported by prosecutors and utilized to enhance the use of forensic evidence in court. NDAA has formed a special working committee, to respond to this report. The committee is working to ensure that the report of the National Research Council is accurately reflected in Congressional hearings, media conferences, and in our courtrooms. I have been appointed to the committee and I encourage you to read the full report and respond to me by e-mail: [kparker@sedgwick.gov](mailto:kparker@sedgwick.gov), with questions, concerns, or ideas.

## 2009 NDAA Summer Conference

The next NDAA Board of Directors meeting will be held in conjunction with the 2009 Summer Conference in Orlando, Florida July 11-15, at Disney's Coronado Springs Resort. Prosecutors in attendance will have an opportunity to meet board members and attend board meetings. Early reservations are recommended. Log onto [www.ndaa.org](http://www.ndaa.org) and click on the NDAA 2009 Summer Conference for more information. 

# New Days & Date for KCDA Spring 2009 Conference

Kansas Attorney General Steve Six together with the Kansas County and District Attorneys Association and the Wichita TRIAD will bring Paul Greenwood to Kansas for the Spring Conference June 18-19, 2009.

For more than a decade, Paul Greenwood, a California prosecutor, has been on the front lines of a crusade against abuse of the elderly. In June 2009, he'll be bringing that crusade back to Kansas at the KCDA Spring Conference in Wichita.

Greenwood began with the San Diego District Attorney's Office in March 1993, and began leading the Elder Abuse Prosecution Unit in January 1996. Though he can impress with trial statistics and national media appearance lists, the most impressive credential for Greenwood is his dedication to training those who will take his crusade back to their own communities. Greenwood has trained in Kansas before, forging an alliance with Wichita's TRIAD to combat physical, emotional and financial elder abuse in the Sedgwick County area.

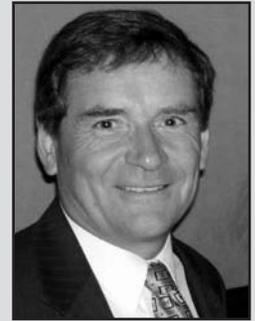
Elder abuse, like the other types of abuse Kansas prosecutors encounter on a daily basis, can present unique dynamics and may raise obstacles to investigation and prosecution in a variety of ways. First, the relationships between the parties may cause the abused victim to try to protect their tormentor, or the lack of a relationship may make the abuser impossible to identify. The victim's vulnerability may cause reluctance to report, or the victim's fear of being judged and losing freedoms may lead to silence or denial. Finally, a perceived loss of memory may make law enforcement and prosecutors loath to rely on the testimony of an elderly person in proving a crime.

None of these dynamics are completely unique to the prosecution of those who abuse the elderly, but Greenwood presents real-life examples of the challenges he has overcome in raising awareness about elder abuse, in increasing law enforcement sensitivity to the crimes, and in presenting the case to a jury.

One big change for the spring 2009 conference is that it will be held on a Thursday and Friday instead of the previous Monday and Tuesday schedule. So, mark your calendars for June 18-19, 2009 at the Hyatt Regency Hotel in Wichita, and watch the KCDA website, [www.kcdaa.org](http://www.kcdaa.org), for more information as it is available. We hope to see you there. 

## Paul Greenwood

Deputy District Attorney V  
Office of the District Attorney  
San Diego, CA



## **Education:**

Leeds University, Leeds,  
Yorkshire, England  
Bachelor of Laws, LL.B [Hons],  
1973

Council of Legal Education, Gray's Inn,  
London Barrister's Finals, 1978  
College of Law, Guildford, Surrey,  
England Law Society Finals, 1979  
Admitted to California Bar, 1991

## **Years in Practice:** 29

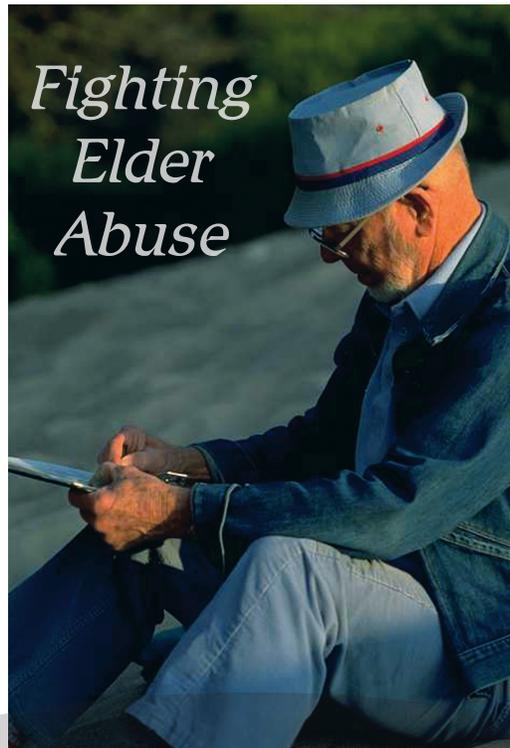
**Practice Area:** Criminal Prosecution; Head of Elder Abuse Prosecution Unit since January 1996

## **Qualifications and Experience:**

- District Attorney's Office prosecutor since March 1993
- Involved in the prosecution of over 300 felony cases of elder and dependent adult abuse
- Prosecuted nine murder cases and in seven of them obtained a first degree murder conviction
- Co-chair of California's DA Elder Abuse Committee
- Assisted with drafting Elder Abuse legislation for California Evidence Code sections 1380 and 1109
- Former member of Board of Directors for the International Network for Prevention of Elder Abuse
- San Diego DA's Elder Abuse Prosecution Unit was awarded the California State Association of Counties' Challenge Award in 1998
- Named as one of the "Lawyers of the Year" by the California Lawyer magazine in December 1999
- An instructor with the California District Attorneys Association (CDA); the National District Attorneys Association, and the American Prosecutors Institute
- Member of UCSD's Advisory Board on its Certified Trauma Specialist program to legal nurse consultants
- Awarded the 2005 "Visionary for Change" Award in October 2005 at the Dementia Care Conference, San Diego.
- Awarded the 2006 San Diego County Bar Association Public Service Attorney award
- Awarded the Professional Leadership Award in February 2007 by Elder Financial Protection Network

*For Paul Greenwood's full biography, visit [www.kcdaa.org](http://www.kcdaa.org).*

# KCDAA Spring 2009 Conference



Thursday, June 18 -  
Friday, June 19, 2009  
Hyatt Regency Hotel  
Wichita, KS

Featuring Keynote Speaker:  
**Paul Greenwood, Deputy District Attorney V**  
Office of the District Attorney,  
San Diego, CA



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