

# The Kansas Prosecutor



The official publication of the Kansas County and District Attorneys Association  
Volume VIII, No. 1, Spring 2011



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**Our mission:**

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

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### About the Cover

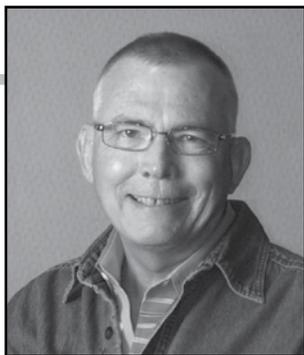
The Thomas County Courthouse is located at 300  
 N. Court in Colby, Kansas.

The courthouse, which was built in 1906, is on the  
 National Register of Historic Places. It is an ornate  
 multi-story brick building, which houses a clock  
 tower.

The courthouse was built with a \$50,000 bond issue  
 after the Commissioners "traveled" to Osborne  
 County, Kansas to view the courthouse there.  
 The courthouse is Romanesque style with lots of  
 detailing in the limestone - note the front steps and  
 sides. J.C. Holland was the architect.

Photo by John D. Morrison, Prairie  
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## President's Column

by John Wheeler, Jr., KCDA President  
Finney County Attorney

# The Legislature and The Supreme Court

As is usual, this year's legislative session has been a busy time for the KCDA Board of Directors. As most of our membership knows, our organization's yearly legislative agenda is developed and formulated by our Legislative Committee. The many legislative proposals submitted are narrowed, prioritized, and then submitted to the Board of Directors for approval. Typically, our legislative agenda is limited to no more than five proposals. However, throughout the legislative session, bills may be advanced by other organizations or by individual Senators or Representatives who may call for the support or opposition by the KCDA.

Our Executive Director Steve Kearney and Kearney & Associates staff Patrick Vogelsberg and Kari Presley are our daily point people operating on our behalf in the legislative halls. During the legislative session, the Board of Directors convenes in a weekly conference call on Thursdays at 3:30 p.m. to review the status of bills we are following, and to determine action required for the upcoming week, including the need for written testimony or personal testimony that may be required on any bills.

We thank our volunteers for their time in preparing written testimony and for their appearances for testimony before the committees. Because of the active participation of our membership, the respect of the legislators for our professionalism has wonderfully increased. We now find that legislators call upon our organization for our opinion and hopefully our blessing before advancing any legislation that may have any effect on matters which all of us prosecutors must deal on a daily basis.

I look forward to the end of this legislative session. It seems this year that bills have been scheduled for hearing upon very short notice. Often notice has been so short that we didn't truly have time to respond, even with written testimony. We are advised that matters were hastened to hearings

due to legislative closures for weather early on in the sessions as well as lobbying trips to Washington by Senate and House leadership to promote keeping the new bio science lab at Kansas State University.

Yet, I appreciate the hard work our Senators and Representatives do for our state, even though I can also appreciate this unattributed quote I read on the internet this week: "We should thank God we don't get all the government we pay for." That rings true when we consider how many proposed bills we take firm stands in opposition of and struggle to keep them from becoming law. It's fascinating to participate in the legislative process. I encourage our membership to take an interest and make your interest known to your Board of Directors. We certainly can use all the help we can get, particularly in preparing the written testimony and personal appearances to testify before committees.

Some months ago, the KCDA was requested to nominate a member to the Supreme Court for consideration by the court for appointment to the Supreme Court's Blue Ribbon Commission. The Supreme Court had sought nominations from all lawyer organizations in the state as well as from business organizations, universities, legislators, and professions around the state. It was the decision of the Board to nominate me on behalf of the KCDA. I didn't really expect to be selected to serve on the committee, but I find that I have been one of 23 persons from around the state selected to serve on the Commission.

I am sure all are aware of the Blue Ribbon Commission and its purpose. However, just in case some may not be aware, the Commission is charged by the Supreme Court with undertaking a comprehensive study of the operation of the entire Kansas court system. The first paragraph of Chief Justice Nuss's "Charge To The Blue Ribbon Commission" reads as follows:

In August of 2010, the Kansas Supreme Court decided to examine our Judicial Branch operation and court structure to evaluate whether we are being optimum stewards of our taxpayer resources. We are committed to find ways to function as efficiently as possible so that we can assure Kansans justice that is compassionate, swift, and accurate. Our examination includes the study by your Commission. Your study may include, but not be limited to, the number of court locations, services to be provided in each court location, the hours of operation, the appropriate use of technology, cost containment or reductions, and flexibility in use of human and other resources.

Presently, there is an ongoing weighted caseload study taking place in all of the courts and involving all of the judges across the state. With that case study, along with the other information acquired by the Commission during the upcoming year, it is anticipated that the Commission will be making its recommendations to the Supreme Court by late December 2011. Meanwhile, starting in April, three-member panels of the Commission will begin

holding public meetings around the state seeking public input.

I must admit that this task is a heavy responsibility. There are no prescribed or pre-determined outcomes. There is, in my opinion, a high probability that our justice system may undergo dramatic changes in its method of operation, the use of manpower, use of technology, and methods of financing. Our charge is to make both general and specific recommendations exclusively to the Supreme. Those recommendations are to include, but not be limited to, recommendations that are (1) Actionable by the Supreme Court acting on its own authority; (2) Actionable by the Supreme Court only with legislative changes; and (3) Actionable by the Supreme Court only with Constitutional changes.

I encourage each of our members to keep watch for when a panel of the Commission convenes in your area for public comment. We all are invested in the outcome of this study, and it would do us well to participate. Meanwhile, I will keep you advised as I can. I also stand ready to listen to your questions and reply to the best of my knowledge if you should desire to call me.

Hope to see you all at the upcoming Spring Conference, June 9-10 in Wichita. 🌟

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# Legislator's Column

by State Representative Lance Kinzer

## 2011 Legislation of Interest to County and District Attorneys

It is my privilege to once again serve as Chair of the House Judiciary Committee. During the 2011 Legislative Session, the Judiciary Committee has heard a number of bills relevant to county and district attorneys in Kansas.

Prosecutors may be interested in several provisions of House Bill 2372, which amends Kansas immigration laws. In addition to requiring all government agencies and contractors to participate in the federal E-Verify program, the bill amends K.S.A. 22-2802 to provide that individuals who are charged with crimes and deemed to be noncitizens of the United States shall have their immigration status verified with the federal government. The statute creates a rebuttable presumption that any defendant verified by the federal government to be an unlawful alien is a flight risk. HB 2372 also makes it a class A misdemeanor to intentionally conceal, harbor, or shield an illegal alien from detection, with 10 or more aliens constituting a severity level 8, person felony.

The Committee heard and the House has subsequently passed legislation that would allow prosecutors additional use of grand juries for severe crimes. House Bill 2031 would amend K.S.A. 22-3001 to allow the Attorney General and county attorneys to petition the chief judge of the district court (or chief judge's designee) to order a grand jury to investigate alleged violations of off-grid felonies, severity level 1-5 felonies, and drug severity level 1 and 2 felonies. Under the proposed law, the judge considers the petition and then, if it satisfies the requirements, orders a grand jury to be summoned.

Senate Bill 135 would create the Kansas Racketeer Influenced and Corrupt Organization Act (RICO) in order to combat organized crime within the State. The RICO act would make it a state crime to intentionally receive proceeds from a pattern of racketeering activity, acquire or possess any interest or control in any racketeering activity, or be employed by an enterprise engaged in criminal racketeering. These crimes, or conspiracy to commit them, would be severity level 2, person felonies. The bill also gives the Attorney General

and county or district attorneys the power to administer oaths or affirmations, subpoena witnesses or material, and collect evidence relating to violations of the RICO act, as well as request *ex parte* orders to block disclosure of these subpoenas.

House Bill 2346 would create the classification of "aggravated sex offender" and impose additional penalties and regulations on sex offenders. Aggravated sex offenders is defined to include individuals convicted of rape, indecent liberties with a child, criminal sodomy, indecent solicitation of a child, sexual battery, aggravated incest, and others. The new classification would require aggravated sex offenders to notify the law enforcement agency where they last registered as a sex offender and the KBI within 24 hours of any change of address. It would also prohibit them from residing within 2,000 feet or coming within 500 feet of any school or daycare facility.

The House is also considering changes to Kansas laws regarding racial profiling. House Bill 2163 would amend K.S.A. 22-4602 to prohibit the unreasonable use of race in initiating a law enforcement action. Previously, the statute prohibited the use of race as the sole factor in the determination. The term "racial profiling" would be replaced by "biased policing." The act also establishes a community advisory board to review data and advise local law enforcement on how to prevent biased policing.

The Judiciary Committee is extremely interested in feedback from the county and district attorneys throughout the State. We welcome your input on current legislation pending before the Committee. We also encourage you to submit suggestions on future legislation as well as ways the Legislature can assist the administration of justice in Kansas. Our criminal justice system requires substantial communication and cooperation between the branches of government to ensure that it is fair, efficient, and effective. *If you have any questions, concerns or suggestions, please feel free to contact me at 785-296-7692 or lance.kinzer@house.ks.gov.* 

# Guest Column

by Kansas Attorney General Derek Schmidt

## We Will Continue to Build On Our Partnership with KCDAA

After many years of working with prosecutors as a member of the Kansas Senate, I look forward to continuing and building on that working relationship in my new role as your 44<sup>th</sup> Attorney General for the state of Kansas.

I take seriously the criminal justice and public safety duties of the attorney general. As you know, our most frequent interaction with you and other county and district attorneys is through the work of our Criminal Litigation Division. We intend to be good partners, working with you as needed in pursuit of justice and public safety in our state. As I said many times while campaigning for this office, my approach to the work of our Criminal Litigation Division is to hire good people, give them direction and support, and let them do their jobs. To that end, Vic Braden has agreed to continue serving as Deputy Attorney General in charge of Criminal Litigation. We also have worked to expand our team of criminal prosecutors who work with you on cases within your jurisdictions.

To build upon our partnership with you, we also are working to broaden and expand the range of input from local prosecutors on the Sexually Violent Predator review committee. Thank you to all who are assisting in this effort.

I am dedicated to working closely with KCDAA on legislative

priorities and public safety. We want to make sure we are speaking with a common voice when asking the state's policymakers to give us the tools and resources needed to do our jobs. In years to come, I hope to work closely with KCDAA and other public safety organizations before the legislative session begins to develop a common agenda for which we all can advocate.

In this tight budget year, our office proposed several changes in state law aimed at improving the set of legal tools available to prosecutors and law enforcement agencies in protecting kids from sex offenders. We are backing the overhaul of the Kansas Offender Registry to bring it into compliance with the federal Adam Walsh Act requirements (H.B. 2322), proposing to apply the forfeiture act to crimes against children and working with KCDAA on your other proposed expansions of the act (S.B. 74), suggesting amendments to the hearsay rules in civil commitment proceedings in an effort to reduce the number of times a child victim must take the stand to testify (H.B. 2196), and proposing a ban on reproduction of pornographic images of children during criminal discovery (S.B. 73).

The attorney general also must be a leader advocating for the needs of the Kansas Bureau of Investigation, which provides critical services that support

criminal investigations throughout our state. By law, the KBI is and always has been structured as a division of the Office of the Attorney General. I intend to be active in fulfilling that leadership responsibility, and I welcome your thoughts and suggestions on needs and priorities.

Thank you for all your service on behalf of our state. Working together over the next four years, as part of the same team, we can make our great state an even safer place for Kansans to live, work, and raise a family. 🇺🇸



### County Courthouse Portraits



Geary County Courthouse

John D Morrison

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## Executive Director's Column

by Steve Kearney, KCDAA Executive Director & Patrick Vogelsberg, Associate

# 2011 Legislative Session Update

On Friday, April 1, the Legislature gaveled out for first adjournment, and the legislators will be on recess until April 27. While the last days of the regular session were consumed by the budget bills, the Judiciary conference committees sporadically met and sparred over what bills to include and exclude in conference committee reports. The Judiciary conference committees will continue to meet when the legislators return in late April from this hiatus.

Below is a quick look at the KCDAA legislative agenda as well as other bills that spurred interest from the Board on your behalf. As a reminder, HB 2038, 2057, 2151, and SB 63 are KCDAA legislative agenda items.

### HB 2038

HB 2038 amended the 2010 Sessions Laws ch. 136, sec. 298, concerning hearings to consider a departure sentence in felony cases. (2010 Session Laws ch. 136 recodifies the Kansas Criminal Code, and will go into effect July 1, 2011.) The bill makes clear that when a court determines it is in the interest of justice to impose a departure sentence, which requires a separate departure sentence proceeding, the proceeding must take place in front of a jury, unless the jury is waived.

HB 2038 was introduced to bring these sentencing laws into compliance with a recent Kansas Supreme Court decision, *State v. Horn*, holding that waiver of a jury trial does not waive a defendant's right to a jury for an upward durational departure sentencing proceeding.

HB 2038 was signed by the Governor on March 28, 2011.

### HB 2057

HB 2057 would amend KSA 22-3437 by adding the Johnson County Sheriff's Laboratory and the Sedgwick County Regional Forensic Science Center to the list of institutions whose reports and

certificates concerning forensic examination are considered admissible in evidence in any hearing or trial.

HB 2038 was signed by the Governor on March 25, 2011.

### HB 2151

HB 2151 is a bill that amends the current laws on breach of privacy and blackmail. Section 171 of Chapter 136 of the 2010 Session Laws of Kansas was amended to include *disseminating or permitting the dissemination of any videotape, photograph, film or image obtained in violation of subsection (a) (6) and increased penalties*. The Senate Committee of the Whole further amended the definition of "private place" by striking from the definition a place to which the public has lawful access. This amendment was brought on the Senate floor to make it clear in statute that individuals can still have an expectation of privacy in a place in which the public has lawful access, i.e. public changing rooms, public bathrooms, private party rooms in restaurants, etc. HB 2151 further amended the blackmail statute by including trying to gain anything of value by threatening to disseminate information in violation of *subsection (a)(6) of section 171 of chapter 136 of the 2010 Session Laws of Kansas*.

HB 2151 went to conference committee and the House and Senate conferees came to an agreement on a conference committee report, which has passed the Senate and is awaiting action on the floor of the House.

### SB 63 (language now in conference committee report on SB 55)

SB 63 is an example of the alternative path a bill can take to become law. As introduced, SB 63 would have amended the crime of sexual exploitation of a child to include language where the offender believed the child to be under 18 years of age. A similar "belief" provision is contained

in the current electronic solicitation law. The goal of this bill was to align the exploitation of a child and electronic solicitation laws. SB 63 passed out of the Senate with no amendments. In the House Corrections and Juvenile Justice committee, SB 6 was included. SB 6, as amended by the Senate, was a repeal of the search incident to arrest statute, K.S.A. 22-2501. SB 63, now House Substitute for Senate Bill 63, passed the House with its original language and the language from former SB 6 (though the search incident to arrest statute was amended to not repeal by the House Committee; in conference, the House agreed to the Senate's position). H. Sub. for SB 63 made its way into the Senate Judiciary/House Corrections and Juvenile Justice Committee where its language was gutted and put into SB 55. SB 55 has become a sort of criminal law omnibus bill, which includes all or parts of six different bills. This was done to create "shells" for other bills that are "conferencable," meaning that the issue has passed at least one chamber and is eligible for a conference committee report.

The conference committee report on SB 55 has been left open until the conferees return at the end of April. Once the report is signed by the conferees, it was first run on the House floor and then run in the chamber of origin; the Senate.

### **SB 6 and SB 7 – DUI bills**

SB 6 and SB 7 are both DUI bills. SB 7 is the trimmed down version of the DUI commission product. SB 7's fiscal note caused great hesitation and required amendments to decrease its fiscal effects to become viable. SB 6 (formerly a search incident to arrest bill) was gutted in the House Corrections Committee to include the House's position on DUI. SB 7 is yet to be passed by the Senate, but SB 6 is in conference committee. Negotiations on the matter are sure to be interesting.

### **HB 2067 – Voter Identification**

HB 2067 is the highly publicized voter identification bill from Secretary of State Kris Kobach and marks his efforts to crack down on "voter fraud" in Kansas. In the bill's original form, independent prosecutorial authority was given to the Secretary of State, Attorney General, and county and district attorneys. The KCDAAs strongly opposed and still opposes any efforts to usurp the authority

of the local, independent county or district attorney. The KCDAAs requested that the prosecutorial power be left to the county or district attorneys and the Senate Ethics and Elections committee amended the bill to strip the language. Further attempts on the Senate floor to give the Attorney General independent prosecutorial power narrowly failed. The same day, the House passed H. Sub. for S.B. 129 with the original version of HB 2067, including the prosecutorial piece. However, instead of the matter going to conference for negotiations, the House passed the amended HB 2067 on a motion to concur. Therefore, as it stands, HB 2067 is going to the Governor with neither the Secretary of State nor the Attorney General having independent prosecutorial power in voter fraud cases. There have been rumors that another effort may be made to give either the Secretary of State or Attorney General this power in a trailer bill. Regardless, the KCDAAs will be watchful and prepared to defeat any such efforts.

### **SB 23 – In Re L.M.**

House Sub for SB 23 would establish a statutory right to jury trial for juvenile offenders and provide a jury trial procedure within the revised Kansas Juvenile Justice Code. The procedural provisions would be borrowed from the statutes governing adult jury trials, with some modifications. The principal differences from the adult jury trial provisions would be: 1) A juvenile would have to request a jury trial in every case, within 30 days from the entry of a plea of not guilty. In adult felony cases, trial by jury is automatic unless waived. 2) A juvenile would not have the right to personally participate in voir dire. Adult defendants have this right.

SB 23 was recommended by the Judicial Council. The KCDAAs made it known in conference committee that the Association preferred to have the juvenile make a knowing, voluntary, intelligent waiver on the record in felony cases rather than the juvenile making a written demand for a jury trial. In the end, the conference committee decided to go with the Judicial Council's recommendation.

The above matters are a small smattering of the bills that have made it to this stage in the legislative process. As always, we will endeavor to keep you informed. Please do not hesitate to contact us with your thoughts or concerns. Your input is highly valued in the legislative process. 🌟

# KCDAA Member Highlights: Megan Fisher, ADA, Johnson County & Amy McGowan, Chief ADA, Douglas County

by Mary Napier, Editor, Kansas Prosecutor

Megan Fisher, assistant district attorney, Johnson County and Amy McGowan, chief assistant district attorney, Douglas County are being highlighted in this issue because 1) they are KCDAA members and 2) they have something in common - they have both prosecuted in a state other than Kansas. As we find out about these current Kansas prosecutors, we find several other similarities as well, including: they both grew up in Kansas, both graduated from Kansas high schools, both prosecuted out of state, and now both are back in Kansas prosecuting. Let's learn more about these prosecutors, their experiences in other states, and what brought them back to Kansas.

## Megan Fisher

Megan Fisher grew up in Junction City, Kan., but moved to Johnson County and graduated from Blue Valley High School. After receiving a Bachelor's Degree from KU, she graduated from the University of Denver College of Law. During law school, Megan interned with the Douglas County District Attorney's Office in Castle Rock, CO. However, once she graduated, her husband's job took them to Wisconsin where she went to work as an Assistant District Attorney in the Milwaukee District Attorney's Office. Just over a year later, her husband was transferred to Charlotte, NC, so Megan took the NC bar and started in private practice. She soon missed prosecution, so she took a job at the Rowan County District Attorney's Office in Salisbury, NC. After a year in that grant-funded position, Megan moved to the Mecklenberg County DA's Office. She worked there until her husband was transferred to the Kansas City area in November 2008. She joined the Johnson County DA's Office in January 2009 where she handles

domestic violence cases.

Megan described some differences and similarities between Colorado, Wisconsin, North Carolina, and Kansas. "Colorado's statutes are very similar to Kansas'." However, according to Megan, Wisconsin had some unusual criminal laws. "The first time DUI (called OWI up there) is a municipal ticket with a fine only," said Megan. "However, the second time was usually around 45-90 days in jail and then probation depending on seriousness of offense (high BAC, accident, etc.). The third DUI was around 8-9 months in jail and the fourth was around 18 months or so."

The minor differences between Colorado and Wisconsin compared to Kansas pale in comparison to criminal prosecution in North Carolina, though. Megan's first example of a major difference between North Carolina and Kansas is an assault on a female. In North Carolina, "assault on a female is an A1 misdemeanor (the highest misdemeanor you can get), but an assault by a female against a male or assault between two males was only a level 2 misdemeanor," described Megan. "North Carolina also has structured sentencing for misdemeanors, so depending on your criminal history level, you would

be sentenced to anywhere from 15 days to 150 days. 150 days was the maximum jail sentence you could receive, even for an A1 misdemeanor."

Differences in the types of charges aside, however, Megan said, "The biggest difference in North Carolina law and laws anywhere else I've prosecuted is that North Carolina still has a system of private warrants," said Megan. "Private warrants are exactly what they sound like. If you feel someone has committed a crime against you, then you go down to the magistrate's office (open 24 hours, and they are not



*Megan Fisher*

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typically lawyers), and you swear to an affidavit. The magistrate will find probable cause and an arrest warrant goes out for the defendant. A criminal prosecution ensues with prosecutors prosecuting cases where police had little to no involvement. As you can imagine, this creates a whole host of interesting scenarios... The private warrant cases were heard once a week in court dubbed 'Fight Court'. No one wanted to be assigned to Fight Court, but I never minded because I came home with the best stories."

One such story came from a case between two neighbors – an artist and a collector. The collector commissioned the artist to make a cement oriental fighting chicken for \$100. (Cement was the appropriate artistic medium for fighting chickens, explained Megan.) In a side agreement, the collector had some chickens but no coop. The artist had a coop, but no chickens. So, the artist agreed to house the chickens, but would get to keep some of the eggs. After about a month or two, the cement fighting chicken did not materialize and bickering ensued. The artist claimed he wasn't paid, and the collector said he was. So, the collector staged a midnight raid to get his chickens back. After the successful raid, the artist and his sons caught the collector. Then a fight broke out, and the women even got involved the next day. As a result, four private warrants were taken out. It was definitely an interesting case/story for Megan and the judge.

As for being a prosecutor, Megan likes having the opportunity to help victims and to do her best to ensure justice is served. On the flip side, it is sometimes difficult to deal with the tragedies of others on a daily basis. In addition to prosecuting, Megan teaches bar review for PMBR, so she travels twice a year and teaches a practice MBE to students before they take the bar exam. After a hard day, Megan's first choice as a way to relax is reading a good book.

## Amy McGowan

Amy grew up in Roeland

Park, Kan., and graduated from Shawnee Mission North High School. After graduating from KU in 1981, Amy took a year off and worked. She applied to law school because her parents and friends encouraged her to do it, but she didn't really have an interest in it. As she was busy planning a year-long trip to Australia, she got her law school acceptance letter. She immediately started at the KU School of Law that summer and after her first criminal law class, she was captivated by it. She graduated with her JD in 1984. Her first job after graduating was at the Shawnee County DA's Office. She handled mental illness commitments and CINCs, eventually dropping MIs and adding juvenile offenders.

After three years in Shawnee County, Amy headed to the Jackson County Prosecutor's Office in Kansas City, MO. Amy described the unique office structure as cases were charged and bound over for trial by a separate unit and then assigned to attorneys on trial teams to handle cases through to disposition. When she started in 1988, the office only prosecuted felony cases. During her time at Jackson County she worked in the drug unit, tried out sales and possession cases, then expanded to robbery, assault, and murder. Then in 1993, she became the team leader of the sex crimes trial team. In that role, she had supervisory duties, her own caseload, and was the designated child homicide prosecutor. In 1997, she did a six-month rotation with the Kansas City Missouri Police Department where she consulted on

investigations and reviewed and filed all cases from robbery and homicide units. After that she was assigned to the major felony unit and stayed there until 2005.

After many years of dealing with violent crimes in Kansas City, Amy was ready for a change. She was hired by Charles Branson in 2005 to work in the Douglas County DA's Office. She had good memories of Lawrence from college, so she was excited to come back to Kansas.

Even though Jackson County is just across the state line in Missouri, there are still



Amy McGowan

differences and similarities between prosecuting in Missouri and Kansas. Amy tells us that one of the most significant differences was that Missouri had no immunity statute. "If a witness to a murder chose to claim the Fifth Amendment, there was no inquiry regarding incrimination and no way to force them to testify," said Amy. "I had to dismiss more than one murder for this reason, and it was a harsh pill to swallow. The prosecutor rallied a number of us to descend on the State Capitol and work with legislators to pass an immunity protection statute, which eventually occurred."

Other differences were the ability to admit hearsay statements of a witness once they had testified, and there was no crime of battery in Missouri. "There is no such blanket admission for hearsay in Missouri. I think it provides a certain leeway in presenting your evidence," said Amy. "Battery is referred to as assaults and aggravated assaults – that used to drive me crazy. Also, in Missouri a prosecutor can actually argue their case in closing."

One thing that Amy liked about Missouri was the benefit of a grand jury. "There were very few

times I had to take a case to preliminary hearing," explained Amy. "Although the flip side was defendants have a right to take depositions of witnesses. The most difficult situation was when a defendant would exercise his right to be present at the deposition of a child sex crime victim."

Amy thinks "the heart of prosecution is very much the same no matter where you are," so the similarities between states focuses on holding people accountable and ensuring the safety of the people in your community.

Amy likes being a prosecutor because of the people she comes in contact with while doing her job. "The pain, loss, and trauma that brings people through our door provides a unique perspective – to witness the strength it takes to heal and an individual's capacity to forgive" is what Amy likes most about her career. What Amy likes least is waiting for the words that follow "We the jury find the defendant..."

"Prosecution has kept me interested and hooked for more than 25 years, so I guess I was lucky to find my way to it, even if it was a circuitous path," explained Amy. 📍

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Topeka, Kansas 66604  
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Feel free to submit digital photos with your announcement!

**Upcoming Deadlines:**  
**Summer 2011: July 15**  
**Fall 2011: October 28**

## Birth

Ryan Walkiewicz, Wyandotte County Assistant District Attorney, and his wife Aimee welcomed their first child, Henry Glen Richardson Walkiewicz, born December 22, 2010. Congratulations Ryan and Aimee.



## Congratulations

Congratulations to Jennifer Tatum, Wyandotte County Assistant District Attorney, who was named the Wyandotte County Prosecutor Of The Year 2010. The award was based on Jennifer's performance throughout the year.

Wyandotte County Assistant District Attorneys Casey Meyer and Mike Nichols were married February 19, 2011 at the Merriam Christian Church in Merriam, KS.

Senior Assistant District Attorney Robbin Wasson, who worked at the Wyandotte County District Attorney's office from 11/2000-8/2004 and again from 3/2007-until February 2011, has left to be a stay at home Mom. We wish her the best of luck!



## Office Moves

Gary L. Foiles has left the Harvey County Attorney's Office and joined the McPherson County Attorney's Office as Deputy County Attorney. He is also now part of the private law firm of Cornerstone Law, LLC in Newton. This summer, for the second year in a row, he will also be part of the faculty of Washburn Law School's one-week Intensive Trial Advocacy Program (ITAP).

Angela Wilson left the Kansas Attorney General's Office in January 2011 and is now serving as Senior Assistant District Attorney in the Eighteenth Judicial District (Sedgwick County). Angela served 10 years in Douglas County and three years as a Deputy Attorney General.



## New Faces

### *Reno County District Attorney's Office*

Andrew Davidson was hired as an Assistant District Attorney in the Reno County District Attorney's Office. Davidson received his undergraduate degree from KU and his law degree from Washburn.

### *Kansas Attorney General's Office*

There have been some new hires in the Criminal Litigation Division at the Attorney General's Office. Nicole Romine is a new Assistant Attorney General. She comes from the Douglas County DA's office. Kristiane Gray is also a new Assistant Attorney General. She comes from the Wyandotte County DA's office.

Also, Lindy Russell is now the Victim Coordinator. She returned to the AG's office after earning her master's degree.

### *Wyandotte County District Attorney's office*

Devon Doyle joined the Wyandotte County District Attorney's Office in February 2011. Devon graduated from the University of Kansas School of Law in May 2008. Devon is a former Topeka Municipal Court Prosecutor. Devon will be handling CINC cases.

Christopher Mann joined the Wyandotte County District Attorney's Office in March 2011. Chris graduated from Washburn School of Law in May 2010. Before going to law school, Chris was a Lawrence police officer for seven years. Chris will be handling adult criminal cases.



## Prosecutor Milestone

Congratulations to John J. Bryant, Deputy County Attorney, Leavenworth County Attorney's Office, for celebrating 10 years as a prosecutor in March! 



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# Charging Crimes Under the New Kansas Criminal Code

by Steven J. Obermeier, KCDA Appellate Division  
Johnson County District Attorney's Office

The new Kansas Criminal Code goes into effect July 1, 2011.<sup>1</sup> This new code has no application to crimes committed on or before June 30, 2011.<sup>2</sup> This raises issues for prosecutors who charge crimes that occur on or about July 1. It is especially problematic in charging continuing offenses and child sexual abuse cases.

## Citation of the New Kansas Criminal Code in a Complaint, Indictment or Information

Unfortunately, while the new criminal code goes into effect in July 2011, it will not make an appearance in the supplements to the Kansas Statutes Annotated until January 2012, when the 2011 supplements are published. The Revisor's Office recommends that crimes committed on or after July 1, 2011 but prior to the publication of the 2011 K.S.A. Supplements should be cited: "section \_\_ of chapter 136 of the 2010 Session Laws of Kansas, to be codified at K.S.A. 2011 Supp. 21-5101."<sup>3</sup> There are 308 sections in chapter 136 and the crime charged will range between section 33 (attempt crimes) and section 240 (knowingly employing an alien illegally). To help locate the current crime in Chapter 136 of the 2010 Session Laws and its prior location in the Kansas Statutes,

the Revisor's Office has prepared three helpful spreadsheets. This includes a spreadsheet that has the statutes in numeric order under the new criminal code and the statutory reference to the prior law.<sup>4</sup> If the 2011 Supplements are issued while the prosecution is pending, then the charging document can still be amended under K.S.A. 22-3201(e).<sup>5</sup>

The good news is the Kansas Code of Criminal Procedure (KCCP)<sup>6</sup> was not revamped. Under the KCCP, a complaint, information or indictment that is drawn in the language of the statute "shall be deemed sufficient."<sup>7</sup> This charging document must state for each count the official or customary citation of the statute that the defendant is alleged to have violated.<sup>8</sup>

However, an error in the citation or its omission "shall be not ground for dismissal of the complaint, information or indictment or for reversal of a conviction if the error or omission did not prejudice the defendant."<sup>9</sup> This has occurred in Kansas, for example, in a reported forgery case<sup>10</sup> and a sexual exploitation of a child case.<sup>11</sup> Therefore, if the elements of the crime and the accompanying penalty remain the same under the new criminal code and the former criminal code, it should matter little whether the official citation of the statute is incorrect. The defendant, who may seek a bill of particulars<sup>12</sup> under K.S.A. 22-3210<sup>13</sup> in this scenario,

## Footnotes

1. L. 2010, ch. 136, § 308, eff. July 1, 2011
2. Section 3 of chapter 136 of the 2010 Session Laws of Kansas, to be codified at K.S.A. 2011 Supp. 21-5103.
3. Memorandum from the Office of Revisor of Statutes dated September 20, 2010, accessible at [http://www.ksrevisor.org/docs/2011/Memo2011CriminalCode\\_f.pdf](http://www.ksrevisor.org/docs/2011/Memo2011CriminalCode_f.pdf)
4. *Id.*
5. The court may permit a complaint or information to be amended at any time before verdict or finding if no additional or different crime is charged and if substantial rights of the defendant are not prejudiced.
6. K.S.A. 22-2101 et seq.
7. K.S.A. 22-3201(b).
8. *Id.*
9. K.S.A. 22-3201(b).
10. *State v. Perry*, 16 Kan.App.2d 150, 154, 823 P.2d 804 (1991)(the complaint charging forgery by delivery erroneously cited to subsection (c) of 21-3710 instead of (b). Perry was aware of the State's charge, and, absent a showing of prejudice to Perry, an error in the citation is not reversible error).
11. *State v. Liebau*, 31 Kan.App.2d 501, 503-504, 67 P.3d 156 (2003)(although the amended information identified K.S.A. 21-3516(a)(1) as the statute that Liebau violated, the language of the amended information charged him with a violation of K.S.A. 21-3516(a)(2). Liebau's alleged technical error did not require the reversal of his conviction.)
12. The purpose of a bill of particulars is to inform the defendant of the nature of the charges and the evidence against him or her, enabling the defendant to prepare a defense and to prevent further prosecution for the same offense. *State v. Bischoff*, 281 Kan. 195, 207, 131 P.3d 531 (2006).

will have difficulty demonstrating prejudice.

## The Date of the Offense Controls the Criminal Statute that Applies

The Ex Post Facto Clause<sup>14</sup> bars legislative enactments which, by retroactive operation, increase the punishment for a crime after its commission.<sup>15</sup> The new Kansas Criminal Code restates what is required under the Ex Post Facto Clause:<sup>16</sup> “Prosecutions for prior crimes shall be governed, prosecuted, and punished under the laws existing at the time such crimes were committed.”<sup>17</sup> Prosecutors should carefully discern whether the crime to be charged occurred before or after July 1. First, mischarging a crime under the new code could constitute an ex post facto violation if an element of the criminal conduct is altered or if the penalty is increased. If there is a difference in the penalty between a repealed statute and a new statute with the same elements but the date of the offense cannot be determined with certainty, then the accused will

be sentenced under the lesser penalty provision.<sup>18</sup> Second, if there is a difference in elements between the former crime and the new crime, then alternative charging should be employed.<sup>19</sup>

The enactment of the new criminal code may be troublesome in child sex abuse prosecutions. Although a child may have diminished capacity to understand dates and times, it is reasonable that a “child will be well aware of, and remember, sexual acts inflicted upon [his or] her person.”<sup>20</sup> As a general rule, the State need not prove the precise time a crime occurred unless it is an essential element of the offense.<sup>21</sup> Alternative charging should be employed, for example, in child sexual abuse cases where the elements or penalties are different under the new criminal code.

## Continuing Offenses Are Terminated When the Criminal Statute is Repealed

The new code helps address the issue of charging

13. “When a complaint, information or indictment charges a crime but fails to specify the particulars of the crime sufficiently to enable the defendant to prepare a defense the court may, on written motion of the defendant, require the prosecuting attorney to furnish the defendant with a bill of particulars. At the trial the state’s evidence shall be confined to the particulars of the bill.” K.S.A. 22-3210(f).
14. The United States Constitution provides: “No State shall ... pass any ... ex post facto Law.” U.S. Const. Art. I, § 10, cl. 1; see also U.S. Const. Art. I, § 9, cl. 3 (prohibiting Congress from passing ex post facto laws).
15. *Collins v. Youngblood*, 497 U.S. 37, 42, 110 S.Ct. 2715, 111 L.Ed.2d 30 (1990) (The Ex Post Facto Clause forbids resurrection of a time-barred prosecution). See *Stogner v. California*, 539 U.S. 607, 123 S.Ct. 2446, 2461, 156 L.Ed.2d 544 (2003) (“We conclude that a law enacted after expiration of a previously applicable limitations period violates the ex post facto clause when it is applied to revive a previously time-barred prosecution.”).
16. In order for a law to be considered ex post facto, two elements must be present: (1) The law must be retrospective, applying to events occurring before its enactment; and (2) it must alter the definition of criminal conduct or increase the penalty by which a crime is punishable. Stated another way, the law must be retrospective, applying to events occurring before its enactment, and it must disadvantage the offender affected by it. The critical question in evaluating an ex post facto claim is whether the law changes the legal consequences of acts completed before its effective date. *State v. Chamberlain*, 280 Kan. 241, Syl. ¶ 5, 120 P.3d 319 (2005)(Amendment to DUI statute that eliminated five-year decay period for consideration of prior DUI convictions or diversion agreements for purposes of enhancing subsequent DUI offenses did not violate prohibition against ex post facto laws).
17. Section 3 of chapter 136 of the 2010 Session Laws of Kansas, to be codified at K.S.A. 2011 Supp. 21-5103.
18. Where identical offenses are involved, the question is not truly a matter of one being a lesser included offense of the other. Each has identical elements and the decision as to which penalty to seek cannot be a matter of prosecutorial whimsy in charging. As to identical offenses, a defendant can only be sentenced under the lesser penalty. *State v. Campbell*, 279 Kan. 1, Syl. ¶1, 106 P.3d 1129 (2005).
19. Where there is a question in the mind of the prosecutor as to what the evidence will disclose at trial, the correct procedure is to charge the defendant in the alternative under those crimes which may possibly be established by the evidence. This may properly be done under Kansas law by charging several counts in the information to provide for every possible contingency in the evidence. *State v. Saylor*, 228 Kan. 498, 503-04, 618 P.2d 1166 (1980)(subsections to K.S.A. 21-3701 charged).
20. *State v. Myatt*, 237 Kan. 17, 27, 697 P.2d 836 (1985).
21. *State v. Myatt*, 237 Kan. at 28.

continuing offenses. If any of the essential elements of a crime occurred before July 1, 2011, then the crime is deemed committed prior to the effective date of the new code.<sup>22</sup> “An offense is committed either when every element occurs, or, if a legislative purpose to prohibit a continuing offense plainly appears, at the time when the course of conduct or the defendant’s complicity therein is terminated.”<sup>23</sup> Fortunately, there are few continuing offenses in Kansas. Welfare fraud, for example, is a continuing offense.<sup>24</sup> But neither theft nor conspiracy to commit theft was intended by the legislature to be a continuing offense.<sup>25</sup>

A continuing offense that began before July 1 will terminate when the former statute is repealed. A second continuing offense could be charged after the new criminal code goes into effect July 1. This was done, for example, under similar circumstances in Tennessee in *State v. Young*.<sup>26</sup> The State had charged Young with two continuing offenses: one that terminated when the former false pretenses statute was repealed; and another that commenced when the new theft statute went into effect on November 1, 1989.<sup>27</sup> Young argued the crime, which started in 1988 and ended in 1991, was a single continuing offense and the two counts were multiplicitous. The trial court

agreed and ordered the State to charge Young with only one continuous offense. The State appealed the order to amend the indictment to one count.<sup>28</sup>

In reversing, the Tennessee Court of Appeals observed the fact that the statutes changed on November 1, 1989 altered its analysis. First, the ex post facto laws prohibited charging Young under the new theft law for criminal acts that occurred before November 1.<sup>29</sup> The court ruled that because of the change in the law, Young violated two statutory provisions. It stated: “even though the alleged acts of the Defendant meet the definition of a continuing crime, the only way to punish the conduct occurring both before and after the date of the statutory revisions enacted on November 1, 1989, is to charge the Defendant with both crimes. Any other result would in effect allow part of the Defendant’s criminal conduct to go unpunished and would be contrary to the clear intent of the legislature.”<sup>30</sup>

While new charging issues will invariably arise with the enactment of the new criminal code, prosecutors who accurately determine the date of the offense and allege the elements of the applicable statute in effect at the time of the commission of the crime will reduce legal challenges to the sufficiency of the complaint, indictment, or information. Ⓜ

22. Section 3 of chapter 136 of the 2010 Session Laws of Kansas, to be codified at K.S.A. 2011 Supp. 21-5103; L. 2010, ch. 136, § 3, eff. July 1, 2011.  
 23. K.S.A. 21-3106(6); Section 7 of chapter 136 of the 2010 Session Laws of Kansas, to be codified at K.S.A. 2011 Supp. 21-5107.  
 24. *State v. Jones*, 13 Kan.App.2d 520, Syl. ¶2, 775 P.2d 183 (1989).  
 25. *State v. Palmer*, 248 Kan. 681, Syl. ¶ 2, 810 P.2d 734 (1991).  
 26. *State v. Young*, 904 S.W.2d 603 (Tenn.App. 1995).

27. 904 S.W.2d at 604-05.  
 28. *Id.*  
 29. “Therefore, the Defendant could not be charged under the theft statute now in effect for crimes that occurred prior to November 1, 1989.” 904 S.W.2d at 607. See also *People v. Isaacs*, 37 Ill.2d 205, 226 N.E.2d 38 (Ill. 1967)(Where a statute defining an offense is repealed, conduct prohibited thereby no longer constitutes an offense).  
 30. 904 S.W.2d at 607.



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**Prosecutors who orally argue appeals in the Court of Appeals and in the Supreme Court should read the following note given out at attorney orientation prior to oral arguments in March. It concerns Supreme Court Rule 6.09.**

•-----•  
Please direct this practice note to the attorney who will be  
arguing the case.  
•-----•

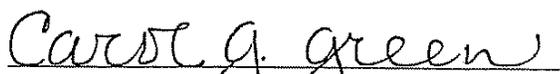
## Practice Note

Supreme Court Rule 6.09(b) provides a means to cite significant relevant authority that comes to a party's attention after that party's brief is filed. Counsel typically should use the rule to alert the court to developments in the law after briefing.

The court does not permit counsel during oral argument to refer to case law or other legal authority not cited in the parties' briefs or supplied pursuant to Rule 6.09(b) in advance of the hearing. In addition, it is ordinarily not appropriate practice to file a 6.09 letter only a day or two before oral argument because this timing does not provide the court and opposing counsel adequate opportunity to review the additional material cited.

Counsel are reminded that appellate courts usually conference cases the same day as oral argument. Accordingly, use of 6.09 letters to supply additional authority arising after argument typically should be limited to controlling authority on applicable issues.

If you have any questions about this rule, contact me at 785-296-3229.

  
Clerk, Kansas Supreme Court

# Kansas Lottery: Retailer Honesty Assurance Program

by Andrew Bauch, Assistant Kansas Attorney General & Paul Schliffke, Enforcement Agent, Kansas Lottery

## Keeping Clerks Honest

In 1986, Kansas voters approved an amendment to the constitution to create a state lottery. The following year, the legislature passed the first Lottery Act and the Kansas Lottery was created. By 1988, the start-up loan was repaid and the Lottery became self sustaining. Since that time, the Lottery has contributed yearly to the state coffers. In fiscal 2010 alone, Lottery sales were \$235 million, with nearly \$68 million being transferred to the state of Kansas.

In 2009, the Retailer Honesty Assurance Program (RHAP) was initiated for the purpose of maintaining the integrity of the Kansas Lottery. The goal was to ensure that each lottery player had a fair and equal chance of winning. Executive Director Ed Van Petten and Director of Security Gary Herman allowed Agent Paul Schliffke the latitude to shape the program from scratch, which included writing the guidelines; coordinating with prosecutors; and conducting the operation. The bottom line, a “sting operation” was created to ensure the Lottery tickets were being paid in a fair manner.

Various other states have conducted operations similar to Kansas’ RHAP. While the overall goal is the same for each operation, the finer points varied greatly. Agent Schliffke incorporated the KISS principle, also known as “Keep It Simple Stupid.” While the initial goal was to ensure retailer honesty, he knew each case could result in a jury trial, necessitating the need to keep the nuts and bolts of the operation clear and concise.

The RHAP tickets were patterned after a live or real instant win (scratch) lottery game. Each RHAP ticket was printed by the same company that generates the real tickets. The RHAP tickets were hand delivered from the company to the Lottery where they were secured until used in the operation. Each RHAP ticket appeared to be a live ticket, and the RHAP game was entered into the Lottery computer system as if it was a live game. Therefore, when a RHAP ticket was scanned by a retailer, it would appear to be a live ticket. While each RHAP ticket appeared to be a live ticket with a large prize, safeguards were put in place internally

so that no money could actually be paid out for a RHAP ticket.

Equipped with undercover video and audio recorders, Agent Schliffke visited numerous stores throughout Kansas. At each store, the operation was the same. He would enter a store with a RHAP ticket, present it to the clerk, and ask them to verify through their lottery terminal if it was a winner. Of the 196 retailers visited, 190 clerks scanned the RHAP ticket and indicated it was a winner and handed it back to claim at Lottery Headquarters. However, six store clerks scanned the RHAP ticket and said it wasn’t a winner. In this scenario, Agent Schliffke left the store without the ticket, investigated and identified the clerk, and then waited to see if the clerk attempted to claim the prize, thereby showing their intent to commit theft. The perceived large prize required that each ticket be verified in person, or by mail, at Lottery Headquarters in Topeka, KS. Within weeks, all six store clerks attempted to claim the prize themselves, or by having an associate claim the prize money. Once an individual tried to claim the prize, Lottery Agents would video interview the suspect, attempt to seize security footage from each store, and chase down potential witnesses.

All six cases were presented to the Kansas Attorney General’s Office for prosecution. Cases were filed in the counties of: Johnson (1) ; Reno (1); Sedgwick (2); Seward (1); and Sherman (1), and each defendant was charged with two felonies, Attempted Felony Theft (trying to claim the lottery ticket) and Computer Crime (using the Kansas Lottery terminal to aid in the commission of the theft).

Assistant Kansas Attorney Generals Lee Davidson and Andrew Bauch prosecuted the cases. They, along with other attorney general staff, hit the ground running and spent considerable time, researching case law and driving across Kansas to ensure successful prosecutions.

In the end, five clerks agreed to plead guilty; four to Attempted Felony Theft and the fifth to Computer Crime. The sixth defendant elected to go

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to trial, probably because the undercover recording equipment failed inside the store. (Remember, Murphy was a cop.) Fortunately, Agent Schliffke had recorded a statement when the defendant's wife attempted to claim the RHAP ticket at Lottery Headquarters, and the jury was able to listen to the recording. Assistant Attorney General Andrew Bauch handled the jury trial, which resulted in the defendant being convicted on two counts.

We believe the Kansas Lottery and the Kansas

Attorney General's Office met the goals of the RHAP. Cases were successfully prosecuted, dishonest clerks were convicted for their crimes, and strong coverage by the press spread the word across the state that stealing from Lottery players will not be tolerated. 🕒

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*Note: Special thanks goes to Pottawatomie County Attorney Sherri Schuck for her consultation when creating the program.*

## The Paperless Prosecutor

by Roger Marrs, Assistant County Attorney, Leavenworth County

In the fall of 2007, I had the opportunity to attend an NDAA conference on technology for prosecutors. Part of the conference was devoted to information about how the Eaton County, Michigan District Attorney's Office had made the transition to paperless case files and the benefits they had realized. After learning about the many benefits of going digital that were experienced by Eaton County and several other prosecutor offices, I proposed the possibility of developing a paperless case file system for our office in Leavenworth County. We had been using a scanner to convert all the law enforcement reports submitted to our office into PDF files for more than a year, so paperless case files seemed like a logical next step.

### Exploring the Options

There are several options for creating a paperless case file system, but they fall into two basic categories.

- A Document Management System (DMS) or
- A Windows file folder-based approach.

The DMS software solutions are probably the most common. Since this isn't an article about DMS software, I'm going to skip over how such software typically works, but would like to point out two compelling benefits of a DMS. Such software typically provides the ability to maintain a fine degree of access control over documents, e.g. the ability of users to view, print, delete, or edit. If an office requires the ability to easily control the level

of access individual members of the staff have to imaged documents, then a DMS-based system is probably required. Also a DMS-based system is likely to have strong vendor-provided end user support. On the downside, DMS systems are usually expensive to acquire. Plus, there are ongoing costs in the form of annual maintenance fees that are required to keep the DMS software up-to-date and to pay for the vendor support services. In addition, because of the way most, if not all, DMS software is designed, you have to use the DMS to retrieve any documents or files stored in the DMS.

The alternative to using DMS software is to simply store documents in Windows file folders where they can be accessed just like any other files that an office creates and saves. The benefits of using Windows file folders are fairly obvious. There's no expensive DMS software to acquire and maintain; and you can access the documents in any case without being dependent upon proprietary DMS software to access your documents and files.

Our office opted for the file folders approach when we implemented the use of digital case files in July 2008. In the remainder of this article, I will briefly describe the unique manner in which our office implemented the file folder-based approach, and highlight some of the benefits we've realized over the use of paper case files. This is not a "how to" article, and I'll make an effort to hold the technical jargon to a minimum.

Our overriding goal – design a digital case file that's as easy to use as a paper case file.

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Despite the advantages that digital files have over paper files, it's hard to beat paper for ease-of-use. This is especially true when you're faced with a high volume, fast-paced court docket. Once the paper case file is up-to-date with the latest filing, and in the courtroom with all the other cases that are on the docket, the user experience for the prosecutor is pretty good. Picking up a file, opening it, and writing some case notes in it, or reviewing the charging document or investigative reports is generally a breeze. So the challenge was to create a paperless system that not only eliminated the negative aspects of paper-based files, but which also retained, as much as possible, the positive aspects of using paper files in the courtroom.

Our case management system (CMS) provided the foundation for our Windows file folder storage approach. Thanks to our CMS, whenever we saved Word documents that were created for court cases, those Word documents were organized by case number inside a folder called CaseDocs. For example, any Word documents created for case number 2011-CR-000123 would automatically be saved in folder named 2011-CR-000123. We decided to use the folders that our CMS application was already creating as the place where we would store our digital case files.

So, we had a place to store all the documents and other files that go into a case file. We also needed a way to view and work with the contents of the case file, as well as some way to document all the events that take place in the "life" of a case file. The court hearings that take place, who was present at the hearing, what was decided, what needs to be done next, etc. We discovered that the web browser would be an excellent way to work with our digital case files.

Web browsers are free and every member of our staff already had a web browser installed on his (or her) PC or laptop. Web browsers obviously provide a great way to display content, but a web browser also offers a convenient way to enter information. Everyone is familiar with using a web browser to access the internet, but a web browser can also access files stored on a local computer, or local computer network. The paperless case file system used in Leavenworth County takes advantage of the ability to use a web browser to work with files on the

local computer network.

The core component, or front end, of our paperless system is actually a simple web page, or HTML file. Every court case gets its own web page. We use free, open source software, to create these web pages and the web pages are designed so that information like case notes can be entered quickly and easily right in the web browser. Web browsers also are capable of displaying a PDF file. In our office, copies of court documents, investigative reports, and all the other documents that need to be placed in a case file are stored as PDF files. As a result, the prosecutors and support staff can pull up any digital case file in a web browser and view any court documents, investigative reports, or any other document that has been saved to the case as a PDF file.

Every time we file a new criminal, juvenile offender, or CINC case, we create a digital case file, i.e. a web page for the case. Details about the case, from basics like the defendant's name and the court case number, to more detailed information like the victims, witnesses, and charges are all added to the web page. The process used to get all that case-specific information into the web page for a case is largely automated. As a result, it only takes a few seconds of staff time to create a digital case file complete with instant access to the law enforcement reports associated with the case, as well as any court documents that have already been filed, such as the complaint and probable cause affidavit.

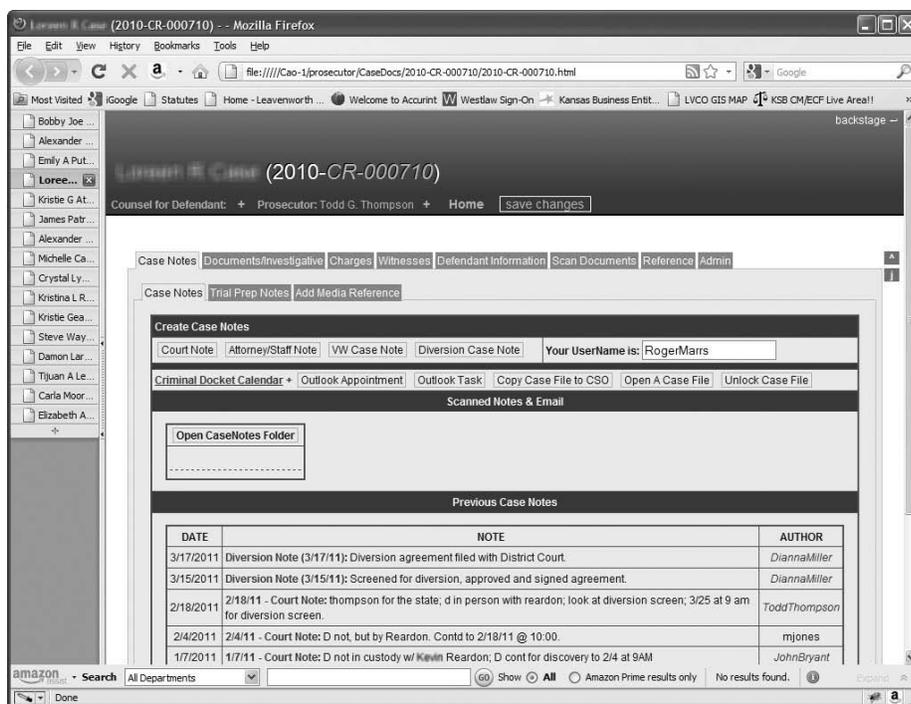
Prior to going paperless, we had been using a single Fujitsu ScanSnap scanner to scan the law enforcement reports into the PDF file format. As part of our paperless case file project, we purchased five new Fujitsu scanners, as well as some software that would work with these scanners and our digital case files. These scanners and the associated software provide our office with the ability to convert all the paper documents related to a case into a digital format. As we all know, case files consist of more than just file-stamped copies of court documents and law enforcement reports. There is usually correspondence from opposing counsel, letters to victims and witnesses, invoices, expert reports, or any number of other paper documents that may need to be maintained in a case file. For all those documents, we use the desktop Fujitsu

scanners to convert the paper into PDF files. Our digital case files are set up to work with these desktop scanners so that documents can quickly be added to a case file.

Fortunately, we don't process paper copies of all the documents that get filed with the court. The Leavenworth County District Court was one of the first courts in Kansas to begin imaging all the documents that are filed with the court. The court clerk advised that rather than supplying paper copies of file-stamped documents, they would prefer to email file-stamped copies of court filings as the documents were imaged by the clerks. Our office was able to take advantage of this change in business practice by creating an automated process to handle nearly all the filing of documents received from the court. That automated process was created using a combination of the features built into both Outlook and our scanning software.

The task of keeping paper case files up-to-date with copies of the file-stamped court documents used to be very time consuming. First the files had to be pulled from the storage vault. If the file wasn't in the vault, then someone had to track it down. The paper case file might have been on a secretary's or prosecutor's desk, or in someone's inbox, or outbox. Once the correct case file was located, there was the physical task of actually adding the document(s) to the file folder. The file folder for a digital case file, on the other hand, is always in the same place and always available. Filing copies of court documents, which formerly consumed several hours of staff time each week, has been transformed into an automated process that takes just a few minutes each day. Situations do arise that require a few minutes of staff time to make sure documents are filed correctly, but several days at a time can go by without any need for a single staff member to get involved in the filing of any court documents.

Similarly, the task of "pulling the docket" has been completely transformed. In order to get files ready to take to court in the days of paper case files,



the physical file folder had to be located. While the majority of the files could be found in the storage vault, invariably there were always some files that had to be hunted down. Like filing, "pulling the docket" generally consumed several hours of staff time each week. Now the docket is maintained on Outlook Calendars, and the docket for any given day is also emailed to the prosecutors. The emailed version of the docket contains links to the digital case files, so that any case on the docket is just a click away. Prosecutors can open up all of the case files in a single web browser window, as well as open any documents they anticipate they will need at the hearing. This can be done in court, before going to court, even days prior to court. (The above image is a screen shot that demonstrates how numerous digital files can all be available in a single web browser window.)

## Portable files

Since our digital case files are stored on the network in regular Windows folders, the files are portable. In other words, if a prosecutor wants to take a case file home to do some additional trial preparation, they have that option. This portability came in very handy in 2008. Todd Thompson had been newly elected as County Attorney and John Bryant was going to come on board as Deputy

County Attorney. In preparation for the transition, they decided they would like to review a number of the pending court cases. Because most of our court files were already digital case files by that time, we were able to copy onto a CD all the case files in which Thompson and Bryant were interested. They had the ability to then view the case files using a web browser.

Backing up all these case files is obviously a necessity. We take advantage of the tape backup system maintained by the county Information Services department, but we also maintain our own independent backup using an off-the-shelf USB drive. The office has been paperless for three years now, and hasn't ever needed to resort to any of the backed up case files; but they are there if the need arises.

### What about Trials and Trial Exhibits

Obviously, paper still plays an important role in the office of a paperless prosecutor. Individual prosecutors generally keep track of the originals of certain documents, like certified driving records or other certified documents. However, for all the other documents that may be needed at a trial or other court hearing, a paper copy is printed from the digital (PDF) version. Also, most of the time, our prosecutors still feel more comfortable in trial working from a trial notebook, rather than relying on pixels displayed on the screen of their laptop.

If you would like more information about how

Leavenworth County made the transition to digital case files, feel free to contact me. In addition, the Johnson County District Attorney is a completely paperless office. Their office makes use of the JIMS system, which is a CMS/DMS that was custom built for both the Johnson County District Court and the District Attorney. Also, I know that the County Attorney's Office in Finney County has a paperless case file system in development. Finney County also opted to pursue a DMS-based approach. So, there are fellow prosecutors and staff around the state that may be able to help you learn more about the benefits of a paperless case file system and the things that need to be considered in creating a paperless system.

Going digital definitely presented some challenges, and there were plenty of skeptics, both inside and outside the office. Yet, our experience as a paperless office has turned out to be extremely positive. You can view a quick demonstration of our digital case file in action on our website at: <http://www.leavenworthcountyattorney.org/video/digital-case-file>.

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*Note: all references in this article to "Word", and "Outlook" refer to Microsoft® Word and Microsoft® Outlook, products of the Microsoft® Corporation. All references to "Windows" refer to the Microsoft® Windows® operating system, a product of the Microsoft® Corporation.*

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# Domestic Violence Tagging Law: Ramifications for Prosecutors

by Megan Fisher, Assistant District Attorney, Johnson County

K.S.A. 22-4616, formerly Kansas House Bill 2517 (hereinafter referred to as the DV Tagging law) was signed into law on April 12, 2010 by then Governor Mark Parkinson. The law was authored by the Committee on Corrections and Juvenile Justice and introduced by Curtis and Christie Brungardt.

The Brungardts are the parents of Jana Mackey, a 25-year-old University of Kansas law student who was murdered by her ex-boyfriend, Adolfo Garcia-Nunez, in 2008. Following the death of their daughter, the Brungardts advocated for two years for tougher domestic violence laws in Kansas.

The DV tagging law is an effort to label crimes, which might not otherwise be considered domestic violence so that law enforcement agencies, prosecutors, and courts will have a more accurate picture of a defendant's criminal history. For example, if a defendant has a prior arson on his record from a different county, absent pulling the police reports or court documents, a prosecutor would not know that the defendant's arson conviction was a result of burning down his ex-girlfriend's house.

The thinking behind this law was that Domestic Battery is not the only domestic violence crime. The DV tagging law focuses instead on the relationship between the defendant and the victim. The law recognizes that, in domestic violence situations, the defendant's motive to commit the crime is to coerce, intimidate, or control the victim.

For example, a domestic violence criminal damage to property is often much more than a random destruction of property. When a domestic violence defendant destroys the victim's property, it is often property which had meaning or significance for the victim, such as her grandmother's tea set. The message this sends to the victim is that if they do not comply, then the next act of destruction could be directed toward them.

Although the motivation behind the law is good,

it will create an incidental burden for prosecutors. The DV tagging law requires numerous changes to current laws and even has additional provisions, which are applicable to law enforcement agencies that will require changes in their respective department policies. Each of these provisions will be addressed in turn.

## The Tagging Provisions

K.S.A. 22-4616 (a) provides: "On or after July 1, 2011, in *all* criminal cases, if there is evidence that the defendant committed a domestic violence offense, the trier of fact shall determine whether the defendant committed a domestic violence offense."<sup>1</sup>

The trier of fact will therefore be the judge if the trial is to the bench, or a jury. The law does not specify whether this requires the State to prove an additional element in every case involving domestic violence or whether the court can simply add a special question instruction to the jury. No doubt this issue will be the subject of appellate litigation at a later date.

The law further provides: "...if the trier of fact determines that the defendant committed a domestic violence offense, *the court* shall place a domestic violence designation on the criminal case and the defendant shall be subject to the provisions of subsection (p) of K.S.A. 21-4603d and amendments thereto."<sup>2</sup>

The court then must place a domestic violence designation on the case subsequent to the finding that the defendant committed a domestic violence offense. The law therefore requires the "tagging" of a DV case after a verdict has been rendered and not before. Once the case is "tagged" then the DV sentencing provisions would apply. This indicates that the DV designation on a case affects the sentence that the court could hand down. Defense attorneys could argue that this implicates *Apprendi*.<sup>3</sup> If the appellate courts were swayed by this argument, then the DV designation would become

## Footnotes

1. K.S.A. 22-4616 (a) (2010) [emphasis added].
2. *Id.* at subsection (1) [emphasis added].
3. *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348,

147 L.E.2d 435 (2000); cited by *State v. Gould*, 271 Kan. 394, 23 P.3d 801 (2001) (holding that aggravating factors which increase a sentence beyond the statutory maximum must be found by a jury beyond a reasonable doubt).

an additional element of every crime in which the defendant and the victim were in a domestic relationship. However, this argument would likely fail as nothing in the DV tagging law increases the sentence of these crimes beyond the statutory maximum.

The court must, however, decline to designate the case as domestic violence if the court makes findings on the record that “The defendant has not previously committed a domestic violence offense or participated in a diversion upon a complaint alleging domestic violence; *and* the domestic violence offense was not used to coerce, control, punish, intimidate, or take revenge against a person with whom the offender is involved or has been involved in a dating relationship or against a family or household member.”<sup>4</sup>

This provision will no doubt give defense attorneys an opportunity to argue that their clients should not be ordered to participate in domestic violence treatment programs. However, given that the jury would have already found that the case involved domestic violence under the new definition provided by this statute, it seems unlikely that this argument would carry much weight.

## Expanded Definitions

The new law expands the definition of domestic violence. It reads:

“Domestic violence” means an act or threatened act of violence against a person with whom the offender is involved or has been involved in a dating relationship, or an act or threatened act of violence against a family or household member by a family or household member. Domestic violence also includes any other crime committed against a person or against property, or any municipal ordinance violation against a person or against property, when directed against a person with whom the offender is involved or has been involved in a dating relationship or when directed against a family or household member by a family or household member.<sup>5</sup>

A “Dating relationship” is defined as:

... a social relationship of a romantic nature. In addition to any other factors the court deems relevant, the trier of fact may consider the following when making a determination of whether a relationship exists or existed: Nature of the relationship, length of time the relationship existed, frequency of interaction between the parties and time since termination of the relationship, if applicable.<sup>6</sup>

The addition in the definition of domestic violence which expands it substantially is that of a “dating relationship” between the defendant and the victim. The legislature does not appear to have intended this definition to include everyone who has, at one time or another, been sexually intimate with each other. Rather, there seems to be a particularized inquiry necessary to determine the, for lack of a better term, quality of the relationship.

## Sentencing Requirements

Once the court makes the determination that the domestic violence designation should be added to a case, the court “shall require the defendant to undergo a domestic violence offender assessment and follow all recommendations unless otherwise ordered by the court or the department of corrections.”<sup>7</sup>

Although the statute contains the word “shall” it then makes the requirement of a domestic violence assessment discretionary. The statute further allows that the court can order this assessment prior to sentencing if the court feels it would be helpful in determining the sentence. Additionally, the domestic violence assessor must provide the assessment and its recommendations to the court which must then provide it to the defendant’s probation officer.

The defendant would be required to pay for the assessment. However, if the defendant has a history of domestic violence, the assessment would typically recommend a Batterer’s Intervention Program. It is therefore useful, when the defendant has a history of domestic violence, to recommend

4. K.S.A. 22-4616 (2)(A) and (B) (2010) [emphasis added].

5. K.S.A. 21-3110 (7) (2010).

6. *Id* at (7)(A).

7. K.S.A. 21-4603d (p) (2010).

that that the defendant skip the assessment and complete Batterer’s Intervention. That ensures the defendant receives the maximum amount of counseling possible and saves the defendant the cost of the assessment. The new statute allows room for this sort of recommendation.

## Law Enforcement Provisions

Written policies of law enforcement agencies will be required to change to reflect the changes in the new statute. K.S.A. 22-2307(b)(1) will require that the written policies of all law enforcement agencies in the state direct the officers to arrest when they have probable cause to do so. Although that is nothing new, the policies must now reflect the new, expanded definition of domestic violence, including dating relationships, within their mandatory arrest policies.

The law further requires that agencies have a statement in their policies that the mandatory arrest policy would not be so strict as to require dual arrests. In fact, the policies will now be required to say that officers need to make individual determinations when both individuals at the scene claim to be the victim. In other words, each story must be evaluated on its merits.<sup>8</sup>

Essentially, the policies of law enforcement agencies must now include the expanded definition of domestic violence as well as a requirement that officers attempt to determine the identity of the primary aggressor.

## Diversion

Diversion agreements were also be limited when this statute took effect. The law provides that prosecutors shall not enter into diversion agreements when “the complaint alleges a domestic violence offense, as defined in K.S.A. 21-3110, and amendments thereto, and the defendant has participated in two or more diversions in the previous five year period upon complaints alleging a domestic violence offense.”<sup>9</sup>

Although hardly a tough stance, this section is attempting to curtail the prevailing view that

because many DV cases have evidentiary issues, diversion is often a good disposition.

In addition to limiting the number of diversions a defendant could get, the new law now requires defendants going through diversions in DV cases to get a DV assessment, and follow recommended treatment “unless otherwise agreed to with the prosecutor in the diversion agreement.”<sup>10</sup> Therefore, although the assessment is required, the prosecutor would have discretion in making that a part of any diversion agreement.

## Record Information

It is easy to lose sight, amongst all the changes to the current laws, that this DV tagging law is aimed at keeping track of domestic violence cases and convictions. The final section of the law requires the KBI to “make available to the governor’s domestic violence fatality review board crime record information related to domestic violence, including, but not limited to, type of offense, type of victim, and victim relationship to offender, as found on the Kansas standard offense report. Such crime record information shall be made available only in a manner that does not identify individual offenders or victims.”<sup>11</sup>

It remains to be seen whether this provision will require prosecutors to submit case information to the KBI for the purposes of compiling reports. It is also unclear what the legislature meant by “type of victim.” Perhaps light will be shed on these issues at a later date.

## Conclusion

The purpose behind this law is a laudable one. The DV tagging law will have many ramifications on prosecutors and their offices. In the long term, however, most of the questions remaining about the wording of certain sections will be resolved by the courts. Further, acknowledging that domestic violence cases are unique and require specialized treatment by law enforcement, prosecutors, and the courts will be a big first step in addressing the problem of domestic violence. 🌐

8. K.S.A. 22-2307 (b)(3) (2010).

9. K.S.A. 22-2908 (b) (3) (2010).

10. *Id.* at subsection (d) (2010).

11. K.S.A. 75-712 (b)(2) (2010).

# Forensic Science: How Can We Make It Better? (Part II)

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

In the Spring 2010 edition of *The Kansas Prosecutor*, I reported on the recommendations made by National Academy of Science to Congress concerning the problems within the Forensic Science community. This article is to report on the response of Congress to that report.

On January 25, 2011, Senator Patrick Leahy, Democrat from Vermont, and Chairman of the Senate Judiciary Committee sponsored a bill, the purpose of which, is to strengthen and promote confidence in the criminal justice system by promoting best practices and ensuring consistency, scientific validity, and accuracy with respect to forensic testing, analysis, identification, and comparisons, the results of which may be interpreted, presented, or otherwise used during the course of a criminal investigation or prosecution.<sup>1</sup> This bill has appropriated \$150 million per year.<sup>2</sup>

This bill has six major parts:

1. Creation of the Office of Forensic Science and a Forensic Science Board
2. Accreditation of Forensic Science Laboratories
3. Certification of Forensic Personnel
4. Research priorities and funding
5. Development of Standards and Best Practices
6. Additional responsibilities

## Creation of the Office of Forensic Science

This Office will be within the Office of the Deputy Attorney General in the Department of Justice. The director will be appointed by the Attorney General. The duties of the Director are set to implement the purpose of the bill.<sup>3</sup> The Director, of the Office of Forensic Science, shall also establish a website that can be accessible by the public to publish recommendations of the Board and all standards, protocols, definitions and other materials.<sup>4</sup>

A Deputy Director of the Office of Forensic Science will be an employee of the National Institute of Standards and Technology (NIST)<sup>5</sup> and be selected by the Director of that organization.<sup>6</sup>

## Forensic Science Board and Committees

The Forensic Science Board is to serve as an advisory board.<sup>7</sup> The 19 member board will be appointed by the President and will come from professional communities that have expertise relevant to and significant interest in the field of forensic science.<sup>8</sup> Each board member will serve for a term of six years.<sup>9</sup> The Board members shall serve without compensation for services performed for the Board.<sup>10</sup> Their duties include: making recommendations to the Director relating to research priorities, accreditation and certification standards, and protocols for forensic

## Footnotes

1. S. 132 See full text at: <http://www.govtrack.us/congress/billtext.xpd?bill=s112-132> see section 3.
2. For each fiscal year 2012 through 2016: \$15 million for the operation and staffing of the Office; \$5 million for the operation and staffing of the Board; \$15 million for the operation and staffing of the Committees; \$5 million to the National Institute of Standards and Technology for the oversight, support and staffing of the Committees. See Section 104. Other allocations are noted in Footnotes 37, 40, 49
3. See Sec. 101 (e)(2)(A-H)
4. Sec. 101 (f)
5. Founded in 1901, NIST is a non-regulatory federal agency within the U.S. Department of Commerce. NIST's mission is to promote U.S. innovation and industrial competitiveness by advancing measurement science, standards, and technology in ways that enhance economic security and improve our quality of life. See <http://www.nist.gov/index.html>
6. Sec. 101(b)(1)(B)
7. Sec. 102(a)
8. Not fewer than 10 members who have comprehensive scientific backgrounds in scientific research, not fewer than 5 members have extensive experience or background in forensic science and at least 1 member from each of the following: judges, federal government officials, state and local government officials, prosecutors, law enforcement officers; criminal defense attorneys; organizations that represent people who may have been wrongly convicted; practitioners in forensic laboratories and state laboratory directors. See Sec. 102(b)(1-3)
9. Sec 102(c)(1) There is an exception for the first board members chosen. See Sec. 102(c)(2)(A-C)
10. Sec 102(k)(3) travel expenses and per diem will be paid

science disciplines.<sup>11</sup> The Board is required to hold meetings not less than four times a year and these meetings are open to the public.<sup>12</sup> Decisions of the Board require a two-third vote.<sup>13</sup>

Specific duties include developing a definition of “**forensic science discipline.**” The definition should take into account a sufficient scientific basis that involved forensic testing, analysis, identification or comparisons, the results of which may be interpreted, presented, or otherwise used during the course of a criminal investigation or prosecution.<sup>14</sup> The Board must also develop a list of **recommended science disciplines.** If the Board recommends that a field, has insufficient scientific basis and should not be included in the list, the Board must publish an explanation of the recommendation and put it on the website.<sup>15</sup> Every year the Board must evaluate the list and determine if something should be added, modified, or removed.<sup>16</sup>

To accomplish these specific duties the Board will recommend to the Director formation of Committees to help. These Committees will consist of nine members who are scientists with knowledge relevant to the forensic science discipline addressed by the Committee.<sup>17</sup> The Deputy Director shall appoint the members to the Committee to serve for a four-year term.<sup>18</sup> The Committee members shall serve without compensation for services performed for the Committee.<sup>19</sup> There must be an annual review of the Committees to determine if a Committee should be modified, added or discontinued.<sup>20</sup> The Committees are required to hold meetings not less than four times a year with the full Committee and these meetings are open to the public. Decisions of the Committee require a two-third vote.<sup>21</sup>

The Board also is required to submit to Congress every two years a report describing the work of the Board and the work of each Committee.<sup>22</sup>

## Accreditation of Forensic Science Laboratories

The Board, within two years of formation, shall submit to the Director procedures for the accreditation of forensic science laboratories.<sup>23</sup> The Board shall define what is a “**forensic science laboratory.**”<sup>24</sup> Any laboratory that does not hold an accreditation from this Board cannot receive directly or indirectly any Federal funds.<sup>25</sup> Standards for accreditation shall ensure the quality, integrity and accuracy of any testing, analysis, identification, or comparisons performed for the use in the investigation or prosecution of a criminal offense.<sup>26</sup> Every five years the Board shall review the accreditation standards to account for developments in relevant scientific and technological advances as well as review the labs holding accreditation to determine if standards continue to be met.<sup>27</sup> Any development, reviewing and updating of accreditation will be open to the public and allow for public comment on proposed standards.<sup>28</sup> A website will be created to give a current list of labs accredited, applications submitted, certificates denied and certificates that have been suspended, limited or revoked.<sup>29</sup>

To administer the accreditation process the Director can contract with professional organizations with sufficient experience and expertise relevant to the accreditation of forensic laboratories.<sup>30</sup> The Director shall provide oversight to the organization and provide regular reports to the Board. The Director

11. Sec 102(d)(1-4)

12. Sec. 102(f)(1&2)

13. Sec. 102(g)(1)

14. Sec. 102(h)(1)(A)

15. Sec 102(h)(1-3)

16. Sec. 102(h)(5)

17. See Sec. 103(b)(1)(A-D) Not fewer than 5 members who have extensive experience or background in scientific research; a number of members who have extensive experience or background in the forensic sciences to ensure the Committee has an adequate understanding of the factors and needs unique to the forensic sciences . An individual may fulfill more than one requirement.

18. Sec. 103(c) & (d)

19. Sec. 103(i)(1); travel expenses and per diem will be paid

20. Sec. 103(a)(3)

21. Sec. 103(g) & (h)

22. Sec. 102(j)

23. Sec. 201(b)(1)

24. Sec. 201(c)

25. Sec. 201(a)

26. Sec. 202(a)(1)

27. Sec. 202(b)(1)(A) & Sec. 203(b)

28. Sec. 202(b)(2)

29. Sec. 203(c)

shall retain final authority to grant, deny, revoke, limit or suspend a certificate of accreditation.<sup>31</sup>

## Certification of Forensic Science Personnel

The Board, within one year, must establish what individuals will be defined as “**relevant personnel.**” The bill suggests these individuals shall include persons who conduct forensic testing, analysis, identification, or comparisons, the results of which may be interpreted, presented, or otherwise used during the course of a criminal investigation or prosecution or an individual who testifies about evidence.<sup>32</sup> No Federal funds may be received by a laboratory unless all “relevant personnel” of the laboratory are certified.<sup>33</sup> To become certified, the “relevant personnel” will have to comply with any standards, best practices, and testing that each Committee establishes and which is approved by Board.<sup>34</sup> Again the Director may contract with qualified professional organizations that have expertise in administering a certification program.<sup>35</sup> The Director shall establish procedures for review of the certification including a process for appealing certification determinations such as denial, suspension or revocation.<sup>36</sup>

The Director of the National Institute of Justice may make a grant of Federal funds for laboratories and personnel to become accredited and certified. \$10 million will be allocated each year for this technical

assistance.<sup>37</sup>

## Research Priority and Funding

The Board shall make recommendations to the Director a list of priorities for forensic science research funding based on information the Board has received from the respective Committees. Once the list is made, the Director must prepare a comprehensive strategy for fostering and improving peer-reviewed scientific research relating to the forensic science disciplines.<sup>38</sup> Eligible entities to receive the research funding are nonprofit academic or research institution, or any other entity designated by the Director of the NIST.<sup>39</sup> \$90 million is allocated for such research.<sup>40</sup> There should be encouragement for non-profits, universities, private corporations, and local and state forensic laboratories to become involved in this research.<sup>41</sup> A plan for funding of these entities and standards in which they are to operate shall be developed within three years of the Act.<sup>42</sup> Reports and oversight are required on any grant awarded.<sup>43</sup>

## Standard and Best Practices

Within 18 months, Committees shall recommend to the Board standard protocols; quality assurance standards, and standard terminology for identification, analysis and comparison in Forensic Science disciplines.<sup>44</sup> The Board shall submit to the Director and he shall publish these on the website of the

30. Sec. 203(a)(2) This author suspects the use of the American Society of Crime Laboratory Directors (ASCLD) is what is contemplated. A laboratory accreditation board was created within ASCLD to meet the needs of the criminal justice system and eventually incorporated as a separate and distinct non-profit entity. To the confusion of many, its name continues to reflect its origins and is known as The American Society of Crime Laboratory Directors / Laboratory Accreditation Board, or ASCLD/LAB - usually pronounced azz-clad-lab by those in the profession. You can visit their website at [www.asclclab.org](http://www.asclclab.org).

31. Sec. 203(a)(2)(C)

32. Sec. 301(b)(1)(A&B)

33. Sec. 302

34. Sec. 303(a) &(b)

35. This author suspects organizations such as the International Association for Identification (IAI) would be what the Act had envisioned. In 1977, the first IAI certification

program was initiated for Latent Print discipline. Since then, several other certification programs have been developed. Each program consists of a rigorous educational process, a certification procedure, and recertification requirements. Each is administered by a certification board comprised of experts in the discipline. All programs operate under a written set of procedures approved by the IAI's Board of Directors to ensure compliance with broad IAI goals and policies. See <http://www.theiai.org/>

36. Sec. 304(d)

37. Sec 305: Not less than 75 percent of the funds shall be used for these type of grants.

38. Sec 401(a)(2)

39. Sec 402(a)(1)

40. Sec. 402(c)(1&2): \$75M for peer-reviewed research; \$15M for development of new technologies

41. Sec. 404

42. Sec. 404(b)

43. Sec. 403

office.<sup>45</sup> There shall be review of these protocols every three years.<sup>46</sup> These reviews will be open and transparent to the public.<sup>47</sup>

## **Additional Responsibilities**

### **1. Training and Education for Judges, Attorneys, and Law Enforcement**

This training shall include fundamental scientific principles, which shall include education on the competent use and evaluation of forensic science evidence. The Director of NIST may provide assistance directly to judges, attorneys, and law enforcement and give grants to states and local government and non profits to provide training.<sup>48</sup> \$10 million each year has been allocated for these grants.<sup>49</sup>

### **2. Educational Programs in the Forensic Sciences**

The Board shall submit to the Director a recommended plan for encouraging the development of educational programs in the forensic science disciplines and related fields and standards for educational programs.<sup>50</sup>

### **3. Medical-Legal Death Examination**

The Board shall submit to the Director a plan to encourage Federal Government and State and local governments to implement systems to ensure qualified individuals perform medical-legal death examinations. The Bill also suggests requirements and standards and regulations on how to perform death examinations.<sup>51</sup>

### **4. Inter-Governmental Coordination**

The Board and Director shall regularly coordinate with relevant Federal agencies including the National Science Foundation, the Department of Defense, Department of Homeland Security, and the National Institute of Health to make efficient and appropriate use of research expertise and funding as well as ways in which Forensic Science disciplines may assist emergency preparedness.<sup>52</sup>

### **5. Anonymous Reporting**

The Director shall develop, within three years, a system, either through a hotline or website, that has appropriate guarantees of anonymity and confidentiality to provide information relating to compliance or lack of compliance with the standards and regulations required of this Act.<sup>53</sup>

### **6. Interoperability of Databases and Technologies**

No later than three years from the date of the Act, the Board shall submit to the Director a recommended plan to encourage interoperability among databases and technologies in each of the forensic science disciplines among all levels of government, in all states and with the private sector.<sup>54</sup>

### **7. Code of Ethics**

The Board shall submit to the Director, within three years, a recommended code of ethics for the forensic science disciplines. This code would be incorporated into the standards for accreditation and certification of the forensic laboratories and certification of relevant personnel.<sup>55</sup>

## **Conclusion**

This clearly is a comprehensive “overhaul” of the Forensic Science community. There is nothing in the bill that would “require” a forensic laboratory or its personnel to conform to the mandates that will be set forth by the committees/Board. However, by not allowing any Federal monies to be allocated to those entities not in compliance, it will send a clear message to those groups. Also by publishing all protocols, best practices, reporting guidelines on the web, lawyers will be able to determine whether or not these were followed in a particular case.

At the present time this Act has been referred to the Senate Judiciary, but it has not been set for any hearings.🌐

44. Sec. 501(a)(1)

45. Sec. 502

46. Sec. 503(a)(1)

47. Sec. 503(d)

48. Sec. 601(b)

49. Sec. 601(b)(3): Not less than 75 percent of the funds shall be used for grants

50. Sec. 602

51. Sec. 603

52. Sec. 604

53. Sec. 605

54. Sec. 606 -- the interoperability was specifically mentioned in the NAS report dealing with fingerprint data. The ultimate goal was to get a nationwide system for AFIS (Automated Fingerprint Information System) and the database it uses.

55. Sec. 607

# The Prosecutor Review Committee Under the Kansas Sexually Violent Predator Act

by Christine T. Ladner, Assistant Kansas Attorney General

The Kansas Sexually Violent Predator Act (KSVPA) provides for the potentially long term commitment of sexually violent predators.<sup>1</sup> In 1994, the legislature recognized that “there exists an extremely dangerous group of sexually violent predators who have a mental abnormality or personality disorder and who are likely to engage in repeat acts of sexual violence if not treated for their mental abnormality or personality disorder.”<sup>2</sup> The KSVPA has had quite a work-out since 1994.

## An Overview of the Sexual Predator Treatment Program

The Sexual Predator Treatment Program (SPTP) is located at Larned State Hospital (LSH). There are seven phases to the program. Phases one through four are the core intensive treatment phases. Phase five is a transition phase where the residents are introduced into open society with close supervision. Phases six and seven are the last stages of transition before a resident is completely discharged. Phases one through five are located at LSH. Transition phases six and seven are located at Osawatomic State Hospital (OSH). Phase seven conditional release requires court order.<sup>3</sup> Persons must complete a minimum of five years on conditional release before they may be considered for final discharge.<sup>4</sup>

## The KSVPA By the Numbers<sup>5</sup>

- 249 persons committed
- 7 on transition (phase 5)
- 4 on court ordered conditional release (phase 7)
- 15 died

- 13 discharged by court order
- 2 completed the program
- 200 current residents in SPTP

## The Kansas Experience with SVPs

The first SVP case reviewed by the United States Supreme Court came out of Sedgwick County.<sup>6</sup> The jury’s finding that Leroy Hendricks met the criteria of an SVP was reversed by the Kansas Supreme Court.<sup>7</sup> Kansas appealed. The United States Supreme Court reversed the Kansas Supreme Court and concluded that involuntary commitment under the KSVPA is civil in nature and not punitive, precluding any double jeopardy or ex post facto violation.<sup>8</sup> In reversing the Kansas Supreme Court, the United States Supreme Court explained its rationale:

“The numerous procedural and evidentiary protections afforded here demonstrate that the Kansas Legislature has taken great care to confine only a narrow class of particularly dangerous individuals, and then only after meeting the strictest procedural safeguards. That Kansas chose to afford such procedural protections does not transform a civil commitment proceeding into a criminal prosecution.”<sup>9</sup>

After all, sexually violent predator (SVP) cases are brought under Chapter 59 of the K.S.A.’s, not Chapter 21. If the KSVPA is civil, not criminal, why is this article appearing in a prosecutor magazine?

Sexually Violent Predator (SVP) cases are a hybrid between civil and criminal law. Over time, they have become increasingly more criminal in

## Footnotes

1. K.S.A. 59-29a01 *et seq.*
2. K.S.A. 59-29a01.
3. K.S.A. 59-29a18.
4. K.S.A. 59-29a19.
5. SPTP Resident Information prepared by Larned State Hospital
6. See *Kansas v. Hendricks*, 521 U.S. 346, 362, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997). The cast of lawyers who worked on the *Hendricks* case is a cast of considerable prosecutorial pedigree. At the District Court level, Sedgwick County District Attorney Nola Foulston and Debra Barnett, now an Assistant United States Attorney, appeared for the State. The trial judge was the Hon. Gregory L. Waller, formerly a long time prosecutor in Sedgwick County. Attorney General Carla J. Stovall argued the case for Kansas in front of the United States Supreme Court. Appearing for Mr. Hendricks throughout the entire case was Thomas J. Weilert, now a Chief Attorney in Ms. Foulston’s office.
7. *In re Hendricks*, 259 Kan. 246, 912 P.2d 129 (1996).
8. *Kansas v. Hendricks*, 521 U.S. 346, 362, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997).
9. *Id.* at 364-365. Justice White writing for the majority in a 5-4 decision.

nature and have been litigated in that fashion. The issues raised on appeal in these cases are now the traditional issues raised by criminal defendants, including claims of prosecutorial misconduct. By 2005, claims of misconduct in opening statements were making their way to the appellate courts.<sup>10</sup> *In re Foster* concerned comments in opening statement where the prosecutor described in general terms all the levels of review that occur before a case is presented to a jury. The Supreme Court found that such a description, even in general terms, was a violation of due process and reversible error.<sup>11</sup> Don't try to present this in your case in chief either, or you will similarly be reversed.<sup>12</sup>

In finding such comments a violation of due process, Justice Nuss pointed out in *Foster* how these cases have many of the characteristics of a criminal case.<sup>13</sup> The analysis of attorney/prosecutor misconduct in SVP cases since *Foster* follows a due process analysis rather than the *Tosh* "stair step" analysis typically used in claims of prosecutorial misconduct.<sup>14</sup> Although the issue is not named "prosecutorial misconduct," in SVP cases, Kansas Appellate Courts treat the issue as such.

*In re Ward* teaches us to also be wary of claims of misconduct in closing argument,<sup>15</sup> which are particularly dicey because issues of propensity or "likely to engage in repeat acts of sexual violence" is one of the elements that must be proven beyond a reasonable doubt.<sup>16</sup> Predisposition to commit sexually violent offenses to such a degree that the person is a "menace to the health and safety of others" is precisely the point we have to prove.<sup>17</sup>

Another garden variety issue raised in criminal cases is ineffective assistance of counsel (IAC). Very recently, this issue was raised in a K.S.A. 60-1501 in *In re Ontiberos*.<sup>18</sup>

From a review of *Foster*, *Ward* and *Ontiberos*,

the take away is: even without timely objection, issues of attorney/prosecutor misconduct can be raised on appeal for conduct in opening statement, closing argument and in K.S.A.60-1501 proceedings for IAC. SVPs are civil cases, but the current SVP landscape sure seems like a criminal arena of battle.

## The Prosecutor Review Committee

As a matter of policy, these cases should be handled by prosecutors, but there is a more specific reason for prosecutors to be interested in these cases. The KSVPA provides for a "prosecutor's review committee" to review individuals who may be subject to the KSVPA. The statute requires *prosecutors*. That's us: Kansas prosecutors.

K.S.A. 59-29a03(e) provides that the *attorney general shall appoint a prosecutor's review committee* to review the records of each person referred to the attorney general who is about to be released for a sexually violent offense. "*The prosecutor's review committee shall assist the attorney general in the determination of whether or not the person meets the definition of a sexually violent predator*".

Therefore, the Prosecutor Review Committee (PRC) is us, or at least some of us. Under the new administration of Attorney General Derek Schmidt, the PRC will fortunately be even more of us. AG Schmidt has appointed several new Special Assistant Attorneys General to assist in the prosecution of SVP cases.

Under the Stovall administration (1995 - 2003), one assistant attorney general was assigned to litigate these cases. As time went on and more cases were filed, two assistant attorneys general split the state in half to cover the cases.

The system of appointing Special Assistant Attorneys General (SAAGs) to serve on the PRC

10. *In re Foster*, 280 Kan. 845, 127 P. 3d 277 (2006) *reversing* 33 Kan. App. 2d 717 (107 P. 3d 1249 (2005)). (Comments of prosecutor describing the procedural history of how SPV cases are reviewed by a multidisciplinary team from the Department of Corrections, reviewed by the prosecutor review committee and brought to a jury only after a probable cause determination by the district court deprived respondent of a fair trial.)

11. *Id.*

12. *In re Franklin*, 182 P.3d 736 (Table), 2008 WL 2051733 (Kan.App.) (unpublished).

13. *In re Foster*, 280 Kan. at 853.

14. *In re Ward*, 35 Kan. App. 2d 356 at 374, 131 P.3d 540 (2006) citing *State v. Tosh*, 278 Kan. 83, 91). 3d 1204 (2004).

15. *Id.*

16. K.S.A. 59-29102(a).

17. K.S.A. 59-29102(b).

18. --- P.3d ----, 2011 WL 262910 (Kan.App.) (decided January 28, 2011) (Petition for Review granted February 21, 2011, Cross Petition for Review granted March 8, 2011).

began in the Morrison administration in 2007. Seasoned sex crime prosecutors from the larger counties, Wyandotte, Johnson and Sedgwick, were invited to serve as SAAGs to vote on the PRC and to handle the SVP cases from their home jurisdictions. These SAAGs were a great help as the flow of sex offenders about to be released continued. The SAAG system provided more geographical representation for the counties who had the most interest in these offenders, particularly if they were about to be paroled back to their home jurisdictions.

## Recent Appellate Treatment of SVP Cases and the Increase in Post Commitment Litigation

The SAAG system of about four to five prosecutors worked pretty well until *In re Miles* which emphasized strict compliance with the procedure surrounding annual reviews.<sup>19</sup> *Miles* reversed a district court's denial of a pro se motion for an independent expert evaluation. The motion was brought by a person who had already been determined to be an SVP, but was challenging his annual review. The *Miles* opinion has led to an increase in pro se post commitment litigation statewide. Each person committed under the KSVPA is entitled to an annual review, which includes a current examination of the person's mental condition.<sup>20</sup>

There is an additional wrinkle that could lead to more post commitment litigation. A person committed may receive a second jury trial on the issue of whether or not the person is safe for release.<sup>21</sup> If a person committed under the KSVPA establishes probable cause that he is safe for transitional release, he may be entitled to a second hearing where petitioner (that's us) must prove beyond a reasonable doubt that the person is *still not safe* for release. Either petitioner or respondent could ask for a jury trial on the issue. In the history of the KSVPA, there has not yet been a second jury trial after the initial commitment, but there could be.<sup>22</sup>

19. *In re Miles*, 42 Kan.App.2d 471, 213 P.3d 1077 (2009).

20. *In re Sipe*, 44 Kan.App.2d 584, 239 P.3d 871 (2010).

21. K.S.A. 59-29a08.

22. See *In re Sipe*, 44 Kan.App.2d 584, 239 P.3d 871 (2010).

## A Bigger and Broader Prosecutor Review Committee

Very few prosecutors have handled SVP cases. These cases require a certain level of litigation expertise. Experience in the prosecution of sex crimes is a plus. Kansas prosecutors should have a special interest in SVP cases because *Kansas v. Hendricks* is the seminal case on the constitutionality of the KSVPA. Other states have patterned their laws after ours. With that backdrop, Attorney General Derek Schmidt has taken the initiative to increase the size of the PRC. The bigger and broader PRC expands the range of input from local prosecutors who have great interest in persons who have committed sexually violent offenses and are about to be released back to their communities.

The new appointees will serve on the PRC voting monthly on which cases should be filed pursuant to the KSVPA. These prosecutors will also handle the prosecution of new SVP cases as well as the post commitment litigation from persons already determined to be SVPs from their home jurisdictions. These prosecutors are assisting AG Schmidt fulfill his statutory obligation under the KSVPA. Congratulations and many thanks to the following whom have been appointed to the Attorney General's PRC.

### Assistant Attorneys General

Christine M. T. Ladner, Chair

Lee J. Davidson

Nicole Romine

### Special Assistant Attorneys

#### Douglas County

Charles Branson, District Attorney

Amy McGowan, Chief Assistant District Attorney

#### Johnson County

Chris McMullin, Chief Deputy District Attorney

Keith C. Henderson, Assistant District Attorney

#### Reno County

Keith E. Schroeder, District Attorney

Sedgwick County

Marc A. Bennett, Deputy District Attorney  
Justin R. Edwards, Chief Attorney  
Donna L. Longsworth, Assistant District Attorney

Shawnee County

Jacqie Spradling, Chief Deputy District Attorney  
Chris Biggs, Assistant District Attorney

Wyandotte County

Jennifer Meyer, Assistant District Attorney

Central Kansas

Christina M. Trocheck, Deputy Saline County Attorney

Northwest Kansas

Thomas J. Drees, Ellis County Attorney

Southwest Kansas

Melissa Johnson, Deputy, Seward County Attorney

Southeast Kansas

Chris Smith, Cowley County Attorney

**NDAA Spring Report**  
National District Attorneys Association

**by Kim T. Parker, Chief Deputy District Attorney, 18th Judicial District  
Vice President, NDAA Board of Directors**



The Spring board meeting of NDAA was held at Orange Beach, Alabama March 26, 2011. The attending members discussed and approved a policy for our participation in Amicus Briefs before the United States Supreme Court. It is the position of NDAA that the filing of Amicus Briefs increases our role as the Voice for America’s Prosecutors on issues that affect prosecutors and the criminal justice system.

The board also discussed proposed bylaw changes that are directed at making the board more nimble and responsive to prosecutor needs. The primary discussion at the board meeting was the financial condition of the National Advocacy Center in South Carolina and the close of NDAA operations at the NAC, September 30, 2011. Members of the board are working together to find a workable solution to provide important trial advocacy training for new prosecutors. One avenue they are pursuing is a partnership with the University of Utah School of Law in an effort to create a National Criminal Justice Academy to be funded through the Department of Justice budget. Some of the other suggestions include keeping the NAC open as a “Pay as You Go” plan in the interim. However, many

board members thought current local prosecutor budget situations may make such a plan unfeasible.

Due to the low attendance at the board meeting, no official action was taken and all issues were tabled until the summer meeting in Sun Valley Idaho, July 15-17, 2011.

**Don't forget to make  
your reservations for the  
NDAA Summer  
Conference  
July 17-20, 2011  
Sun Valley, Idaho  
www.ndaa.org**

# KCDAA Spring 2011 Conference Information

## REGISTRATION

To register go to [www.kcdaa.org](http://www.kcdaa.org) and visit the events page where a registration link is provided. All registrations must be made online.

The earlybird registration deadline is **May 25, 2011** and the final registration deadline is **June 3, 2011**. If you are unable to register by June 3, 2011, you will need to register onsite at the conference.

## CONFERENCE FEES

	On or Before 5/25/11	After 5/25/11
Members	\$ 80.00	\$105.00
Assoc. Members	\$135.00	\$160.00
Non-Members	\$265.00	\$365.00

If you have any questions, please contact Kari Presley at (785) 232-5822 or by e-mail at [kpresley@kearneyandassociates.com](mailto:kpresley@kearneyandassociates.com).

## HELPFUL INFORMATION

Due to different temperature preferences among individuals, it is a good idea to wear layers.

## REFUND POLICY

All Refund requests must be made in writing. Requests made prior to June 1, 2011 will be refunded less a \$25 processing fee. Requests received after June 1, 2011 will not be refunded.

**SPECIAL NEEDS:** Please contact the KCDAA office at (785) 235-5822 if you have any special needs or food allergies. *Provisions will be provided for participants with special needs or food allergies if we are notified by June 3, 2011.*

## Hotel Information

A block of rooms has been reserved at the Hyatt Regency Hotel at a rate of \$108 for single & double occupancy or \$128 for triple & quadruple occupancy. **These rates will be available until May 8, 2011 at 5 pm.**

To make reservations, please call 316-293-1234 or visit [www.hyatt.com](http://www.hyatt.com). You must identify yourself as a KCDAA conference attendee. Check-in time is 3:00 pm and checkout time is 12:00 pm. The address for the hotel is: Hyatt Regency Wichita, 400 West Waterman, Wichita, KS 67202.

## Directions to Hotel

### From Wichita Mid-Continent Airport (7 miles):

Kellogg (Hwy. 54) East to Central Business District Exit. Turn left on Main Street. Go 3 blocks to Waterman Street and turn left. Hotel is in view.

### From the north:

Take I-35 South to the Kellogg (Hwy. 54) WEST exit. Take the Central Business District exit to Main Street and turn right. Go 3 blocks to Waterman Street and turn left. Hotel is in view.

### From the south:

Take I-35 North to the Kellogg (Hwy. 54) WEST exit. Take the Central Business District exit to Main Street, and turn right. Go 3 blocks to Waterman Street and turn left. Hotel is in view.



# 2011 KCDAA Spring Conference



Register online  
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**Thursday, June 9 -  
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