



# Advance Sheet



Kansas County and District Attorneys Association

January 2007

## Kansas Prosecutors Foundation begins Feasibility Phase

*By Steve Kearney, KCDA Executive Director*

The Kansas Prosecutors Foundation continues to move forward setting up 2007 as a very exciting year for the KCDA. The Foundation is the next logical step in moving the KCDA forward as the Bar Association for Kansas Prosecutors. A feasibility study on a fundraising campaign is beginning in January as authorized by your Board of Directors at its December 2006 meeting in Kansas City.

The purpose of the study is to determine the types of individuals and/or communities of interest most likely to contribute to the Foundation; what range of amounts of gifts are indicated; what type of legacy there is interest in sustaining or endowing; and any other relevant information that will aid the Foundation in a fundraising effort.

Over the course of the next couple of months, our fundraising consultant will be conducting targeted interviews with Kansas community and foundation leaders; and Kansas County and District Attorneys Association leaders and members. These interviews will assist them in developing their recommendations regarding how this new Foundation should go about the business of conducting the initial fundraising campaign. You may well be one of those selected for an interview. On behalf of your Association, be generous with your time and wisdom so your Board has the best information going into the fundraiser's

report for implementation.

Following the interviews our fundraising consultant will then prepare a report for the Board detailing such things as the interviewees background and selection; the statistical results of the interviews; analysis and commentary relative to the conduct of a fundraising campaign; conclusions and recommendations for further action; and design of collateral materials to guide future initiatives.

Once this research is complete and the report delivered, the Board will have sufficient information to act upon in conducting the Fundraising Campaign itself. Research of this type takes the guesswork out of how to proceed and assists in setting realistic sets of expectations, goals, and a timeline from which to work.

The opportunity to foster the development of career prosecutors in a variety of ways unavailable to the KCDA currently makes this endeavor one of the most exciting prospects for the KCDA family in several years. With the KCDA and KPT&AI on solid footing, this new phase of organizational development will give your Board another tool in the tool box to advance the mission of quality career professional prosecution, benefiting the citizens of the state of Kansas that you all have taken an oath to protect.

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## About this publication...

The Advance Sheet is the official publication of the Kansas County & District Attorneys Association. General members of the KCDAА include county attorneys, district attorneys, assistant county attorneys, and assistant district attorneys. City prosecutors, members of the Kansas Bureau of Investigation, and prosecutors with the Attorney General's office are eligible for associate membership with the Association.

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## Recent Opinions

### HABEAS ISSUES

Miller v. State, # 96,523  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed

Miller appealed the district court's summary denial of his K.S.A. 60-1501 petition, arguing that the court erred in finding a failure to exhaust administrative remedies. Miller failed to contact the KPB regarding the conditions that were imposed on his parole and counsel's argument that the contact would serve no purpose was not convincing. The Court held that the dismissal was proper.

Wilkins v. State, # 95,023  
Jefferson Co., Not Published  
Court of Appeals  
Reversed and remanded with directions

Wilkins appealed the denial of his 1507 motion for ineffective assistance of counsel. The Court agreed that because counsel failed to refute the technical evidence brought by the prosecution, failed to investigate the criminal histories of witnesses, and failed to seek discovery or consult expert witnesses that he did not receive effective trial assistance rendering the trial unfair. His convictions were vacated and remanded for a new trial. The Court did not decide the prosecutorial misconduct claim issue due to the new trial being ordered.

State v. Decker, # 94,262  
Harvey Co., Not Published  
Court of Appeals  
Affirmed in part, reversed and remanded with directions in part

Decker appealed the denial of his out-of-time appeal. The Court reversed and remanded for an *Ortiz* hearing because there was nothing in the record on appeal to show that the defendant was

informed by his counsel of his right to appeal.

Saleem v. State, # 94,945  
Shawnee Co., Not Published  
Court of Appeals  
Reversed and remanded with instructions

Saleem appealed the summary denial of his successive 1507 motion. The Court reversed and remanded to the district court for an evidentiary hearing solely on the ineffective assistance of counsel claim.

Burford v. State, # 94,817  
Johnson Co., Not Published  
Court of Appeals  
Affirmed in part, reversed and remanded with directions in part

Burford appealed from the district court's summary denial of his 1507 motion. The Court rejected the contentions that he received ineffective assistance of counsel, but reversed and remanded the case because the trial court did not inform the defendant that a time limit existed for him to exercise his appeal, and there was no evidence in the record whether his attorney informed him of the time limits for appeal.

State v. Davis, # 94,755  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed

Davis appealed the district court's finding that no exceptions existed at his *Ortiz* hearing. The Court found that the defendant was informed multiple times of his right to appeal, and did not provide sufficient evidence that his letter requesting the appeal was received in a timely manner.

State v. Pondexter, # 95,119  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed

Pondexter appealed the district court's summary denial of his motion to correct an illegal sentence; this was his fifth appeal following his conviction. The defendant claimed the district court erred by failing to appoint counsel and by denying him a hearing on his motion. The Court found that the district court is not required to appoint counsel and conduct a hearing in the defendant's presence on every motion to correct an illegal sentence. Instead, the district court must examine the motion and determine if it raises substantial issues of law or fact requiring a hearing. If it does not, the court may summarily deny the motion. *State v. Duke*, 263 Kan. 193, 196 (1997). This was the defendant's fourth attack on his conviction and sentencing and failed to raise substantial issues; therefore the district court did not abuse its discretion in denying the motion.

State v. Coulter, # 95,943  
Crawford Co., Not Published  
Court of Appeals  
Affirmed

Coulter appealed the denial of his four pro se motions to correct an illegal sentence. He challenged the jury's verdict, and on appeal contended the trial court abused its discretion in denying the motions without appointment of counsel or conducting a hearing. The Court held that the defendant did not show exceptional circumstances requiring consideration of the successive motions.

### **EVIDENTIARY ISSUES**

State v. Curtiss, # 93,707  
Johnson Co., Not Published  
Court of Appeals  
Affirmed

Curtiss appealed his conviction of manufacturing meth and criminal possession of a firearm claiming the court erred in denying his motion to suppress evidence. The defendant alleged that the State illegally acted through the hotel manager by having him evicted. The Court held that because the hotel manager did not act under the authority or direction of the police or search the hotel room she was not a state actor, she merely consulted with the police before acting. The defendant also claimed that the police did not have reasonable suspicion to stop his car after he left the hotel room. The Court found that based on the totality of the circumstances, there was reasonable suspicion to stop the vehicle.

State v. Margrave, # 94,168  
Wyandotte Co., Not Published  
Court of Appeals  
Affirmed

Margrave appealed multiple convictions claiming he was denied a fair trial as a result of prosecutorial misconduct. The Court held that the actions by the prosecutor attacking the defendant's psychologist witness were improper, but the trial court properly remedied the actions by sustaining the objection and instructing the jury to disregard the statements. The Court also held that the prosecutor's reference to DNA material in her closing was within the wide latitude afforded her in presenting her case, and that even though comments made by the detective, as a witness, were improper they were not elicited by the prosecution and were therefore not misconduct.

State v. Miller, # 94,943  
Johnson Co., Not Published  
Court of Appeals  
Affirmed

Miller appealed his conviction of four counts of manufacture and possession of meth claiming the trial court erred in denying multiple motions to suppress evidence. The defendant worked at a landfill and was approached by the officer at work after searching the defendant's home through consent of the defendant's live-in girlfriend. The defendant claimed the girlfriend lacked the authority to consent to the search and that the evidence found at the landfill should be suppressed. With regard to the statements and the evidence made at the landfill, the Court held that the defendant lacked standing to object to the search of the landfill, and the statements made by him at the time were voluntary and non-custodial. The Court also found that the girlfriend had apparent authority and denied the suppression of the evidence found in the home.

State v. Prine, # 93,345  
Reno Co., Not Published  
Court of Appeals  
Affirmed in part and dismissed in part

Prine appealed his jury convictions for rape, aggravated criminal sodomy, and aggravated indecent liberties with a child claiming there was insufficient evidence of the penetration to support the rape conviction and that the court erred in allowing evidence of the defendant's prior sexual activities with other minors. The court found that the evidence was sufficient enough for a rational factfinder to find the defendant guilty beyond a reasonable doubt and that the prior bad acts were properly admitted because the defendant created an inference of innocent motive for alleged criminal conduct. Also, the Court held that it did not have jurisdiction to consider the defendant's challenge to his sentence.

State v. Stubby, # 95,229  
Reno Co., Not Published  
Court of Appeals  
Affirmed

Stubby appealed the denial of her motion to suppress evidence. The Court found that the statements made by the driver after paraphernalia was found on his body gave the officer probable cause to search the defendant's purse.

State v. Hess, # 94,318  
Sedgwick Co., Not Published  
Court of Appeals  
Reversed

Hess appealed the denial of his motion to suppress the evidence obtained through a search of his person and his car, following a traffic stop claiming that the initial stop was unconstitutional, that the officer exceeded the legitimate scope of the traffic stop detention, and lacked probable cause to conduct a warrantless search of his pockets and car. The Court held that the original stop was an "unparticularized hunch" because the officer testified that he stopped the car solely based on the fact that the driver "hugged the line."

State v. Blake, # 95,098  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed

Blake appealed his conviction of criminal sodomy claiming he was denied a fair trial because of comments made by the prosecutor during closing. The Court held that because the comments were either directed to the theory of the defense or to cast doubt on the defendant's claim of an innocent transfer of DNA when he fell on the girl, the comments were not outside the wide latitude granted prosecutors.

State v. Strube, # 95,492  
Jackson Co., Not Published  
Court of Appeals  
Affirmed in part and dismissed in part

Strube appealed his drug convictions by arguing that the trial court erred in failing to suppress evidence from a warrantless search and that because the statute of conviction, 65-4159, overlaps with the statute that prevents the use of paraphernalia to manufacture a controlled substance, 65-4152(a), he should be sentenced under the latter because it carries a less severe penalty. The Court held that because no evidence of standing was presented at the hearing on the motion to suppress and because Strube has no expectation of privacy in the premises he could not object to the seizure of any of the evidence. The Court also held that because the evidence in the case indicated that Strube possessed drug paraphernalia, not that he used drug paraphernalia to conspire to manufacture meth, the conduct was different and the greater penalty should remain.

State v. Ingram, # 94,656  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed

Ingram appealed his conviction of possession of methamphetamine after a prior conviction arguing that the trial court erred in not granting his motion to suppress after drugs were found on his person during a traffic stop. The defendant claimed that the officers did not have sufficient reasonable suspicion nor did they obtain the proper consent to search his person. The Court held that based on the factual findings of the trial court and *Ohio v. Robinette*, 519 U.S. 33, 34 (1996) (holding that after completing a traffic stop and returning all documentation to a driver, the Fourth Amendment does not require that a lawfully seized defendant be advised that they are free to go before their consent to search will be recognized as voluntary), the search was voluntary and lawful.

State v. Diggs, # 95,974  
Saline Co., Not Published  
Court of Appeals  
Reversed and remanded with directions

In an interlocutory appeal, the State of Kansas challenged the district court's suppression of evidence seized during a warrantless search of the defendant's vehicle arguing that the district court erred in its legal analysis and conclusion. The State argued at the suppression hearing that the *Carroll* doctrine applied because the trooper had probable cause to believe the car contained evidence of a crime. The district court apparently found that the state could not rely on the *Carroll* doctrine because the doctrine had been overruled by statute and granted the suppression motion. The Court held that 22-2501, which refers only to a search incident as a lawful arrest, and remanded the case for the district court to make a determination as to whether the trooper had sufficient probable cause to support the search, did not overrule the *Carroll* doctrine.

## **SENTENCING ISSUES**

State v. Grey, # 94,166  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed

Grey appealed claiming he was improperly sentenced based on his status as a persistent sex offender based on the argument that *State v. Moore* was improperly decided. The Court held that Grey's argument fails because the Supreme Court has given no indication that it will depart from *Moore* based *Blakely*.

State v. Rhodes, # 95,849  
Butler Co., Not Published  
Court of Appeals  
Affirmed

Rhodes appealed the revocation of his probation. The Court held that the

revocation was warranted because the defendant admitted to violating his probation.

State v. Wigfall, # 95,404  
Douglas Co., Not Published  
Court of Appeals  
Dismissed

Wigfall appealed his sentences for one count of robbery and one count of attempted kidnapping. The Court dismissed the appeal because the sentence was within the presumptive guidelines.

State v. Smith, # 94,454  
Harvey Co., Not Published  
Court of Appeals  
Affirmed

Smith appealed from sentencing of one count of felony abuse of a child and two misdemeanor counts of battery claiming the sentences were inconsistent and violated double jeopardy. The Court held that the claims were not inconsistent according to *State v. Huff*, 277 Kan. 195, 197-98 (2004) (holding that a defendant may be sentenced to consecutive misdemeanor convictions in addition to the sentence imposed under 21-4720(b)(4) for any multiple felony convictions). Also, 21-4610 does not limit sentences arising from multiple convictions. The jail time ordered by the sentencing court was not a condition of probation. The defendant further argued that the sentences were inconsistent based on *State v. Torkelson*, 29 Kan. App. 2d 672 (2001). The Court analyzed this case along with *Dubish and McDaniel* resulting in the following three rules: 1) probation and incarceration sentenced concurrently in the same case produces an inharmonious, inconsistent result; 2) probation and incarceration sentences arising out of cases from different charging documents are permissible; and 3) probation and incarceration may be ordered in cases arising out of the same charging document when the sentences are to be served consecutively. The

defendant further relied on *State v. Benoit*, 31 Kan. App. 2d 591 (2003), arguing that incarceration and probation ordered either consecutively or concurrently may not be “harmonious;” however, the Court found *Benoit* to be distinguishable in two ways. Ultimately, the Court relied on *Huff* because it was legally and factually more similar to this case than *Benoit*. With regard to the double jeopardy claim, the battery and abuse of child convictions arise from the same conduct and satisfy the first prong of *State v. Schoonover*, 281 Kan. 453 (2006); however, the charges do not share all the same elements. Abuse of a child requires the victim to be under 18 and does not require intent to injury.

State v. Padgett, # 94,695  
Sedgwick Co., Not Published  
Court of Appeals  
Reversed and remanded with directions

Padgett was ordered to enter and successfully complete Labette pursuant to 21-4603(b)(5), which he failed to do and the trial court ordered him to serve the original imprisonment term. He appealed the revocation of his probation from this failure claiming the district court failed to comply with the requirements of 22-3716(b). Because the trial court failed to specifically pronounce the reason for denying a community correctional service program the Court reversed and remanded for the district court to either place the defendant in a community correctional services program or make the requisite findings necessary to avert such a placement.

State v. Jones, # 94,137  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed

Jones appealed the district court’s decision to summarily deny his motion to correct his sentence claiming that in accordance with 22-3504(1) the trial court should have conducted an

evidentiary hearing, appointed counsel to litigate his motion, and ruled in favor of him on the motion’s merits. The Court held that a full hearing and assistance of counsel is not mandatory if the defendant has not raised any substantial questions of law or fact by motion to correct a sentence. The motion made by the defendant was successive and did not assert any claims that had not previously been ruled upon; therefore the court did not err in summarily denying the motion.

State v. McGuire, # 95,062  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed

McGuire appealed the district court’s revocation of his probation claiming there was no evidence that he violated his probation. McGuire was ordered to attend and complete Labette, but he was denied admission to the Labette program. The district court, due to his criminal history and several fights he was involved in while in jail, did not find the defendant to be a suitable candidate for placement in a community corrections facility. The Court held that because his probation included being admitted and completing Labette it had been violated.

State v. Cooper, # 95,633  
Clay Co., Not Published  
Court of Appeals  
Affirmed

Cooper appealed his 22-month sentence for manufacture of methamphetamine claiming his offense was identical with possession of drug-manufacturing paraphernalia, a level 4 drug felony. The defendant claimed he should have been convicted to the lesser of the penalties prescribed by the two statutes. The Court held that manufacture of methamphetamine, under 65-4159(a), does not include conduct, which is identical to the conduct included in possession of drug paraphernalia under 65-4152(a)(3). Therefore, the *McAdam* rule does not require re-sentencing of the defendant.

State v. Pusillo, # 94,779  
Johnson Co., Not Published  
Court of Appeals  
Affirmed

Pusillo appealed the district court's restitution order imposed following his convictions of two counts of felony theft. After the sentencing, a hearing was scheduled and the defendant agreed to proceed with the hearing without an independent appraiser. The defendant argues that the district court abused its discretion in calculating restitution because it used replacement cost instead of fair market value. The Court held that there was no readily ascertainable fair market value for many of the items taken in the theft; therefore, the district court did not err by considering other factors to determine the amount of restitution.

State v. Kapaun, # 95,336  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed

Kapaun appealed his conviction of reckless driving, arguing that the evidence was insufficient to support the conviction. The Court held that the multiple driving infractions and recklessness were sufficient that a rational factfinder could have found the defendant guilty beyond a reasonable doubt.

State v. Garza, # 95,470  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed

Garza appealed the trial court's revocation of his probation contending that it abused its discretion. The Court held that because it was apparent the defendant violated his probation the trial court did not abuse its discretion in revoking his probation.

## **MISCELLANEOUS AND MULTIPLE ISSUES**

State v. Johnson, # 92,951  
Wyandotte Co., Not Published  
Court of Appeals  
Affirmed

Johnson appealed from his conviction of attempted first-degree murder claiming a number of issues on appeal: 1) That his confession was involuntary based upon the fact that he was mentally impaired, that the detectives used deception and trickery, and that the detectives used threats and promises to obtain his statement; 2) The trial court erred in admitting a hearsay statement; 3) The detective's testimony concerning the defendant's veracity constituted reversible error; 4) The trial court erred in excluding evidence supporting the defendant's theory of defense; 5) That prosecutorial misconduct violated his right to a fair trial; 6) The trial court erred in denying a motion for mistrial after the victim violated a motion in limine by referring to gang membership by the defendant; 7) The defendant's right to a speedy trial was violated; 8) The trial court erred in not allowing the defendant to change clothes prior to voir dire because the dark shirt and jeans resembled a prison uniform; 9) There was cumulative error. The Court held that: 1) Johnson's statement was the product of his free and independent will; 2) The statement, "You know how I feel about this, an eye for an eye," was found to be hearsay and was improperly admitted into evidence; 3) Johnson did not properly reserve this issue for appeal; 4) The defendant failed to make a proffer as to what the evidence would have been had the objection been overruled; therefore, the Court is precluded from reviewing the issue; 5) The state conceded that the prosecutor improperly bolstered the credibility of the detectives during closing arguments; 6) The reference by the victim to an "organization" did not necessarily refer to a gang, and even if

it did, the reference did not prejudice the defendant; 7) The requirements of K.S.A. 22-3402(3)(c) were met for granting the state a 90-day continuance; 8) The defendant should have been allowed to change, but the error was harmless; 9) There was no cumulative error.

State v. Beauclair, # 91,999  
Shawnee Co., Not Published  
Court of Appeals  
Affirmed

This case was before the Court on remand from the Supreme Court for consideration of claims not considered in the original decision. The Court this time found that the defendant did understand the charges against him and was aware of the rights he waived in his plea; therefore, the trial court did not err in denying the motion to withdraw his plea.

State v. McKone, #95,184  
Geary Co., Not Published  
Court of Appeals  
Affirmed

McKone appealed her conviction by a jury of assorted drug crimes and transporting an open container claiming that the district court erred in denying her motions to suppress evidence based on the fact that the scope and duration of her detention were excessive and that her arrest was not supported by probable cause. McKone failed to present a record for the Court to review. Had the issue been properly reserved, the Court held that the detention was not excessive because the dog sniff did not expand the scope and duration of the detention, and the arrest was valid based on the drugs found in the car. McKone also argued that the trial court erred in joining her case with the other defendant's cases. The Court found that there was no error in joining the cases because the defendants did not implicate each other. Next, she contended that the two arguments made by the prosecutor during closing

arguments were misconduct, denying her the right to a fair trial. The Court found that even though the prosecutor was referring to the character of the individuals the defendant associated with, the comments were not outside the wide latitude given prosecutors because his comments were directly related to McKone's defense and evidence admitted at trial. Finally, McKone contends the trial court erred in denying her post trial motions for judgment of acquittal. The Court was convinced that a rational factfinder could have found her guilty beyond a reasonable doubt based on the evidence presented at trial.

State v. Reed, # 95,130  
Wyandotte Co., Not Published  
Court of Appeals  
Affirmed

Reed appealed his conviction of aggravated indecent solicitation of a child claiming the district court erred in giving an *Allen*-type instruction and in failing to give a lesser-included offense instruction. He also argued that cumulative error warranted a new trial. The Court disagreed and affirmed finding the jury instruction not to be clearly erroneous because it was given prior to deliberation and the jury was not deadlocked. Furthermore, Reed requested the lesser-included of criminal threat, the Court found that because the statutory definitions were so different that legislature did not intend for criminal threat to be a lesser degree of the crime of aggravated indecent solicitation of a child. The Court also found that there was not cumulative error and the use of Reed's prior criminal history in sentencing was appropriate under *Apprendi*.

State v. Willis, # 94,664  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed

Willis appeals his convictions arguing the district court erred in denying his motions to withdraw his no contest pleas because they were not made knowingly and voluntarily. The Court held the defendant was fully informed of the consequences of his pleas in open court and determined he made the pleas voluntarily.

State v. Hopson, # 93,543  
Sedgwick Co., Not Published  
Court of Appeals  
Affirmed

After several drug convictions, Hopson appealed claiming the district court erred: 1) when it admitted opinion testimony of the arresting officer that violated his rights under the confrontation clause; 2) when it allowed the State to amend the complaint to change the severity level of the cocaine charge; and 3) when it used prior convictions to enhance his sentence. The Court held: 1) the testimony by the officer did not violate the constitutional rights of the defendant because it was not hearsay and was not in violation of either 60-456 or 60-419; 2) the trial court did not err in allowing the amendment to the complaint because the defendant's rights were not substantially prejudiced by it, see *State v. Hayden*, 281 Kan. 112, 130-31 (2006); and 3) the prior conviction argument has already been decided against Hopson in *Apprendi v. New Jersey* and *State v. Ivory*.

State v. Runyon, # 95,090  
Reno Co., Not Published  
Court of Appeals  
Affirmed in part and remanded in part

Runyon appealed his conviction of various drug offenses claiming the district court erred in ordering him to reimburse BIDS without a finding regarding his financial ability and the district court's consideration of his criminal history to enhance his sentence. The Court affirmed

the convictions and remanded the case to the district court to make a finding as to his financial ability to reimburse BIDS. *State v. Robinson*, 281 Kan. 538 (2006). Again, *Apprendi* and *Ivory* have previously decided the criminal history issue.

State v. Neff, # 93,974  
Rush Co., Not Published  
Court of Appeals  
Affirmed

Neff appealed his convictions for unlawful manufacture of methamphetamine and conspiracy to unlawfully manufacture methamphetamine, arguing jury instruction error, prosecutorial misconduct, and insufficiency of evidence. The Court held that a rational factfinder could have found Neff guilty beyond a reasonable doubt and rejected his jury instruction error because the defendant included the jury instruction in his proposed instructions filed with the court and made no objections when it was included. Finally, even though the comments elicited by the prosecutor may have been irrelevant, the Court saw no substantial prejudice to the defendant.

State v. Monohan, # 95,778  
Leavenworth Co., Not Published  
Court of Appeals  
Affirmed

Monohan appealed his convictions of aggravated battery and domestic battery claiming: 1) the evidence was insufficient to support his aggravated battery conviction; 2) he received ineffective assistance of trial counsel; and 3) his convictions are multiplicitous. The Court held: 1) that a rational factfinder could have found him guilty beyond a reasonable doubt; 2) the defendant failed to present the ineffective assistance claim to the trial court; and 3) the multiplicitous issue has already been decided by the Kansas Supreme Court in *Schoonover* and *Patten*. The two offenses do not share identical elements; therefore, they are not multiplicitous.

# Calendar of Events

KCDAA 2007 Spring  
 Conference  
 June 10-12, 2007  
 Hyatt Regency Hotel  
 Wichita, Kansas



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