

# The Kansas Prosecutor



The official publication of the Kansas County and District Attorneys Association  
Volume VI, No. 2, Summer 2009



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

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## About the Cover

The Cheyenne County Courthouse is  
 located at 212 E. Washington Street in St.  
 Francis, Kansas. Constructed in 1924, the  
 courthouse is a rectangular, four-story, masonry  
 block designed in the Classical Revival style.  
 Distinctive features of the style include Tuscan  
 columns, a projecting pavilion, and a flat roof.  
 Architect Thomas W. Williamson designed the  
 building with Thomas D. Howard constructing  
 it. Williamson's firm designed three other  
 county courthouses in Kansas.

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

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

## Preservation of the Right to Free Thought

As we celebrate the 233<sup>rd</sup> anniversary of the birth of our nation, I pause to consider those ideas which formed the basis of this great country. Of the many concepts contained within the United States Constitution and the Bill of Rights, many of which were considered extremely radical in 1776, I believe the one core ideal binding these documents together is freedom of thought and speech. These freedoms permeate every other freedom we enjoy in this nation, for no other freedom can continue to exist without freedom of expression, and freedom of thought. Frank Murphy, a former United States Attorney General and Justice of the United States Supreme Court, said, "Freedom of speech, freedom of the press and freedom of religion all have a double aspect - freedom of thought and freedom of action." While most would agree that freedom of action must have some limitations, freedom of thought should have no government mandated limits.

In our nation, there is currently a movement toward the policing of personal thought. Legislators in many jurisdictions are considering legislation to criminalize the thoughts of those whose ideas run contrary to current politically correct agendas. This movement should cause us to stop and consider the consequences of criminalizing thought.

Ben Franklin, a person most would agree had a first-hand understanding of the concepts which undergird this nation, said, "Whoever would overthrow the liberty of a nation must begin by subduing the freedom of speech." Because all speech begins with the formation of thought, it follows that the subduing of freedom of speech has at its core the suppression of thought, a person certainly cannot put into speech that which he or she is forbidden to think. Thus, government control over the thought processes of the people will, in all instances, result in the type of tyranny this nation

was founded to abolish.

Political and personal discourse often has as its goal the pursuit of truth. This free discourse is the foundation of any nation seeking to be the best it can be. Consider the positive changes made in this nation's moral conscience based on the free exercise of thought and expression. Where might we be today if the government, at any point in our history, had determined that a specific idea, or set of ideas, would constitute reason for enhanced criminal penalties because a person held any specific idea? I venture to claim we would be less of a nation for doing so. As I write this, the powers that be in Iran are murdering citizens in the streets because they seek freedom, democracy, and elections free from government control. Those Iranian citizens are being brutalized because of what they think, not because of what they have done.

In this world there exists many ideas which a majority of citizens in this nation would find morally repugnant, even evil. It would be better for the world, in my opinion, if people would cease to hold on to those ideas. But my disagreement with those positions should not give me, the government, or anyone else, the right to keep a person from holding them. Voltaire said, "I do not agree with what you have to say, but I'll defend to the death your right to say it." That is how important the right to free thought is - it is a right worth dying for.

Justice Frankfurter eloquently described the absolute value of the freedom of thought in his concurring opinion in *Dennis v. United States*, 341 U.S. 494, 550, 71 S.Ct. 857 (1951) when he wrote:

"For social development of trial and error, the fullest possible opportunity for the free play of the human mind is an indispensable prerequisite. The history of civilization is in considerable measure the displacement of error which

once held sway as official truth by beliefs which in turn have yielded to other truths. Therefore the liberty of man to search for truth ought not to be fettered, no matter what orthodoxies he may challenge. Liberty of thought soon shrivels without freedom of expression. Nor can truth be pursued in an atmosphere hostile to the endeavor or under dangers which are hazarded only by heroes.

'The interest, which (the First Amendment) guards, and which gives it its importance, presupposes that there are no orthodoxies-religious, political, economic, or scientific-which are immune from debate and dispute. Back of that is the assumption-itself an orthodoxy, and the one permissible exception-that truth will be most likely to emerge, if no limitations are imposed upon utterances that can with any

plausibility be regarded as efforts to present grounds for accepting or rejecting propositions whose truth the utterer asserts, or denies.' International Brotherhood of Electrical Workers v. National Labor Relations Board, 2 Cir., 181 F.2d 34, 40. In the last analysis it is on the validity of this faith that our national security is staked."

The importance of the freedom of thought for prosecutors is plain. We hold discretion as to the persons who will be charged, and the charges to be brought against those persons. In the future, we may very well be in the position to determine if freedom of thought is as important as Voltaire, Ben Franklin, Justice Murphy, and Justice Frankfurter believed it to be. We may be the last bastion of hope for the preservation of the right to free thought. 🌐

## **2010 KCDAAs Legislative Request for Proposals**

The KCDAAs Legislative Committee is soliciting Legislative Proposals for the KCDAAs Legislative agenda for the 2010 Legislative Session. This input from the membership will be considered by the Committee in making its' recommendations to the KCDAAs Board of Directors.

The RFP is the first step in the process of gaining the input of the membership in changes needed to the Kansas Statutes for the benefit of prosecutors.

Please submit your proposals using the RFP form. A copy of the RFP form is on page 26 of this magazine, or you can download the RFP form from the members only section of the website, [www.kcdaa.org](http://www.kcdaa.org).

***Deadline for submissions is August 21, 2009.***

Submit proposals to: KCDAAs Office, 1200 W 10th Ave., Topeka, KS 66604  
Fax: 785-234-2433, E-mail: [skearney@kearneyandassociates.com](mailto:skearney@kearneyandassociates.com)



# Executive Director's Column

by Steve Kearney, KCDA Executive Director

## 2009 Legislative Session Wrap-Up

While the 2009 Legislative Session was most contentious in recent memory, overshadowed by state budget woes not seen in years, the legislative agenda of the Kansas County and District Attorneys Association was met with careful deliberation by the Legislature and was ultimately one of the most productive and successful in recent years.

Prior to the commencement of the 2009 session, the KCDA Board of Directors selected several proactive priorities for passage based on the comprehensive surveying of its members during the interim last year. The board included such matters as what was euphemistically known as the "Holt" fix; limitations on withdrawal of guilty pleas; an increase in the docket fee for the Prosecutors Training Fund, which had been flat since 1984; addition of electronic solicitation to the rape shield laws; and a clarification of statutes related to aggravated electric solicitation of a minor.

In addition to the KCDA legislative priorities, there were just shy of 100 other bills that had impact for our membership. Many of those matters required that the KCDA take a position and have one or more of our members testify before the respective legislative committee. They ranged from the repeal of the Death Penalty, Concealed Carry for Prosecutors, amendments to the admission of prior bad acts, and a bill establishing a DUI commission to review DUI laws and proposals. The KCDA worked closely with judiciary committee members, leadership, and the AG's office to draft and/or amend several of these issues as well as send others that were not ready for prime time for further study and deliberation.

Ultimately the following matters did pass and become law. For those of you unable to attend the spring CLE, the detailed summary of these matters is posted on the KCDA website for your review:

**SB 19:** Prosecutor Concealed Carry Exemption

for Court Facilities; Signed by the Governor on April 17, 2009; Effective July 1, 2009

**SB 28:** Civil Asset Forfeiture; Signed by the Governor April 17, 2009; Effective July 1, 2009

**SB 33:** State Board of Pharmacy; Statewide Electronic Logging System for Sale of Meth Precursors; Fingerprinting; Awaiting signature by the Governor; Effective July 1, 2009

**SB 44:** Kansas False Claims Act; **Evidence of Prior Bad Acts**; Signed by the Governor on April 20, 2009; Effective on publication in the Kansas Register

**SB 66:** Change of Venue; Judicial Branch Surcharge; **Prosecuting Attorney's Training Fund**; Kansas Criminal Code Recodification Commission; Court Appeals; Signed by the Governor April 23, 2009; Effective July 1, 2009

**SB 68:** Judges Retirement Age; Signed by the Governor on April 20, 2009; Effective July 1, 2009

**SB 134:** Child in Need of Care; Signed by the Governor on April 17, 2009; Effective July 1, 2009

**SB 237:** Traffic in contraband in care and treatment center; Regulation of Scrap metal; Signed by the Governor on April 13, 2009; Effective July 1, 2009

**HB 2059:** Proceeds derived from violation of the uniform controlled substances act or any substantially similar offense from another jurisdiction; Signed by the Governor on April 10, 2009; Effective July 1, 2009

**HB 2060:** Cockfighting; Dog Fighting; **Battery on a LEO**; Drug Crimes; **Carrying or Discharging of a Firearm**; **Holt Fix**; Fleeing or Eluding an LEO; Offender Risk Assess-

ment Analytical Tool; Prior Criminal History; Administrative Driver's License Suspension; Parole Board; Signed by the Governor on May 21, 2009; Effective July 1, 2009

**HB 2096: DUI Commission**, Fourth or Subsequent DUI; Mandatory records checks for prior convictions before filing a complaint; Signed by the Governor on April 20, 2009; Effective July 1, 2009 (certain provisions in the bill not effective until 2010)

**HB 2098:** Rape shield amendment, Electronic Solicitation; Signed by the Governor April 8, 2009; Effective upon publication in the Kansas Register

**HB 2111:** Extension of the sunset provision on the Kansas Commission on Judicial Performance to June 30, 2013; Deletes the provision in prior law that would have decreased docket fees by \$2.00 on or after July 1, 2010 and changes date to on and after July 1, 2013; Signed by the Governor on April 13, 2009; Effective July 1, 2009

**HB 2165:** Establishing recklessness as a standard in unlawfully hosting minors in a person's residence; Signed by the Governor on April 13, 2009; Effective July 1, 2009

**HB 2233:** Withdrawal of a guilty plea, Alternate Juror; Signed by the Governor April 7, 2009; Effective upon publication in the Kansas Register

**HB 2311:** Addition of licensed private detectives to list of people for service of process; Signed by the Governor on March 27, 2009; Effective July 1, 2009.

As indicated in our winter issue about the then upcoming 2009 Legislative Session, new committee chairs, vice chairs, and ranking minority members were pivotal in the successful pursuit of the KCDAAG agenda. Senators Tim Owens, Derek Schmidt, and David Haley on Senate Judiciary; Representatives Pat Colloton, Joe Patton, and Melody McCray-Miller on House Corrections and Juvenile Justice; and Representatives Lance Kinzer, Jeff Whitham, and Jan Pauls on House Judiciary all took the lead at one point in time or another on the most important matters to us. I would be remiss if I did not extend

our heartfelt thanks to all the committee members who heard and deliberated on matters that impacted each of you. If you see your legislator in this list, please let them know you are grateful for their assistance and service:

## Senate Judiciary

Chair **Tim Owens**, R-Overland Park, vice-chair **Derek Schmidt**, ranking Democrat **David Haley**, D-Kansas City. Members: **Les Donovan**, R-Wichita, **Julia Lynn**, R-Olathe, **Dwayne Umbarger**, R-Thayer, **John Vratil**, R-Leawood, **Terry Bruce**, R-Hutchinson, **Jean Schodorf**, R-Wichita, **Mary Pilcher-Cook**, R-Shawnee, **Laura Kelly**, D-Topeka.

## House Corrections and Juvenile Justice

Chair **Pat Colloton**, R-Leawood, vice-chair **Joe Patton**, R-Topeka, ranking Democrat **Melody Miller**, D-Wichita. Members: **Bob Bethell**, R-Alden, **J. Robert Brookens**, R-Marion, **Lance Kinzer**, R-Olathe, **Charlie Roth**, R-Salina, **Sheryl Spalding**, R-Overland Park, **Nile Dillmore**, D-Wichita, **Stan Frownfelter**, D-Kansas City, **Janice Pauls**, D-Hutchinson

## House Judiciary

Chair **Lance Kinzer**, R-Olathe, vice-chair **Jeff Whitham**, R-Garden City, ranking Democrat **Jan Pauls**, D-Hutchinson. Members: **John Grange**, R-El Dorado, **J. Robert Brookens**, R-Marion, **Pat Colloton**, R-Leawood, **Aaron Jack**, R-Andover, **Jeff King**, R-Independence, **Marvin Kleeb**, R-Overland Park, **Joe Patton**, R-Topeka, **Jason Watkins**, R-Wichita, **Kay Wolf**, R-Prairie Village, **Kevin Yoder**, R-Overland Park, **Marti Crow**, D-Leavenworth, **Raj Goyle**, D-Wichita, **Annie Kuether**, D-Topeka, **Milack Talia**, D-Merriam, **Annie Tietze**, D-Topeka, **Jim Ward**, D-Wichita.

Lastly, on behalf of those of us who lobby for you and on behalf of your Board of Directors, **Thank You the members**, of the KCDAAG, for your time and input in seeing that changes to criminal law continue to improve how justice is served in the state of Kansas. 🍷



# Legislator's Column

by Senator Thomas C. (Tim) Owens, J.D.  
(with contribution by Legislative Research Analyst Athena Andaya)

## Kansas DUI Laws Redux (a commentary on Senate Substitute for HB 2096)

In 2008, House Bill 2707 established the Kansas Substance Abuse Policy Board (SAPB) under the supervision of the Kansas Criminal Justice Coordinating Council (KCJCC). Its mission was to consult and advise on issues and policies pertaining to treatment, sentencing, rehabilitation, and supervision of substance abuse offenders. In January 2009, the SAPB published its report and recommendations with less than complimentary comments relating to the entire DUI system and its implementation in Kansas. The report is public record so I won't go into detail about it except to refer generally to the report and to its recommendations as we lead into a discussion of Senate Substitute for House Bill 2096, which was passed by the 2009 legislature and went into effect on July 1, 2009.

The SAPB made the following recommendations:

- Reduce the number of courts and court systems having jurisdiction over DUI offenders to a number small enough to achieve consistency.
- Monitor the smaller number of courts to determine that sentencing and sanctioning practices are consistent with state statutes.
- Provide education to judges and court personnel on a systematic basis regarding evidence-based practices found to be effective in dealing with DUI and other substance abusing offenders.
- Identify and remove incentives and disincentives for courts to treat multiple DUI offenders as if they were first or second time DUI offenders. Not only do date system inadequacies make a due diligence search of criminal history very labor intensive, but we have a concern that there are fiscal incentives in place that may encourage municipal courts to retain jurisdiction over multiple DUI offenders who should be seen

in district court because of the revenues generated from fines and fees.

I have had the opportunity to become familiar with how DUIs have been handled since 1975 by having served in a variety of capacities relating to DUIs during my career in the legal profession. I have been a Municipal Prosecutor, Public Defender, Municipal Court Judge, and even in one unusual circumstance, a member of a District Court Jury. I also followed the sequence of statutory modifications through the years. Depending upon my role within the system and in relation to the client I represented, I became increasingly aware of the disparity of treatment and handling of DUI offenders depending upon the jurisdiction and the individual propensities of judges, prosecutors, and defense counsel relating to offenders.

I carried this concern to the legislature when I was first appointed to the House of Representatives in 2001. Then I began working to study and develop ways in which the disparities could be overcome and the treatment of offenders could be uniformly applied across the state. I took into account, of course, the recommendations of the substance abuse professionals relating to the need for some individualized treatment, while still achieving a "fair, just, and equitable" outcome. The recommendations of the SAPB and my appointment to chair the Senate Judiciary Committee gave me an opportunity to follow up on the SAPB recommendations and my own concerns for the lack of consistency and uniformity in how DUIs are handled in Kansas.

Senate Substitute for HB 2096 was signed into law this year and does basically four major things:

1. Of critical importance as a follow up to the SAPB, the bill creates the DUI Commission which is made up of 23 members representing generally all of the stakeholders related to the prosecution, defense, treatment, and judicial resolution in DUI

cases, as well as representatives of the community and victims advocates. The DUI Commission is required to:

- Review Kansas DUI Statutes;
  - Review DUI Statutes in other states;
  - Review evaluation, treatment, and supervision practices, enforcement strategies, and penalty structure to determine what is effective in changing the behavior of DUI offenders;
  - Develop a legislative proposal for centralized recordkeeping;
  - Gather and assess information on all groups and committees working on DUI issues;
  - Review proposals introduced in the 2009 Legislative Session; and
  - Consider other DUI-related proposals (including other bills proposed by members of the legislature during the 2009 session) as directed by chairpersons of the standing committees of Senate and House Judiciary and the Corrections and Juvenile Justice Committee in the House.
2. Amends current law on driving under the influence of alcohol or drugs (DUI) or DUI penalties (K.S.A. 8-1567 and other statutory references)
  3. Amends the duties of the municipal court
  4. Creates statewide driver improvement clinics

In addition to the creation of the DUI Commission, a critical part of the bill has to do with the creation of a central repository whereby at the time of an arrest, a prosecution, or a conviction for DUI, law enforcement, prosecutors, and the courts would be required to report the conviction to the central repository at each step along the way. The same would apply to any DUI offender being placed on a diversion program. It is anticipated that the central repository will be the KBI, which already has the capacity to implement such a repository and in addition has access to criminal history records

through the NCIC and other reporting sources. The simply stated purpose for the central repository is to create a system whereby mandatory reporting up and down the chain would lead to a clear understanding as to which offense each level may be dealing with. The KBI would be required to immediately notify the various reporting agencies which level of DUI they are dealing with and what other outstanding pending cases there may be.

The legislature passed legislation many years ago to prevent plea bargaining of DUIs to a lesser offense. We all know that many prosecutors use a variety of creative means to get around this prohibition against plea bargaining. It is hoped that with this new legislation and with the work of both the SAPB and the DUI Commission, plea bargaining will cease to occur and the DUI threat in Kansas will be reduced through consistent and strict enforcement, prosecution, and treatment.

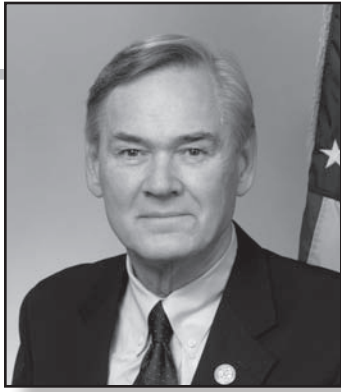
One of the first signs that you see when you travel across the Red River into Texas from Oklahoma is, "DUI – In Texas You Can't Afford It." Kansas needs to be stricter and more consistent in enforcing its DUI laws to ensure that in Kansas not only can you not afford it, but you can count on consistent consequences and treatment to ensure the public safety of every person on our streets and highways. It is hoped that Senate Substitute for House Bill 2096 will be a giant step toward that goal and toward making Kansas Highways a safer place to be. My only initial concern is that in this day of budget crises, we must fund the program from top to bottom or it will fare no better than the laws that have gone before it. There must be adequate facilities at the state and local levels, and there must be funding for the treatment providers and programs so that the initial phases of the program will work effectively to reduce the number of multiple DUI offenders on the road who have never received any treatment for their alcohol or drug problem. 🗣️

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

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

**Next submission deadline: October 23, 2009.**





# Strengthening Our Economy, Improving Public Safety

by U.S. Representative Dennis Moore, Third District, Kansas

Over the last few months, there has been an important national discussion about how best to address our struggling economy. This conversation led to the development of the American Recovery and Reinvestment Act, which was signed into law on February 17, 2009.

Enacting this bill into law was a necessary and vital step to stabilize our nation's economy. The mix of tax cuts – including the largest middle class tax cut in U.S. history – and investments in the American Recovery and Reinvestment Act is designed to provide quick relief and a substantial boost to our struggling economy, as well as create the foundation for our nation's future economic growth.

In Kansas alone, the law has already provided over \$347 million in highway funds to help build and repair roads and bridges, making them safer for all travelers. Many of these improvement projects are beginning around the state, including a project in the Third District to make significant improvements to Highway 69 between I-35 and I-435.

Our infrastructure system is not only a mode of commerce or a system for commuters and travelers; it's also the network that holds our communities together. Investing in these projects will make important improvements to

the state's transportation system, but it will also create and sustain thousands of jobs, indirectly support related businesses, and ensure that our communities remain vibrant and active, now and in the future.

In addition to addressing our immediate infrastructure needs and putting people to work quickly, the Recovery Act makes a strong commitment to education, acknowledging that strategic investments in education are the foundation to helping America become stronger and more competitive in the long-term. This commitment includes investments to modernize our schools, help states avoid teacher layoffs and other education cutbacks, invest in early childhood education, and make college more affordable.

Specifically, the Act establishes a \$53.6 billion State Fiscal Stabilization Fund, which includes \$39.5 billion that goes to local school districts to restore state education cuts, prevent teacher layoffs, prevent other education cutbacks and modernize, renovate and repair public schools. Approximately \$671 million could be available to Kansas to lay the foundation for a generation of education reform and help save thousands of teaching jobs at risk due to state and local budget cuts.

An additional component of the State Fiscal Stabilization Fund, which is especially important for those working in public safety, is the \$8.8 billion to states for high-priority needs, such as maintaining

a strong police and public safety force to fight crime and assist victims.

The Recovery Act also makes a strong investment in the Department of Justice so that it can continue its public safety and crime prevention programs, including: \$1 billion for Community Oriented Policing Services (COPS) grants to support the hiring and rehiring of additional career law enforcement officers; \$100 million for the Office for Victims of Crime to support state compensation and assistance programs for victims and survivors of federal and state crimes; \$50 million for the Internet Crimes Against Children Task Force Program, which will help state and local law enforcement agencies enhance investigative responses to offenders who use the Internet to sexually exploit children; and \$2 billion for the Edward Byrne Memorial Justice Assistance grants, which help states and local governments support activities to prevent and control crime and to improve criminal justice system enforcement. Through the Edward Byrne Justice Assistance Grant (JAG) Program alone, more than \$19.9 million for state and local law enforcement assistance is available in Kansas.

The Recovery Act also provided the largest middle class tax cut in history, giving immediate relief to 95 percent of American families and workers. The Making Work Pay tax credit will leave every worker with

more money in their pocket – an additional \$400 this year – by reducing their monthly tax withholding, beginning with April 2009 paychecks.

There were also several tax cuts and other incentives for small businesses, as well as investments in health care that will address the needs of families and seniors hit hardest by the economic downturn.

These health care investments focus primarily on research and prevention efforts, including: \$19 billion to accelerate adoption of Health Information Technology systems (electronic medical records) by doctors and hospitals, in order to modernize the health care system, save billions of dollars, reduce medical errors and improve the quality of care; \$10 billion for the National Institutes of Health (NIH), including funds to improve NIH facilities and for expanding good jobs in biomedical research to study diseases such as Alzheimer's, Parkinson's, cancer and heart disease; and \$2 billion in community health centers to renovate clinics and to increase the number of uninsured Americans who receive quality health care.

In Kansas, we've already received \$2.6 million to fund two new community health centers, which will serve an estimated 14,070 patients and create a projected 105 jobs, and \$3.1 million to expand services at 13 existing community health centers, which will expand service to an additional 38,119 patients and create or save a projected 49 jobs. We've also received \$2,064,374 in vaccines and grants to ensure more underserved Americans receive the vaccines they need.

But, we're not just focused on prevention efforts for future health care costs. With this economic downturn, millions of people are not only out of work, they have lost the employer-based health insurance they relied on to cover themselves and their families. While (COBRA) currently provides temporary coverage for workers between jobs, it is expensive, with a typical family premium on COBRA of over \$1,000 a month. To help people maintain their health coverage, the bill provides a 65 percent subsidy for COBRA premiums for up to 9 months for people who were involuntarily separated from their jobs between 9/1/08 and 12/31/09. This provision could temporarily help as many as 7 million people with the cost of their health insurance coverage.

I was proud to support this legislation in Congress and have been pleased to see the results of these profound investments to strengthen our communities, support our businesses, and help every American make it through these difficult economic times, while also paving the way for a stronger, brighter future.

There is much to be proud of, but there is still more work to do to ensure that your tax dollars are spent wisely on Recovery Act projects and programs that will make a real difference in our communities.

That's why the Recovery Act included an unprecedented commitment to government transparency. You, the taxpayer, deserve specific information about how each and every dollar of this Act is spent.

At [www.Recovery.gov](http://www.Recovery.gov), you will be able to see which states, congressional districts and federal agencies receive funds as a result of this act. As more information becomes available, [www.Recovery.gov](http://www.Recovery.gov) will also display fund allocation in easy to view maps, charts, and graphics.

You can also visit the Kansas Recovery website – [www.governor.ks.gov/Recovery](http://www.governor.ks.gov/Recovery) or check out the state by state progress reports available at [www.whitehouse.gov/progressreports](http://www.whitehouse.gov/progressreports) to find out where Kansas' Recovery money is going.

The most important thing to remember in all of this is that it took us a long time to get into our current economic situation – it's going to take longer than we would like to fully recover. We have a long road ahead of us, but we're making progress every day! 🇺🇸

### *County Courthouse Portraits*



*Cheyenne County Courthouse*

*John D Morrison*

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151 N Rock Island, Suite 1D  
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[www.prairievistas.com](http://www.prairievistas.com)

# KCDAA Member Highlights:

## New County Attorneys Terry Malone and Todd Thompson

by Mary Napier, Editor, Kansas Prosecutor

Newly-elected Ford County Attorney Terry Malone and Leavenworth County Attorney Todd Thompson have a few things in common, besides being newly-elected. 1) Terry and Todd are both members of KCDAA; 2) They were both influenced by their families to practice law; 3) They both graduated from Washburn University School of Law; and 4) They both think the most difficult thing about being a county attorney is the budget. While they have quite a few things in common, there are some differences between them as well. Some of these differences include where they grew up, their work history, and their hobbies.

### Ford County Attorney Terry Malone

Terry Malone grew up on a farm south of Chase in Rice County, Kansas. Just across the road from his farm, three of his father's cousins grew up on their own farm, but went on to become lawyers. This strong family influence helped Terry make the decision to attend law school. In 1971, he obtained a Bachelor of Science degree from Kansas State University, and in 1975, he received his Juris Doctorate from Washburn's School of Law.

After graduating, Terry started as an Assistant Ford County Attorney. He held that position for about five months before becoming the Ford County Attorney for the first time. In July 1977, he changed directions and started his career in private practice. In private practice, Terry's work involved representing insurance companies and defending their insured in personal injury, product liability, and medical malpractice cases. He has also been the city prosecutor for Dodge City since August 1990.

Terry's opponent for the Ford County Attorney position in the primary election was the former County Attorney, John Sauer. In the general election, his opponent was Larry Daniels. During his campaign, Terry stressed his experience as a prosecutor, the need for young prosecutors to remain in prosecution as a career, and ways to develop resources that protect the elderly. He also campaigned on the concept that there would be better prosecution of the laws, since the city

prosecutor and the county prosecutor would be the same person.

"I felt that the county attorney's office had been mismanaged for several years and that the people of Ford County were not receiving all of the services they should receive from the county attorney's office," said Terry.

The Ford County Attorney's Office is presently staffed with four assistant county attorneys. There was a fifth position in the budget, but Terry allocated those funds to give each of the staff attorneys a raise. He believes the most difficult thing about his job is working within a budget, and the best thing about his job is the interaction he gets to have with people.

Terry's goals for the future include the addition of another assistant attorney and an investigator. "I hope to obtain an adequate budget for my office, so that we may address all of the duties and responsibilities that come along with the office of the county attorney," said Terry.

Terry is a member of the KCDAA and the NDAA. He believes that associations "are extremely important in developing policy to assist in fighting crime. They are also the most important vehicles in providing training and education for prosecutors and law enforcement." Terry served on the board of the KCDAA over 32 years ago and was president-elect of the organization when he left the county attorney's office in 1977 to enter private practice.

Terry is married to his wife, Gretchen, who grew up in Dodge City, and he has three children. Terry's



**Terry Malone**

hobby is gardening, which led him to help develop the Sunflower Community Garden in Dodge City. They have recently expanded the garden due to an increasing interest in it. Terry's favorite thing to grow is asparagus. With his partner, they have a plot with 300 asparagus plants. They planted these plants the day after the Greensburg tornado, so this was the first year of production. They harvested approximately 2,100 asparagus spears, and expect to harvest twice that many next year. You may ask, what do you do with all that asparagus? Terry said they give it away to anyone who requests it.

## Leavenworth County Attorney Todd Thompson

Todd Thompson's family has lived in Leavenworth for 150 years, so that is where he was born and raised. He graduated from Leavenworth High School, received an undergraduate degree at KU, and received his law degree from Washburn's School of Law, just like his grandfather. His grandfather was the person who inspired him to go into law. During his last year of law school, a job opened up in the Leavenworth County Attorney's office. This job allowed him to move back home, take care of his parents, and start giving back to the community. As an Assistant County Attorney, Todd was the head of the Juvenile Division and stayed for five years.

People in the community kept telling Todd they wanted change, so he decided to run against Frank Kohl, the 24-year incumbent and his former boss for the County Attorney position. When he announced his intention to run for County Attorney, Frank fired him the next day despite the office being down one attorney, and Todd's 60 case docket the next day.

"Law enforcement officers, staff in the office, and people of the community – they all wanted change," said Todd. "They wanted more communication, more explanation, and better results with the cases coming into the County Attorney's office. I was told time and again that the County Attorney's office was referred to as 'plea bargain central'."

During his campaign, Todd's main strategy was to work hard and get his message out. He walked to as many houses as he could to meet as many people as he could. "My best experience was going door to door. The people will tell you what is needed and wanted with your position. Every day something new and different happened," said Todd.

As the Leavenworth County Attorney, Todd handles most major cases like person felonies. He has found that the job is much more of a management position, but he tries to stay active and knowledgeable with all the events happening in each docket. Todd's first priority in his new position was to address the backlog of cases once he discovered more than 30 percent of the cases presented to the office had not been charged from last year alone. In the first five months of 2009, Todd's office has charged about the same number of cases as all of 2008.

A few new things in Todd's



**Todd Thompson**



**Todd Thompson working in his new position.**

office include: interns from law schools; hiring an investigator; new policies for diversion, staff, and attorneys; a new management tool and paperless system; staff meetings; and the creation of a law enforcement liaison position. The Leavenworth County Attorney's office has approximately 3100 cases come into the office each year, and it has six attorneys including Todd, and 19 other staff members.


The most difficult thing about Todd's new position was trying to restructure the budget to meet the needs of the office. According to Todd, the best thing about his position is "being able to make things better and seeing the results of those changes. Prior to me taking office, there was a lot of frustration and apathy in the county attorney's office. The change seems to have brought a new life and energy."

Todd's goals for the future include finishing the backlog of cases and helping law enforcement officers present better cases, which helps get better convictions for serious and repeat offenders.

In addition to being a member of the KCDA, Todd is a member of the Lions Club, Rotary, JCAB,

and is the Leavenworth Bar Association president. He believes being active in these organizations helps him and his staff members learn more about the concerns of the community, and in turn, they can inform the community about the improvements in the County Attorney's office.

In his spare time, Todd loves to travel. He has climbed Mt. Kilimanjaro and the highest sand dune in the world located in the Gobi Desert in Mongolia, he has sailed the Virgin Islands, hiked the Amazon jungle, and visited Machu Pichu and Ireland. In the future, he hopes to see as much of the country as he can.

Todd's role models have been his grandparents and his parents, which all worked hard and ran successful businesses. Todd's father passed away the December before the election, and his mother passed away two weeks before he announced his intention to run for county attorney. "One of the reasons I made the decision to run for county attorney is because I knew it was what my parents wanted for me." Todd has had a lot of tragedy in his life during the past year, but he believes "there is nowhere left to go but up!" 

*We want to share your news!*



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

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

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

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Topeka, Kansas 66604  
(785) 232-5822  
or e-mail:  
mary@napiercommunications.com

**Feel free to submit digital photos  
with your announcement!**

**Next Deadline:  
October 23, 2009**

## Office Move

After 16 years at its old location, the Brown County Attorney's office realigned its office staff and relocated to the Brown County Courthouse effective January 1, 2009. Our new address and contact info is as follows:

Brown County Attorney's Office  
601 Oregon, Suite 101  
Hiawatha, Kansas 66434  
785-740-7401 (phone)  
785-740-7403 (fax)

Kevin M. Hill, Brown County Attorney, [khill@rainbowtel.net](mailto:khill@rainbowtel.net)  
Linda Ramey, Administrative Assistant, [lramey@brcoks.org](mailto:lramey@brcoks.org)



## New Faces

**Bruce Flipse**, Colby, Kansas was elected Thomas County Attorney and took office in January 2009.



**Bryan A. Ross** started in the Leavenworth County Attorney's office in February 2009. He is a 2004 KU Law graduate. Previously, he was an Assistant City Attorney in Chanute and worked at Couch, Pierce, King and Hoffmeister, CHTD before joining the County Attorney's office.



## Anniversary for Years in Prosecution

On August 10, 2009, **Dennis C. Jones** will have completed 25 years as a prosecutor in Kansas. He began his career in prosecu-

tion as the Assistant Kearny County Attorney, and was City Attorney for the City of Deerfield for 20 years. He also served as the City Attorney for the City of Lakin for 10 years. In October of 1988, Dennis was sworn in as the Kearny County Attorney, having defeated the incumbent in the August primary, who then resigned effective October 1. He won the general election in 1988; and has been re-elected five (5) times (1992, 1996, 2000, 2004, and 2008). Dennis has served in every position on the KCDAA Board of Directors.



## Births

**Cathy Eaton**, Assistant District Attorney, in the Wyandotte County District Attorney's Office, and her husband, Dave Copeland, announce the arrival of their daughter, Ryley Iana, born June 19, 2009. She weighed 10 pounds.

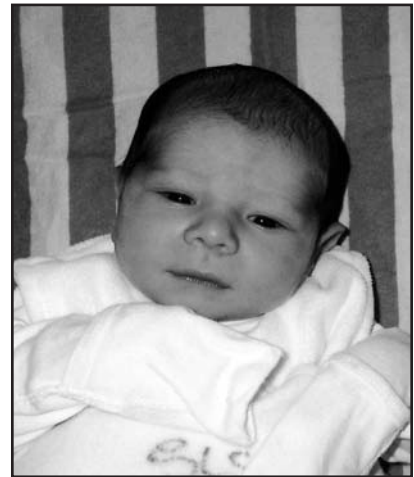


Ryley Iana



**Daniel Martinez**, Assistant District Attorney, in the Wyandotte County District Attorney's Office, and his wife Shelly announce the arrival of

their son, Nicolas Daniel, born May 4, 2009. He weighed 7 pounds and 12 ounces.



Nicolas Daniel



**Doug McNett**, Assistant Pawnee County Attorney, and his wife Jennifer had their fourth child, Emma, on April 14, 2009.



## Wedding

**Serena Hawkins**, Assistant District Attorney, in the Wyandotte County District Attorney's Office, was married to Ryan Schletzbaum, May 25, 2009, in Rivera Maya, Mexico.



Serena and Ryan

# Searches Incident to Arrest After *Arizona v. Gant*

by Clay Britton, Assistant Solicitor General  
Office of Kansas Attorney General Steve Six

When the Supreme Court decided *Arizona v. Gant*<sup>1</sup> this year, it either dramatically overruled three decades of criminal procedure jurisprudence in which a bright line rule allowed police to effectively ferret out crime while protecting themselves from armed criminals; or it merely re-affirmed four decades of Supreme Court decisions in perfect step with the Fourth Amendment's prohibition of unreasonable searches. Which alternative is correct is thoroughly debated in the Court's intriguing 5-4 opinion, in which two odd coalitions emerged,<sup>2</sup> but of more practical interest to Kansas prosecutors is *Gant*'s real-world impact. At issue in *Gant* was whether an automobile search incident to arrest is reasonable under the Fourth Amendment when the arrestee/occupant is secured and no longer within reaching distance of the car.<sup>3</sup> The Court's answer was an equivocal "no."<sup>4</sup> This article briefly discusses the jurisprudential history that led to *Gant*, Kansas' judicial and legislative responses, and the awkward application of *Gant* to K.S.A. 22-2501, which controls all searches incident to arrest in Kansas.<sup>5</sup>

The road to *Gant* began in earnest in 1969 with *Chimel v. California*,<sup>6</sup> when the Court held that a search of "the area into which an arrestee might reach in order to grab a weapon or evidentiary items" is reasonable under the Fourth Amendment as

a search incident to arrest.<sup>7</sup> The dual justifications of protecting the arresting officer and preventing the concealment or destruction of evidence were the bases of the Court's decision.<sup>8</sup>

*Chimel* only involved an arrest in the arrestee's house,<sup>9</sup> but in *New York v. Belton* the Court applied—and some argue extended<sup>10</sup>—*Chimel* to the context of automobile searches incident to an arrest.<sup>11</sup> According to the *Belton* Court, "courts have found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile and the arrestee is its recent occupant."<sup>12</sup> In response to this difficulty, the Court laid down a "bright-line rule"<sup>13</sup> that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."<sup>14</sup> Seemingly aware that this bright-line rule could be seen as an extension of *Chimel*, the Court noted that its holding did "no more than determine the meaning of *Chimel*'s principles in [the] particular and problematic [context of automobile arrests]."<sup>15</sup> But if that was the Court's intention, in many jurisdictions over the last 18 years *Belton* nonetheless came to allow a broader type of search than *Chimel*'s limited scope appeared to consider.<sup>16</sup>

## Footnotes

1. 129 S.Ct. 1710 (2009).
2. Justice Stevens wrote for the Court, joined by Justices Scalia, Souter, Thomas and Ginsburg; Justices Alito, Breyer, Kennedy—and Chief Justice Roberts—dissented.
3. *Gant*, 129 S.Ct. at 1714.
4. *Id.*
5. This article does not address arguments for the admissibility of evidence in pending cases where *Gant* now makes the pre-*Gant* vehicle search unconstitutional. In such cases, two possible approaches are the inevitable discovery doctrine, see *Nix v. Williams*, 467 U.S. 431, 448 (1984), and the "reasonable reliance," or "good faith," exclusionary rule exception, see *Herring v. United States*, 129 S.Ct. 695, 702 (2009). The "good faith" exclusionary rule argument has been rejected by one court, but should still be made in the appropriate case. See *United States v. Buford*, 2009 WL 1635780, at \*4 (M.D. Tenn. June 11, 2009) (*Herring* "good faith" exception not applicable when police conduct search based on later-invalidated Supreme Court decision).
6. 395 U.S. 752 (1969).
7. *Id.* at 763.
8. *Id.*
9. *Id.* at 753-54.
10. See *Thornton v. United States*, 541 U.S. 615, 631 (2004) (Scalia, J., concurring).
11. 453 U.S. 454, 460 (1981).
12. *Id.*
13. *Gant*, 129 S.Ct. at 1727 (Alito, J., dissenting); *Thornton*, 541 U.S. at 625 (Scalia, J., concurring).
14. *Belton*, 453 U.S. at 460.
15. *Id.* at n.3.
16. *Gant*, 129 S.Ct. at 1718.

In *Thornton v. United States*, the Court considered whether the *Belton* rule applied even when police first encountered the arrestee shortly after he or she had exited the vehicle.<sup>17</sup> Acknowledging again the need for a clear rule to guide officers in the field, the Court held that a *Belton* search is appropriate “[s]o long as an arrestee is the sort of ‘recent occupant’ of a vehicle as [Thornton] was.”<sup>18</sup> Concurring in the judgment, Justice Scalia would have upheld the search only under a separate rule allowing police to search the area where a suspect is arrested, but solely for evidence of the crime of arrest.<sup>19</sup> He traced the precedent for such a rule from English common law as far back as 1829,<sup>20</sup> to Supreme Court cases such as *United States v. Rabinowitz*,<sup>21</sup> and described his preferred rule and the *Belton/Chimel* rule as “two different rules” with distinct justifications.<sup>22</sup> Satisfied with the *Belton* approach to Thornton’s case, the majority simply noted that “[w]hatever the merits of Justice Scalia’s opinion concurring in the judgment, this is the wrong case in which to address them.”<sup>23</sup>

Apparently *Gant* was the proper case in which to address Justice Scalia’s alternative rule. Faced with a fact pattern in which police performed a *Belton* search when they encountered Gant after he left his car and walked 10-12 feet away from it,<sup>24</sup> the Court rejected the broad reading of *Belton* and *Chimel* it had espoused in *Thornton*. Instead it held that “the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”<sup>25</sup> The Court then went on to adopt Justice Scalia’s *Thornton* rule, holding that “[a]lthough it does not follow from *Chimel*, we also

conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is ‘reasonable to believe evidence relevant to the crime of arrest may be found in the vehicle.’”<sup>26</sup>

After *Gant*, police who arrest a recent occupant of an automobile have two avenues for searching the passenger compartment incident to that arrest. First, if the arrestee is unsecured and within reaching distance of the car, *Chimel*’s dual justifications of officer safety and preventing destruction or concealment of evidence allow police to search the car for weapons and evidence to the same pre-*Gant* extent.<sup>27</sup> That is to say, although *Gant* limited the situations in which a *Belton* search is allowed, it did nothing to restrict the items for which police may search once a *Belton* search is allowed. Accordingly, just as before *Gant*, if a *Belton* search is authorized police may search the car for weapons and evidence of any crime.<sup>28</sup> Second, following Justice Scalia’s *Thornton* concurrence, police may search for evidence of the crime of arrest—even after the arrestee is secured and outside reaching distance of the car—as long as there is reason to believe such evidence may be found in the car.

With that understanding of *Gant*’s two separate rules for vehicle searches incident to arrest, the question for Kansas prosecutors becomes what effect *Gant* has on K.S.A. 22-2501, which controls all searches incident to arrest in Kansas.<sup>29</sup> As a brief discussion at June’s KCDAA conference showed, the answer may not be perfectly clear. First, review of the statute is in order. It reads:

When a lawful arrest is effected a law enforcement officer may reasonably search the person arrested and the area within such person’s immediate presence for the purpose of:

17. 541 U.S. at 617.

18. *Id.* at 623-624 (quoting *Belton*, 453 U.S. at 460).

19. *Id.* at 632 (Scalia, J., concurring).

20. *See id.* at 629-630.

21. 339 U.S. 56 (1950).

22. *Id.* at 632.

23. *Id.* at 624 n.4.

24. *Gant*, 129 S.Ct. at 1715.

25. *Id.* at 1719.

26. *Id.* (quoting *Thornton*, 541 U.S. at 632 (Scalia, J., concurring)).

27. Admittedly, a true *Belton* search situation will be rare. In *Belton*, one officer arrested four occupants of a vehicle and had only one set of handcuffs; as he searched the car, the arrestees stood nearby. *Belton*, 453 U.S. at 456.

28. This is particularly relevant in the context of K.S.A. 22-2501(c), as will be discussed below.

29. *State v. Conn*, 278 Kan. 387, 391, 99 P.3d 1108 (2004).

- (a) Protecting the officer from attack;
- (b) Preventing the person from escaping; or
- (c) Discovering the fruits, instrumentalities, or evidence of a crime.<sup>30</sup>

The first half of the statute delineates the physical area subject to a search incident to arrest, and the second half sets out the purposes for which such a search may be executed.<sup>31</sup>

The first *Gant* rule, limiting *Belton* searches to the area within the arrestee's reaching distance, deals only with the physical area to be searched, and has no effect on the enumerated permissible purposes for a search incident to arrest in subsections (a) through (c). But it does affect the definition of "immediate presence" in the first half of the statute. Before *Gant*, Kansas courts broadly construed "immediate presence" in step with *Belton*, such that even after an arrestee was handcuffed and placed in the back of a patrol car, the passenger compartment of the arrestee's car was still within the arrestee's "immediate presence."<sup>32</sup> After *Gant*, if an arresting officer in Kansas wants to conduct a *Belton/Chimel* vehicle search for officer safety or to prevent the destruction or concealment of evidence of a crime, "immediate presence" must mean within the arrestee's physical reaching distance at the time of the search.

But what if the officer has arrested the car occupant for possession of hallucinogenics<sup>33</sup> after smelling marijuana smoke billowing from the passenger compartment—does *Gant* still require "immediate presence" in K.S.A. 22-2501 to mean nothing more than the area within the arrestee's reaching distance at the time of the search? Put another way, in this situation, can the officer arrest the

occupant, place him in the patrol car, then proceed to search the car for marijuana? *Gant's* apparent answer is "yes." Because the officer would have reason to believe that evidence of the crime of arrest would be found in the car, *Gant* and Justice Scalia's *Thornton* search rule now allow such a search even if the car is outside the arrestee's reaching distance.<sup>34</sup>

This separate avenue for a vehicle search incident to arrest is all well and good under *Gant*, but in Kansas we have one statute that controls all searches incident to arrest, whether they are pursuant to *Gant's* first rule regarding *Belton/Chimel* searches, or pursuant to *Gant's* second rule allowing Justice Scalia's *Thornton* mode of searches for evidence of the crime of arrest. It seems that now, under *Gant* and the Fourth Amendment, "immediate presence" in K.S.A. 22-2501 can have one constitutionally permissible meaning for *Belton/Chimel* vehicle searches, and a broader constitutionally permissible meaning for Justice Scalia's *Thornton* "crime of arrest" searches. Going forward, the question becomes whether Kansas courts will apply *Gant's* more restrictive definition in all vehicle searches incident to arrest, or whether they will distinguish between the two *Gant* search rules and apply two different—constitutionally permissible—definitions of "immediate presence" depending on the type of search at issue.

A similar distinction exists in the context of K.S.A. 22-2501(c), which makes searching for evidence of "a crime" one of the allowed purposes for a search incident to arrest. In 2006, K.S.A. 22-2501(c) was amended to allow police to search for evidence of "a crime" where it previously allowed searches only for evidence of "the crime" of arrest.<sup>35</sup>

30. *State v. Henning*, Nos. 98,118 and 98,119, 2009 WL 1811200 (Kan. June 26, 2009), which invalidated K.S.A. 22-2501(c), will also be discussed below. For present purposes, the statute as amended in 2006 is a helpful starting point.

31. See *State v. Davison*, --- Kan.App.2d ---, 202 P.3d 44, 47 (2009) (petition for rev. filed Mar. 2, 2009).

32. *State v. Press*, 9 Kan.App.2d 589, 595, 597, 685 P.2d 887 (1984), rev. denied 236 Kan. 877 (1984) (citing *State v. Deskins*, 234 Kan. 529, 543, 673 P.2d 1174 (1983)); *State v. Hays*, 2004 WL 1812662, at \*3 (Kan.

Ct.App. Aug. 13, 2004), rev. denied Dec. 14, 2004.

33. See K.S.A. 65-4162.

34. Assume for purposes of this example that the arrest is valid but that probable cause does not exist to search the car; if it did, of course the officer would not need to rely on either *Gant* rule to search the car. See *California v. Acevedo*, 500 U.S. 565, 569 (1991) (citing *Carroll v. United States*, 267 U.S. 132, 153 (1925)).

35. See *State v. Henning*, 38 Kan.App.2d 706, 716, 171 P.3d 660 (2007), rev'd by *State v. Henning*, Nos. 98,118 and 98,119, 2009 WL 1811200 (Kan. June 26, 2009).

The purpose of that amendment was to bring the statutorily permissible purposes of a vehicle search incident to arrest in step with *Belton*.<sup>36</sup> As discussed above, *Gant* did not affect the purposes for which a *Belton* search may be conducted—it only restricted the physical scope of such a search to the area within the arrestee’s reaching distance. So, when police do happen to conduct a *Belton/Chimel* search consistent with *Gant*’s first rule, the search could still be for evidence of “a crime” as K.S.A. 22-2501(c) currently allows.

But again, what about searches under *Gant*’s second rule allowing Justice Scalia’s searches for evidence of the crime of arrest? In that situation, the phrase “a crime” in subsection (c) is obviously overbroad under *Gant*. Will Kansas courts leave the statute as written in *Belton/Chimel* situations, yet read “a crime” to mean “the crime of arrest” when *Gant*’s second rule justifies the search?

On the date this article was to be submitted for publication, the Kansas Supreme Court partially answered this question in *State v. Henning*,<sup>37</sup> finding

K.S.A. 22-2501(c) facially unconstitutional in light of *Gant*. The court reasoned that under *Gant*, “[t]o have a valid search incident to arrest, when there is no purpose to protect law enforcement present, the search must seek evidence to support the crime of arrest, not some other crime, be it

actual, suspected, or imagined.” *Id.*

As this article suggests, the court’s decision need not have gone so far as to fully invalidate K.S.A. 22-2501(c) for all searches incident to arrest—especially for true *Belton/Chimel* search situations. *Henning* appears consistent with *Gant* to the extent that it applied *Gant*’s second rule regarding searches for evidence of the crime of arrest. But *Henning* seems to have treated *Gant* as if it espoused only one rule. It invalidates K.S.A. 22-2501(c) by treating Justice Scalia’s separate *Thornton* rule on searches for evidence of the crime of arrest as a restriction on *Belton/Chimel* searches, instead of an alternative, distinct avenue for searches when there is reason to believe evidence of the crime of arrest may be found in the car.

So, as the law now stands in Kansas, under *Henning* and K.S.A. 22-2501, police can only search the area within an unsecured arrestee’s immediate presence—meaning reaching distance—for evidence of the crime of arrest, to prevent attack, or to prevent escape. There is no alternative search incident to arrest as Justice Scalia described in his *Thornton* concurrence, and as the Court held in *Gant*. Instead of the two *Gant* rules described above, Kansas is now left with half of each, unnecessarily welded together.

This extended dissection may seem simply academic, but it is not rare for judges to be academics. On the other hand, sometimes courts gloss over the complexities of an issue like vehicle searches incident to arrest in favor of an easy-to-understand, bright-line rule. In *Belton*, the Supreme Court handed down a bright-line rule that gave police clear guidance and an often-used search procedure. While *Gant* may have been an appropriate return to a more involved analysis of such searches, in *Henning* the Kansas Supreme Court appears to have favored simplicity over nuance, and in the process unnecessarily restricted the ability to conduct searches incident to arrest in Kansas. Ⓜ

36. *Id.* at 722-723.

37. Nos. 98,118 and 98,119, 2009 WL 1811200 (Kan. June 26, 2009).

## Forensic Analyses of Real Estate Appraisal Reports

*For Cases Including*

**Eminent Domain  
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*By*

**Anthony Reynolds, MAI**

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# KCDAA Members Served on KBI Advisory Board

by Jess W. Hoeme, Assistant District Attorney-Drug Offenses, Shawnee County, Kansas

In January 2009, the Kansas Bureau of Investigations developed an Advisory Board consisting of representatives from law enforcement and prosecutors across the state of Kansas. Representing the Kansas County and District Attorneys Association were prosecutors from jurisdictions of variable sizes. Richard Raleigh of Barber County represented rural jurisdictions; Jan Satterfield of Butler County represented medium-sized jurisdictions; and Jess Hoeme of Shawnee County represented large jurisdictions. Each brought to the Advisory Board their unique ideas and perspectives on the services offered by the KBI.

The Kansas Bureau of Investigations developed the Advisory Board and scheduled two days in January to consider and answer three distinct questions: (1) If the KBI were to expand services, what services should the KBI expand or improve? (2) If the KBI were to reduce services, what services could the KBI reduce with the least amount of harm to its customers? And (3) If the KBI were to improve efficiencies where could those be found?

These questions were prompted by the unfortunate but necessary budget cuts, which were demanded by the cuts placed on all state agencies by Governor Sebelius. The KBI invited the Advisory Board to explore in-depth all the many essential services they offer and to consider the impossible task of prioritizing those services. Throughout the first day of the meeting, the KBI presented information on their

history and origin followed by presentations by representatives of the various departments within the KBI.

Many of us are familiar with the most fundamental services offered daily by the KBI's Investigations Programs including the cyber crimes unit, the meth eradication, asset forfeiture, and prescription drug monitoring programs as well as the drug endangered children, child death review board investigators, and the evidence recovery team. The Investigations division has field officers spread across the state and offices stationed in Kansas City, Wichita, Great Bend and the headquarters and field office in Topeka. Other specialties offered by the KBI investigations division are the Top Gun narcotics training program, Project Safe Neighborhood and even the team responsible for ensuring law enforcement security during natural disasters. The presentations from the Investigations Division reiterated that the first and foremost calling of the KBI is to provide "agents who shall be trained in the detection and apprehension of criminals." K.S.A. 75-711.

The second aspect of the KBI with which we are all immediately familiar with is the laboratory services offered by the four labs sanctioned by the KBI. The KBI Advisory Board Outline stated, "The KBI Forensic Laboratory, as an integral part of the KBI, is committed to providing timely, state-of-the-art forensic service to Kansas law enforcement and the Kansas criminal justice system." Each of the four forensic labs is

accredited in biology, chemistry, firearms/tool markings, latent prints, questioned documents and toxicology, respectively. The four labs are located in Great Bend, Kansas City, Pittsburg and Topeka and collectively employ 67 people. The forensic laboratories were agreed by all members of the board to be a vital part of our investigations and successful prosecutions. The Advisory Board also sought to reiterate across the state the importance of collecting the KBI laboratory fee. K.S.A. 28-176 provides that any person convicted, diverted or adjudicated of certain offenses shall pay a separate court cost of \$400.00 to the KBI for each offense in which forensic science or laboratory services were rendered or administered.

Other vital services of the KBI relate to the processing, maintenance, and dissemination of information services. Information services, including fingerprint records, criminal history, fingerprint database, offender registration and incident-based reporting, are not only vital projects, but are statutorily the sole responsibility of the KBI. These records are not only utilized by law enforcement agencies and prosecutors across the state of Kansas but are vital for background checks required of teachers, child service providers, and even government officials.


Similar to the Information Services Division, the KBI Information Technology division provides services delivery for all of the other aforementioned services offered by the KBI. The Advisory Board was equally

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impressed by the extent of the services provided by the ISD and the reports and metrics the ISD provides throughout the KCJIS and AFIS programs, among others.

In conclusion, the KBI Advisory Board was collectively reminded of the value of the many services offered by the

KBI. Unequivocally, the point was reiterated that each of us as citizens and representatives of the state of Kansas should appreciate these services and do all that we can to support them. The KBI has a monumentally difficult challenge ahead but as representatives of the KCDA,

the prosecutors who attended the meeting were of the opinion that investigations, the laboratory, and IT services offered by the KBI are valuable and assist us when we need it most to ensure the effectiveness and efficiency of the criminal justice system in the state of Kansas. 

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## KDOC Adopting New Detainer Policies

by Beth Mechler, Detainer Specialist, Kansas Department of Corrections

The Kansas Department of Corrections is presently adopting new policies and procedures for processing detainees lodged by law enforcement agencies. We are reaching out to our law enforcement partners to educate them on the barriers that these detainees create within the correctional system and on the individual inmate, as well as to engage these same partners in the resolution process so all participants and the communities benefit.

To further understand the impact of incarcerated subjects on our communities, one only has to read the latest statistical summaries. The following are a few of the highlights that directly affect you:

- 700,000 persons are released yearly from United States prisons
- More than 5,100 offenders are released yearly from Kansas prisons
- 9 million plus are booked into and released from county jails nationwide yearly
- 98 percent of those released from **Kansas** prisons return to our Kansas communities.

In order to assist our communities and all branches of law enforcement we must work together and engage ourselves as active participants in the offender re-entry process. An effective offender release plan, with existing barriers for successful re-entry removed, increases the probability of the offender remaining crime free. This makes our

communities safer, which is a goal we all share.

I would like to encourage our law enforcement partners to use the inmate's incarceration period to your advantage. Please lodge your existing warrants on inmates as detainees with the Kansas Department of Corrections as soon as possible. We want the individual inmate held accountable and responsible for their past actions. We also want the opportunity to assist them in resolving detainees while incarcerated so we can assist them with an effective release/parole plan.

The effects of an existing warrant/detainer to an inmate are numerous. It increases their custody to a higher level. The trickle-down effect from this increased classification results in the inmate being unable to participate in programs, whether that is drug/alcohol counseling, batterers intervention, vocational training, educational courses and jobs in prison, that are designed to improve their ability to lead a productive and law abiding life when they are released. It means that they will report back to your community the same as they left it! It also means that effective release planning cannot take place as far as a parole plan, arranging transportation, setting up community residential treatment beds, family/peer support and employment issues. With all this said, I hope that you see the importance of the timely filing of warrants as it pertains to state statutes, and

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also as it pertains to the inmate and community.

The Kansas Department of Corrections has adopted new policies to assist in locating and identifying these same warrants. We are running queries through the NCIC Wanted Files; Triple I, Kansas Wanted/Hot Files, and ALERT as well as a Kansas Administrative Message to all Kansas law enforcement agencies requesting any outstanding wants or warrants on the inmate. We send an Administrative Message (NLETS-AM) to the four surrounding states, (Oklahoma, Colorado, Missouri and Nebraska) as well as any other state where we have identified that the inmate resided or visited during the ten years prior to incarceration.

We run these queries upon admission to the Department, prior to their placement in programs and/or consideration for work release placement; prior to placing the inmate in a minimum security setting; six months prior to their release date; and, fourteen days prior to release. **If** the warrants are dropped into the Hot Files and NCIC, we will find them and will then be able to assist in resolving them.

We have the opportunity to work with offenders while they are incarcerated. With your help we can resolve these warrants by making arrangements with the courts for new court dates; setting up payment plans with the inmates to pay court fees/restitution while incarcerated, and get them to court while your witnesses and cases are still fresh. You can benefit greatly as an agency in deputy/officer time, maintenance and repair costs to equipment and vehicles, transportations costs as well as resource costs, if detainers can be resolved safely without the need for your staff to pick the offender up and bring him or her to court upon release. To do this we need you to enter those warrants timely; enter them into the Kansas Hot Files and NCIC; and notify KDOC of warrants you hold on inmates/parolees.

Recently I forwarded a survey through Darrell Wilson of the Kansas Sheriff's Association to all Kansas Sheriffs, requesting information on their individual warrant divisions, computer checks and other processes used in working a warrant. I asked if their department uses KASPER (Kansas Adult Supervised Population Electronic Repository). Of the responses received to date, over half were not

aware that the KASPER site existed or have chosen not to use the site as a resource.

This site is free and simple to use. You can run your wanted persons simply by typing in their name. If the individual has ever been incarcerated in Kansas, is on parole or community corrections supervision, or is an escapee or absconder from supervision, he/she will appear on the site. You will have their photo, Kansas criminal history, facility history and current location, as well as parole location, all at your fingertips.

I would encourage you to try the site at [www.dc.state.ks.us](http://www.dc.state.ks.us), Go to KASPER, hit "I accept," on the disclaimer, and then type in the name you would like to submit. If there is more than one response to the submitted name, all subjects with that name will appear on the screen, and you can select the one that matches your given profile.

I recently attended the Joint Law Enforcement Conference in Wichita Kansas and briefly addressed the Kansas Sheriffs' Association Board, the Kansas Peace Officers' Association Board, and the general assembly. We discussed detainers and "walked through" the KASPER website. I have been amazed at your responses and have thoroughly enjoyed the e-mails listing the successes with the site! I hope everyone remains encouraged and enthusiastic about the site and passes it on to others who may not have attended the conference or do not receive this publication.

Most recently Larry Thomas, Ed Klumpp, Gordon Langsford, Bill Noll and I met to discuss linking our KASPER System to the Kansas Hot Files for two way notification on warrant entries. This discussion is ongoing and appears highly probable at this point.

I am here to assist you in this process and look forward to working and partnering with you and your agency. Please let me know what I can do to be of assistance. My contact information is below.

Elizabeth (Beth) Mechler  
Program Consultant II - KDOC  
Detainer Coordinator  
(785) 368-6577  
[BethMe@doc.ks.gov](mailto:BethMe@doc.ks.gov) 

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



## NDAA Summer Conference - Legislative Issues, Programs, Other Resources

A very hot and humid Orlando, Florida was the site of the National District Attorneys Summer Conference in July. In conjunction with the conference events, the National Board of Directors met to discuss current legislation, financial issues, programs and projects. All of these initiatives require funding from various sources, and the board is working hard to fully provide for our nationwide needs.

The NDAA has recently sent a letter of support for the confirmation of Judge Sotomayor and has also passed a resolution by the Board of Directors giving support for Veterans' Courts [a mental health initiative with current programming in Brooklyn, New York].

On a very positive note, Deputy District Attorney Kim Parker, who serves on the Associate Board, was elected their president and claims a seat on the National District Attorney Association Executive Board of Directors 2009-2010. With her direct input into the functioning of our association, we are sure to have many positive changes and guidance.

### PENDING LEGISLATION AND FUNDING ISSUES

The funding for the National Advocacy Center still faces a shortfall and while the center is operating on a scaled back basis, attendance is good. Until Congress appropriates full funding for the center, attorneys who attend will continue to pay their travel expenses to attend the courses. In the first round, paltry funding was set at \$150,000 in the House and \$250,000 from the Senate. We are working to raise the \$5,000,000 necessary to keep the NAC alive. Once again, the national board encourages all offices to contact their Congressional representatives to fully fund the needs of prosecutor training at NAC.

The John Justice legislation to provide loan forgiveness for both prosecution and defense counsel has passed; however, it has not yet received funding for its implementation. This is a critical initiative for all prosecutors and we will continue to monitor its implementation.

Other pending legislative issues include debate on the following topics:

- Mandatory minimum changes applied to crack/powder disparity. The US sentencing commission trend is changing to recognize and deal with these issues.
- Hate Crimes: S909 introduced by Kennedy offers additional grant funding for hate crimes
- Juvenile sentencing: life without parole. We have been active in the debate on this issue. The Heritage Foundation [that opposes ending life without parole] has put together a working group that NDAA will attend.
- National Academy of Sciences – debate continues over the critical report issued by the NAS. Together with the International Association of Chiefs of Police, the NDAA and forensic science organizations have requested that AG Holder meet on addressing how legislation can address these concerns. While not totally opposed to the report as it does support more research in forensic sciences, there still remain many issues of concern for prosecutors.
- Senator Webb – has put forth a criminal justice bill to address all aspects of the system. We have serious concerns with the findings section of the bill, listing why people should be let out of prison. Law Enforcement is opposed to the bill and we are seeking to edit provisions that are detrimental.

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## PROGRAM DEVELOPMENT AND SERVICES

Our national organization, that combines the *American Prosecutors' Research Institute* as well as the *National Advocacy Center*, has a number of on-going programs that continue to provide high quality assistance to our offices.

- The Gang Violence Prosecution Program has a mission to support state and local prosecutors in the nationwide efforts to address gun crimes. This program offers Anti-Gang training in different venues at no cost to the prosecution offices. See web site. Monographs are available. Civil Gang Injunctions. Nuisance and injunctive common law. TRO and permanent injunctions can be found on the web site ~ [www.ndaa.org](http://www.ndaa.org)
- Project Safe Neighborhoods continues to train prosecutors in firearms cases and now offers technical assistance in the civil injunction process and gang related discovery issues. Publications from this program, as well as many other resources are available online ~ [www.ndaa.org](http://www.ndaa.org)
- The Homeland Security Program has been funded by grants to develop domestic terrorist training and the NDAA E-Learning program
- FUSION CENTER: Originally focusing on terrorism issues, this program has broadened its scope to include all crimes of violence.
- For our friends in the southwest, a new program has been initiated: the Southwest Border Prosecution Initiative. With assistance from the Department of Justice, summits in California, Arizona, New Mexico, and Texas are planned to address contemporary issues. Hopefully this fall, they will have plan to a summit for 75 persons to attend. No location yet and the curriculum is pending. Plans are to create a number of programs in that area to address border protection.
- The NDAA has requested DOJ funding for training in forensics, mortgage fraud, project safe neighborhoods, and training on combating the CSI effect.
- NDAA National Center for Community Prosecution continues its long term proactive partnership among prosecutors, law enforcement, and communities. Our interest in quality of life issues is promoted with the NCCP program development team working to expand and disseminate information on problem solving restorative justice. The goal is to ensure that our prosecutors can effect lasting change in their communities. The publication "BUILDING BRIDGES" is available for order or on the website.
- The National Center for the Prosecution of Child abuse continues to offer training, technical assistance, and publications on all aspects of criminal child abuse and exploitation. Looking forward, the NCPC hopes to merge online crimes and more technical assistance to prosecutors with a range of courses regarding computer evidence. As with all programs of our association, funding for training/tuition is of critical importance. Here are a few of the national training courses:
  - ❖ Unsafe Havens – Online crimes against children
  - ❖ Unsafe Havens II – Advanced Trial Ad for Prosecutors
  - ❖ Safety Net – multidisciplinary Investigation and prosecution of computer facilitated Child Sexual Exploitations.
  - ❖ Child Proof
  - ❖ Strategies For Justice

*The National Center for Child abuse provides a nationwide summary of child abuse state laws online.*

There are a multitude of other resources available to prosecutors for information, training and assistance including:

- National Center for the Prosecution of Violence Against Women
- The National Center for the Prosecution of

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Identity Crime offers a number of courses including White Collar Crime: Training in Internet Fraud; Cybercrime I and Cybersleuth II; telemarketing fraud and crimes against the elderly.

- The DNA Forensics program – online learning in basic DNA science [www.dna.gov](http://www.dna.gov)
- Protecting lives, saving futures
- Prosecuting the DWI
- Prosecuting the Drugged Driver
- Lethal Weapon

DWI monographs available at [www.ndaa.org](http://www.ndaa.org) include:

- Special Topic Series
- Breath Testing
- Crash Recognition Basics
- Children and Cars
- Traffic Safety Resource Prosecutors
- DWI PROSECUTOR HANDBOOK
- Guide for Law Enforcement and Expert Witness
- Hardcore Drunk Driving Prosecutorial Guide

For additional information, contact Joanne

Michaels, the Director of the National Traffic Law Center: (703) 519-1645 or [Joanne.michaels@ndaa.org](mailto:Joanne.michaels@ndaa.org).

## NATIONAL ADVOCACY CENTER COURSES

For a complete listing of courses and dates please go to the website - [www.ndaa.org](http://www.ndaa.org)

- Prosecutor Boot Camp – Introductory Course for new prosecutors
- Prosecutor and the Jury – 5 year experience level required
- Trial Advocacy II – (more advanced). Average experience 5 years.
- Courtroom Technology
- Capital Litigation Jury Selection
- Capital Litigation
- Elder Disability Program
- Arson and Explosives.
- Evidence for Prosecutors – Introductory course

- Prosecuting Drug Cases
- Government Civil
- Solving Prosecution Problems – a management course
- Forensic Evidence
- Prosecuting Homicide Cases
- Prosecuting Sexual Assaults
- Contemporary Trial Issues
- Office Administration – second level management course
- Crime Scene and Investigations – combating the CSI effect
- Prosecution and Victim Advocacy
- Career Prosecutor Course
- The Executive Program – premier management leadership program for the elected/appointed prosecutor
- National Conference on Domestic Violence
- National Center for Prosecution Ethics – on line, as there is no grant funding.

## AROUND THE COUNTRY AND THE WORLD

NDAA continues to work with the international prosecution community. Each year, representatives of our organization attend “Hands Across the Borders.” The meeting will be this fall in Quebec and is generally attended by prosecutors in the northern states with connections to the Canadian Border. Note: Quebec is the most populated city in Canada and has the lowest crime rate!

The National Association of Hispanic Prosecutors will have their CLE conference and other training this Labor Day weekend in Albuquerque.

The American Bar Association Criminal Justice Section has made excellent progress under the tutelage of Brooklyn District Attorney Joe Hynes. There are 25 representatives in this section of the ABA and for the first time...the split is 13 prosecutors and 12 defense representatives. This November a re-entry summit and sentencing CLE (Nov. 5-6) will be held in Washington, D.C.





## **2010 KCDAA Legislative Request for Proposals**

**(One Proposal per page – use additional pages as needed)**

The KCDAA Legislative Committee is soliciting Legislative Proposals for the KCDAA legislative agenda for the 2010 Legislative Session. This input from the membership will be considered by the Committee in making its' recommendations to the KCDAA Board of Directors.

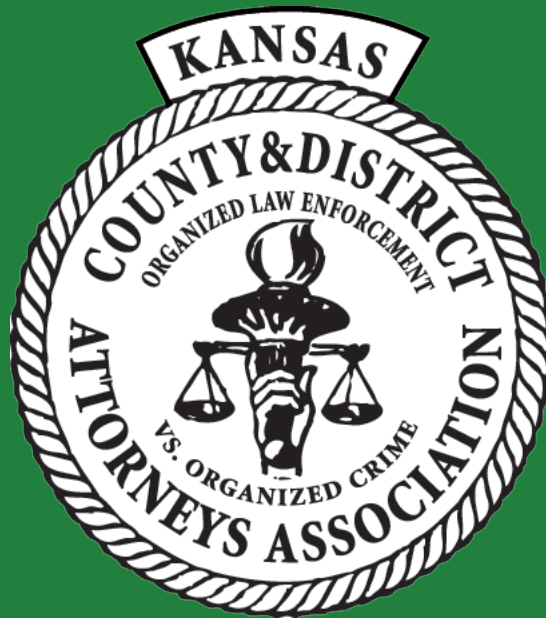
This RFP is the first step in the process by gaining the input of the membership in changes needed to the Kansas Statutes for the benefit of prosecutors. Please submit your proposals with the information below as a minimum. Feel free to provide other information, background or cases that will aid the Committee in selecting and targeting the most critical issues. Thank you for your prompt attention to this matter.

1. Statute to amend: \_\_\_\_\_
2. Please describe the need for this change as it applies to the membership of the KCDAA across the state as well as the specific concern in your jurisdiction.
3. Draft Language – Please attach and if you are amending an existing statute, please attach a copy of statute with the change noted.
4. If known, any other Statutes affected:
5. Are you aware of any previous legislative efforts similar to this proposal? If so, when and by whom?
6. Other organizations that might support this legislative proposal? Oppose?
7. Legislators or others already contacted about the proposal:

Submit proposals to: KCDAA Office, 1200 W. 10<sup>th</sup> Ave, Topeka, KS 66604

Fax: (785) 234-2433 Email: [skearney@kearneyandassociates.com](mailto:skearney@kearneyandassociates.com)

**Deadline for submission is August 21, 2009**



# KCDAA FALL 2009 CONFERENCE

*October 11-12, 2009  
Capitol Plaza Hotel  
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**Kansas County and District  
Attorneys Association**

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