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2 The Kansas Prosecutor Fall/Winter 2013
Our mission:
The purpose of the KCDAA is to promote, improve and facilitate the administration of justice in the State of Kansas.

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About the Cover
At 218 S Grant in Smith Center, Kan. is the “Modern (classical) Eclecticism” style Smith County Courthouse. The building was started in the Spring of 1918. Work on the new building was delayed several times, due to the scarcity of material caused by the war. It was completed and ready to be occupied by January 1, 1920. It was constructed in gray ozark granite to the first floor. From there on it is of cream colored Bedord Stone. The floors are tile and all stairways are marble with tile wainscoting. The total cost furnished completely was approximately $98,000 and was all paid for when ready to be occupied.

Photo by John D. Morrison, Prairie Vistas Photography

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Being named president in October, caused me to reflect on my journey as a prosecutor and that parallel journey with the KCDAA that began in August 1990. I reflected on what the KCDAA has meant to me professionally as I went from young and inexperienced prosecutor, to the point I could navigate my way through murder cases, rape cases, and child sexual abuse cases. When I attended the KCDAA conferences early on, I picked up tips on conducting Voir Dire from Jim Flory, closing argument in sexual assault cases from Tom Bath, and Jim Punctch was a regular presenter. I also watched Gene Olander wind down a long and distinguished career as the Shawnee County District Attorney.

In those 23 years since I first became a member of KCDAA, the names have changed. In 1990, Nola Foulston, Paul Morrison, Jim Flory, Nick Tomasic, Gene Olander, Dennis Jones, Wade Dixon, and my boss and predecessor Bill Kennedy were household names and continued a strong foundation within the KCDAA either as Board Members, or key people in shaping policy within the KCDAA and the state. Soon thereafter John Wheeler, Chris Biggs, David Miller, Doug Witteman, and John Settle along with many others became household names within the association. These individuals are just a few in a long list of others who continued the strong and diverse leadership within the KCDAA. The passage of my 23 years has seen the so called passing of the torch in leadership both within the KCDAA and the state of Kansas. In the last nine years, Jerry Gorman, Steve Howe, and Marc Bennett have taken the reigns in their jurisdictions and within the KCDAA. From the western counties Mark Frame and Melissa Johnson provided valuable leadership along with Doug McNett. Vice President Marc Goodman from Lyon County gives the mid-size counties a voice. This is but a short list of the many who made and continue to make KCDAA a diverse, representative association and a voice for the safety of the citizens of Kansas.

The diversity within the KCDAA, both in terms of membership and leadership is important not just for purposes of representation, but we must also remember that serious crimes do not just happen in the large metropolitan areas of our state. Capital Murders can occur in any county such as the one in Atchison County which Jerry Kuckelman prosecuted a few years ago. The smaller counties are no more immune from the murder, child/sexual abuse, rapes, and drug dealing that make the news in Johnson County. The crimes hit every corner and every county maybe not with the frequency as the larger counties but rural counties, like the one I grew up in are not immune or off limits to dangerous criminals. A benefit of not only being a member and attending KCDAA conferences is the networking that is available so you get to know your fellow prosecutors. For me, when we had a capital murder in Riley County, I was able to call Ann Swegle and get a copy of the charging form used in Sedgwick County. Or it was a phone call to Jacqie Spradling to get her input when we charged a man who raped his daughter with 77 counts of rape. Mike Jennings in Sedgwick County or Tom Stanton in Reno County were valuable resources for me several years ago when I was faced with a number of meth lab cases. To prosecutors, there is an endless list of resources a phone call away and a more than willing fellow prosecutor to assist.

It is that ability to network with numerous prosecutors from all over the State of Kansas that has helped me and is one of the best reasons to attend KCDAA functions and be engaged. The KCDAA will continue to maintain the diversity on the board that represents all of our membership, large, small, and every size office in between. As a member, take advantage of the CLEs at the conferences but get to know the prosecutors from around the state. There is no better friend than the one you meet at a conference, and can call and who shares your compassion for justice.
The Kansas Prosecutors Foundation was developed several years ago with a mission to “enhance and facilitate the administration of justice in Kansas by providing resources to support and strengthen the criminal justice system for the benefit of the public and the integrity of professional prosecution services.” The KPF is endeavoring to fulfill this mission by being a resource for the Kansas County and District Attorneys Association, by awarding law school scholarships to assist future prosecutors, and by establishing ways more Kansas prosecutors can be recognized for their service to the community and fellow prosecutors. The future goals of the KPF include the establishment of a KCDAA/KPF Prosecutor Chair at one or both of the state’s law schools, and the ability to assist the KPT&AI in bringing nationally recognized speakers to the Spring and Fall KCDAA Conferences.

The KPF Board of Trustees met on June 20, 2013, during the KCDAA Spring Conference. An election was held, and new officers were elected as follows:

- Tom Stanton, President
- John Wheeler, Vice-President
- Doug Witteman, Secretary/Treasurer
- John Settle and Ed Brancart remain as trustees on the Board.

The KPF will again be presenting a $1,000 scholarship to one law student from each of the state’s law schools for the 2014-2015 academic year. These scholarships will be awarded to law school students who show a keen interest in pursuing careers as criminal prosecutors in Kansas.

Also, the KPF has established the Prosecutor Community Service Award intended to recognize a Kansas prosecutor who has rendered outstanding service to his or her community in addition to the performance of the duties required by the position of prosecutor. The award was originally going to be presented at the Fall KCDAA Conference. However, the Board of Trustees unanimously agreed that the presentation of the award be delayed until the Spring Conference. The award will be presented in conjunction with the KPF spring golf tournament, and the presentation of the scholarships for next year’s students. Nominations for the award will be open until May 1, 2014.

We encourage everyone who is aware of a prosecutor deserving of this award to download the nomination form at www.kpfonline.org or use the form on the next page. Nominations may be submitted by anyone who wishes to see a prosecutor recognized for efforts in the community independent of the prosecutor’s job duties.

The KPF also welcomes prosecutors throughout the state to become involved with the Foundation. Do you play golf? Consider helping with or playing in the KPF Spring Golf Tournament. Do you have an idea for an activity that will enhance our mission goals? Let us know. Would you like to support the Foundation financially with a tax-exempt gift? Contact us.

Thank you for your support of the KPF, and do not forget to get those nominations in for the Prosecutor Community Service Award. Find KPF information at www.kpfonline.org.
The Kansas Prosecutor Foundation has announced the creation of an annual award intended to recognize a Kansas prosecutor who has rendered outstanding service to his or her community in addition to the performance of the duties required by the position of a prosecutor. Nominations for the award should include a biography of the nominee, as well as a description of the community service for which the prosecutor is being nominated. Final selection for the award will be made by the Board of Directors of the KPF, and the award will be presented at the KCDAA Spring Conference in June 2014.

Name of Nominee:
Title & Place of Employment:
Years of Service:

Biographical Information:

Community Service:

Nominator’s name:
Title & Place of Employment:
Phone: E-mail:

Please return this form with any additional pages by mail, fax or e-mail to:
Kansas Prosecutors Foundation
Attn: Kari Presley • 1200 S.W. 10th Ave • Topeka, Kansas 66604
FAX: (785) 234-2433 • EMAIL: kpresley@kearneyandassociates.com
ATTENTION: DEADLINE MAY 1, 2014 at 5 P.M.
This past quarter has been a busy one for the Kansas County and District Attorneys Association. The organization has many accomplishments that are covered in detail in other articles of this publication, including award winners at the fall conference; a successful legislative special session regarding the “Hard 50”; furtherance of the Kansas Prosecutors Foundation through a golf tournament, a new award, and the granting of scholarships; and the annual development of the 2014 legislative agenda. I want to give you my perspective of the special session.

During the first special legislative session concerning a criminal justice matter in my memory this past September, stakeholders in the criminal justice system should take notice of the good fortune of Kansas when needs for reform arise. While special sessions are each historic in their own way, and in the eyes of most gratefully rare in their convening, this particular example of elected officials responding to a public safety need that could not be forestalled until January 2014 was heartening.

While the current national media has been consumed with the dysfunction of our national policy leaders and Executive Branch, an example of how public policy can be made in the best interests of constituents was demonstrated here in Kansas this summer. Commencing with the request from Atty. Gen. Derek Schmidt to Gov. Sam Brownback to convene the Kansas legislature to address concerns relating to the Kansas Hard 50 sentencing law brought on by the United States Supreme Court decision in *Alleyne*, Kansas policymakers never faltered.

Upon receiving the request from Atty. Gen. Schmidt, Gov. Brownback exercised a display of political courage and compassion for Kansas citizens in calling the legislature back to address this important public safety matter. Working closely with the Atty. Gen. and legislative leaders, the governor was able to consider all logistical matters both legislative and otherwise in the timing of the special session to aid the proper vetting and preparation of an appropriate work product.

Once the legislature had the ball, legislative leadership on both sides of the aisle collaborated closely with the front-line Kansas prosecutors from the KCDAA with cases affected by *Alleyne*, in an effort to craft the best possible work product from which to begin. Rep. Kinzer and Sen. King convened a joint House and Senate Judiciary committee meeting prior to the official start of the special session to allow the requisite necessary public input and testimony for a full day. When the legislature reconvened a week later, both the House and Senate Judiciary committees coordinated carefully beginning with the House committee holding public hearings and passing the bill out to the House floor following discussion and debate in committee. The full House considered the Hard 50 changes that very same afternoon and passed the matter over to the Senate for its consideration.

The following morning the Senate Judiciary committee held their public hearings on the measure received from...
the House, passing it out of that committee directly to the Senate floor for consideration on day two of the Special session. Senate leadership quickly queued up the matter for debate and had discussion on the Senate floor that same afternoon, advancing the bill to emergency final action thereby sending it to the governor for his signature.

Once the governor received and reviewed the measure, he signed it into law at his earliest possible opportunity to speed the bill along to be published in the Kansas Register taking effect as quickly as the process would allow.

In my third decade of participation in the Kansas legislative process, I was reminded once again during this Special Session of the Kansas legislature how lucky we are in Kansas to have a system of government that when it needs to rise to the occasion for the benefit of Kansas citizens, it does with style and grace.

Now, we look toward the 2014 Kansas legislative session as it approaches on the second Monday of January. For the upcoming session, much of the focus of the KCDAA Board of Directors and the lobbying staff will be spent in preparation for that important time for policy development and refinement by the legislature. We have been blessed for the last decade or more with a cadre of legislators interested in the fair and efficient administration of justice in the state of Kansas. While many of the faces have changed during that time, the citizens of Kansas continue their good fortune with the prevalence of common sense, law and order legislators on their side.

We will keep you informed as issues arise, so stay tuned as things get moving. Thanks to you all for your efforts for KCDAA and public safety! ☺

Don’t Forget: Your tax deductible contribution can be made out to KPF

Projects under Development by the Kansas Prosecutors Foundation, include:

- KCDAA Law School Scholarships
- KCDAA Undergraduate Honors Stipends
- KPT&AI National Speaker Bureau for Prosecutor Continuing Legal Education
- KCDAA Law Day Activities in Kansas High Schools
- ‘Finding Words’ – helping child victims speak
- Grant for a Statewide Victim/Witness Notification System
- Sponsor KVAA
- And so much more...

Learn more at www.kpfonline.org

Send donations directly to:
Kansas Prosecutors Foundation, 1200 SW 10th Ave., Topeka, KS 66604
Guest Column

by Barry Grissom, U.S. Attorney, District of Kansas

Getting Smart on Crime

Today more than 219,000 federal inmates are behind bars. While the entire U.S. population has increased by a third since 1980, the federal prison population has grown by almost 800 percent – and it is still growing. Even though this country comprises just five percent of the world’s population, we incarcerate almost a quarter of the world’s prisoners. Nine to 10 million more people cycle through America’s local jails each year.

U.S. Attorney General Eric Holder cited these figures in August when he made an important statement calling on the American Bar Association to join him and the Obama administration in a drive to recalibrate America’s federal criminal justice system. As a result, I and other U.S. Attorneys across the nation are working to implement the Justice Department’s “Smart On Crime” initiative.

The initiative is based on five principles:
■ Prioritize prosecutions to focus on the most serious cases.
■ Reform sentencing to eliminate unfair disparities and reduce overburdened prisons.
■ Pursue alternatives to incarceration for low-level, non-violent crimes.
■ Improve re-entry programs to curb repeat offenses and re-victimization.
■ Surge resources to violence prevention and protecting most vulnerable populations.

Aggressive enforcement of federal criminal statutes remains necessary. As prosecutors, we must all continue to work hard to protect our communities, to keep violent criminals off our streets, and to make sure those who break the law are held accountable. At the same time, as Attorney General Holder said, we cannot simply prosecute or incarcerate our way to becoming a safer nation. We must never stop being tough on crime, but we must also be smart and efficient.

The Smart On Crime initiative is made necessary in part by the fact we are dealing with an outsized, unnecessarily large prison population. We need to ensure that incarceration is used to punish, deter and rehabilitate, not merely to warehouse and forget. Incarceration has a significant role to play in our justice system, but we have to determine at what level incarceration at federal, state, and local levels is both effective and sustainable. We need to look carefully at the forces that are driving the system. For instance, we know that roughly half of federal inmates are serving time for drug related crimes and many have substance use disorders.

MANDATORY MINIMUMS FOR DRUG CASES

Attorney General Holder has ordered a change in federal charging policies so that low-level, nonviolent drug offenders who have no ties to large scale organizations, gangs, or cartels will no longer be charged with offenses that impose excessive mandatory minimum sentences. They will now be charged with offenses for which the accompanying sentences are better suited to their individual conduct rather than mandatory prison terms more appropriate for violent criminals or drug kingpins. By reserving the most severe penalties for serious, high level or violent drug traffickers, we can better promote public safety, deterrence, and rehabilitation.

CYCLE OF POVERTY, CRIME, PRISON

As I said, we must never stop being tough on crime. I have the utmost faith in America’s legal system. Yet I believe we have to be willing to question accepted truth and to take bold steps
to reform and strengthen America’s criminal justice system. We need to confront the reality that today a vicious cycle of poverty, criminality, and incarceration traps too many Americans and weakens too many communities. In some respects, our criminal justice system may actually exacerbate these problems rather than alleviating them.

A school-to-prison pipeline transforms too many educational institutions into gateways into the criminal justice system. Studies show that six in 10 American children are exposed to violence at some point in their lives. And roughly 40 percent of former federal prisoners, and more than 60 percent of former state prisoners, are re-arrested or have their supervision revoked within three years after their release, at a great cost to American taxpayers. Whenever a recidivist crime is committed, innocent people are victimized. As a society, we pay much too high a price whenever our system fails to deliver outcomes that deter and punish crime, keep us safe and ensure that those who have paid their debts have the chance to become productive citizens.

Equally troubling is the fact that young black and Latino men are disproportionately likely to become involved in the criminal system – as victims as well as perpetrators. Once they’re in the system, people of color often face harsher punishments than their peers. A new study indicates that in recent years black males have received sentences nearly 20 percent longer than those imposed on white males for similar crimes.

With these facts in mind, Attorney General Holder has directed every U.S. Attorney to designate a Prevention and Re-entry Coordinator in his or her district. Their objective will be to ensure that the work of developing alternatives to incarceration and strengthening re-entry programs remains a top priority. In recent years, no fewer than 17 states, supported by the Justice Department and led by governors and legislators of both parties, have directed funding away from prison construction and toward evidence-based programs and service such as treatment and supervision that are designed to reduce recidivism. In Kentucky, for example, new legislation has reserved prison beds for the most serious offenders and re-focused resources on community supervision and evidence-based alternative programs. In Texas, investments in drug treatment for nonviolent offenders has brought about a reduction in the prison population. These measures have not compromised public safety. In fact, many states have seen drops in recidivism rates at the same time their prison populations are declining. Across the nation, U.S. Attorneys are taking steps to identify and share best practices for enhancing the use of diversion programs such as drug treatment and community service initiatives that can serve as effective alternatives to incarceration.

Attorney General Holder has authorized a number of other measures aimed at updating and improving the justice system. He has called for more funding for America’s indigent defense systems, which continue to exist in a state of crisis. The Justice Department recently updated its framework for considering compassionate release for inmates facing extraordinary or compelling circumstances and who pose no threat to the public. And the Justice Department is working through the Justice Reinvestment Initiative to bring state leaders, local stakeholders, private partners, and federal officials together to comprehensively reform corrections and criminal justice practices. At the same time, the Justice Department is working through the COPS program to help keep police officers on the beat while enhancing training and technical support.

And Attorney General Holder has directed U.S. Attorneys across the nation to create comprehensive anti-violence strategies for badly afflicted areas in their districts. He has encouraged U.S. Attorneys to convene regular law enforcement forums with state and local partners to refine the plans, foster greater efficiency, and facilitate more open communication and cooperation.

All these initiatives are aimed at identifying areas in which we can improve in order to advance the cause of justice for all Americans. By examining new law enforcement strategies, we are better able to allocate and adapt to the challenges we face. These are challenging times for the men and women of the U.S. Attorney’s office. Budgets are tight, and we are struggling to cope with cuts to our funding and a growing challenge to do more with less. Nevertheless, my colleagues and I are working every day to continue to protect national security, combat violent crime, fight against financial fraud, and safeguard the most vulnerable members of society.
KCDAA Award Winners

The Kansas County and District Attorneys Association (KCDAA) is pleased to announce its annual award winners: Don Scott – Prosecutor of the Year; Sally Salguero – Lifetime Achievement Award; Natalie Chalmers – Associate Member Prosecutor of the Year; and Kansas Attorney General Derek Schmidt, Senator Jeff King, and Representative Lance Kinzer – Policymaker of the Year awards. The award winners were honored during the 2013 KCDAA Fall Conference Awards Luncheon on Monday, October 14 at the Overland Park Marriott in Overland Park, Kan.

2013 Prosecutor of the Year
Don Scott
Seward County Attorney

This award is presented to a prosecutor for outstanding prosecution of a case or cases throughout the year. The nominee must be a regular member of KCDAA.

Don Scott has been the Seward County Attorney for the past 25 years. He has run unopposed for the position since 1992. He has tried and convicted numerous people for everything from traffic tickets to many of those occurring while being a part-time prosecutor.

His philosophy has always been that his assistants would learn more by trying cases than by watching others try cases. However, he usually doesn’t give them more than they can handle. Under Don’s tenure as Seward County Attorney, the office has grown from part-time to six full-time attorneys.

Don has been a member of the KCDAA for 25 years and has attended almost every Spring and Fall conference during that time. In addition, he is active with Kids, Inc, Rotary, Kiwanis, the Southwest Kansas Alcohol and Drug Abuse Facility (SKADAF) as a board member, St. Andrews Vestry, and West Middle School Site Council.

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

Send your idea/submission to Editor Mary Napier at mary@napiercommunications.com.

Upcoming Deadline: Spring 2014 - March 5

You can find archives of The Kansas Prosecutor at www.kcdaa.org.
Starting with the Summer issue, these are available in a new digital format for easy viewing on tablets and mobile devices.
2013 Lifetime Achievement Award

Sally Salguero
Assistant District Attorney, Sedgwick County District Attorney’s Office

by Angela Wilson, Senior Assistant District Attorney, 18th Judicial District of Kansas

This award is presented to a regular KCDAA member for his/her longevity as a prosecutor. The nominee must have served no less than 25 years in a prosecutor position, and not previously received this award.

Like many of the dozens of prosecutors she has mentored over the years, Sally Salguero started her prosecution career as an intern for the Sedgwick County District Attorney’s Office. After growing up in Wichita and attending Wichita State University, where she played in the band, it was only logical that Sally would return from KU Law School to Wichita to the DA’s office.

Sally worked her way through the office, starting like so many of today’s prosecutors, in the traffic division. She prosecuted whatever cases came her way: domestic violence, sexual assault, homicide. One case which Sally has great pride is the case of State v. Long, a particularly heinous rape case, for which the defendant is a few years into a 1,487 month sentence. (That’s still more than 100 years, even with good time credit).

Sally’s reputation as a sharp, professional, and powerful trial lawyer has certainly earned her a position among the truly skilled prosecutors in our state. This trial prowess, alone, would be sufficient to justify her receipt of the lifetime achievement award. However, the greatest contribution that Sally has made to prosecution in Kansas is her investment in other prosecutors.

By the late 1990s, Sally was a mentor to law students in the intern program in Sedgwick County. As dozens of current KCDAA members transitioned from their 2L to 3L years, Sally was one of the prosecutors who demonstrated to us not only how to be a prosecutor, but also how to love the fact that our job is to do the “right thing.” Professional, personable, prepared: Sally was all of these things. She always had time for our questions, trusted us to handle cases, and instilled in us the desire to pursue a career in prosecution.

When the National Advocacy Center was available to state prosecutors, Sally taught trial advocacy. Beginning in 1998, she taught courses with a variety of names, all focusing her talent and energy on building better prosecutors. In 2006, Sally started training with Finding Words in Kansas. More prosecutors from across Kansas got a chance to learn from Sally as she helped implement the protocols for Finding Words across the state.

Three or four years ago, people in the KCDAA began to learn what Sally had known for a few years: Sally was diagnosed with Multiple Sclerosis and the disease was taking its toll on her. Sally was reluctant to slow down. Inside her small stature dwells an incredibly resilient and tenacious person. Though the MS sapped Sally’s coordination and physical strength, she never stopped being a prosecutor.
Sally doesn’t move quite as quickly as she used to. Sometimes she will even let someone lend her a hand, or an arm, as she needs. Sally doesn’t carry a caseload anymore or have to cover dockets, but Sally has never stopped working with the next generation of prosecutors. She still trains the interns for Sedgwick County. She goes to court, takes notes, and helps coach prosecutors through the process of being better trial attorneys.

While it was a great honor for Sally to win the 2013 KCDAA Lifetime Achievement Award, in a larger sense, there are dozens of members of this organization who are the living embodiment of Sally Salguero’s lifetime achievement in prosecution.
Natalie Chalmers of Kansas Attorney General Derek Schmidt’s Appellate Division is the 2013 recipient of the KCDAA Associate Member of the Year Award. Natalie grew up in Wichita and has spent most of her life in Kansas. Natalie earned her undergraduate degree from Rockhurst College, and her law degree from the University of Kansas. Prior to joining the Kansas Attorney General’s Office in November 2011, Natalie’s experience included a stint at the Court of Appeals in Central Staff and in the Shawnee County District Attorney’s Office.

My first encounter with her occurred in the spring of 2012. I received a brief back from the Attorney General’s Office with several suggestions, something to which I was not accustomed from past experiences in submitting briefs. Natalie’s suggestions were based upon her experience with the appellate courts and the end result was my brief, with her suggestions, turned out to be a much improved final product.

This past summer Natalie’s knowledge, work ethic and calm demeanor became a major asset when Attorney General Derek Schmidt requested a special legislative session to fix the Hard 50 law in Kansas, after the Alleyne decision. Natalie was constantly being inundated with proposals for the bill from Marc Bennett, Jerry Gorman, Steve Howe, and myself. This was in addition to the constant input she was receiving from inside the Attorney General’s Office. Natalie’s appellate knowledge and legal skills were critical in the process of getting a final product that was agreeable to everyone. For Natalie, the Hard 50 was very time consuming, however she was satisfied with the end product and the learning experience of seeing how the legislative process worked.

In addition to her work on the Hard 50 legislation, Natalie continued her normal routine of reviewing roughly 20 briefs per week submitted by our many Kansas prosecutors for form compliance as well as substance viability as well as writing her own briefs on behalf of the Attorney General’s office. During the past year, Natalie successfully argued 13 cases to the Kansas Court of Appeals, three to the Kansas Supreme Court and responded to numerous federal Habeas case’s filed by Kansas prisoners. She has also presented numerous CLE programs to prosecutors on ethics in plea bargaining and appeal advocacy.

Dealing with challenging issues within the appellate process, finding that winning argument and arguing the State’s case before the Appellate Courts are what Natalie enjoys about her work in the Attorney General’s Appellate Division. One of her favorite cases, however was not a homicide or sexual assault case, but a challenging reckless driving case in which she prevailed.

When not writing briefs or arguing before the State or Federal appellate courts, Natalie spends her free time watching movies and taking care of her blind horse Oscar, her dog Mia or her two cats. Fortunately for Kansas prosecutors, the Attorney General, and the citizens of Kansas, Natalie enjoys her work. Once again, congratulations Natalie for a job well done!
Kansas Attorney General Derek Schmidt was essential in asking Governor Brownback to call a special legislative session to fix the “Hard 50” sentencing statute. Schmidt’s letter to the Governor stated, ”…the passage of time will increase the likelihood that convicted killers who, under Kansas law as it has existed for many years, would have been incarcerated and safely removed from society for not less than 50 years will instead become eligible for parole after only 25 years. It is within the state’s ability to fix this problem by an act of the Legislature, and I am recommending that we ask the Legislature to do so soon...” On Friday, Sept. 6, Governor Brownback signed the “Hard 50” bill, which was passed unanimously by the House and the Senate in special session. Schmidt was an integral part in getting this new bill passed. Schmidt has a long history of advocating for Kansans through his support of strong and workable criminal statutes. His support of victims and the prosecuting community began during his time in the Kansas Senate and has not diminished in his role as Attorney General as evidenced in part by his actions and tireless efforts leading up to and during the Special Session this summer.

Schmidt has presented legislative updates to KCDAA for several years, has brought back Attorney General Calls at various locations in the state, developed the Child Victim Unit at the KBI, and has advocated for the new lab facilities at KBI. He is always working to ensure the best possible outcomes for victims of crime in Kansas.

Representative Lance Kinzer, Chairman of House Judiciary and Senator Jeff King, Vice President of the Senate and Chairman of the Senate Judiciary Committee had the foresight to hold a joint special hearing prior to the Special Session on the “Hard 50” to vet the issue. In addition, they constantly kept abreast of all the parties’ concerns, worked closely with affected KCDAA members, and coordinated the effort with the Attorney General resulting in both a solid work product, and to outside observers, an effortless Special Session. Their stalwart legislative support and focus made the Special Session a success for Kansas victims and the Kansas Prosecuting Community.
Births

Sherri Becker, Assistant Leavenworth County Attorney, and her husband DJ, had a baby, Abel William Becker, on Sept. 29, 2013.

John and Kristiane Bryant, both prosecutors in the Kansas Attorney General’s Office, welcomed a girl, Emerson Grace, into their family on Oct. 22, 2013. She weighed 8 lbs. 3 oz.

Jason Lane, Assistant Harvey County Attorney, and his wife Staci Lane, Sedgwick County Assistant District Attorney, welcomed their firstborn son, Jaxen Robert Lane, on August 30, 2013. He weighed 9 lbs. 1.4 oz. and was 18 inches long. Jaxen will join his folks as being a die-hard Kansas State Wildcat fans.

Casey Meyer, Wyandotte County Assistant District Attorney, and her husband Michael Nichols, former Wyandotte County Assistant District Attorney, proudly welcomed their first child, Adeline Grace Nichols. Addie was born July 14, 2013, weighed 7 lbs. 10 oz. and was 20.5 inches long. Both baby and mom are doing great.

Wyandotte County DA’s Office

The Wyandotte County District Attorney’s office is pleased to announce the hiring of Ian Tomasic, Anna Wolf, Ethan Zipf-Sigler, and Jacob Fishman.

Ian is from Kansas City, Kan. and graduated from Bishop Ward High School. He received his bachelor’s degree in Print Journalism from Kansas State University and his J.D. from Washburn University School of Law. Ian interned with the Department of Homeland Security – Immigration and Customs Enforcement and for Shawnee County District Court Judge Mark Braun. While in law school, Ian also participated in Washburn’s Criminal Defense Clinic, providing legal representation for indigent defendants charged with criminal offense in Shawnee County, Kan. Ian will be handling general adult cases.

Anna grew up in Overland Park and graduated from Saint Thomas Aquinas High School. Anna earned a bachelor’s degree in American Studies from the University of Notre Dame and her J.D. from the University of Kansas School of Law. During law school, Anna interned with the Johnson County District Attorney’s Office prosecuting domestic violence cases, the Office of the Kansas Securities Commissioner regulating securities in the state of Kansas, as well as clerked with the Johnson County District Court. Anna served on the staff and later the editorial board of the Kansas Journal of Law & Public Policy, and her article, “Fence Row to Fence Row: An Examination of Federal Commodity Subsidies” was published in the Summer 2012 issue. Anna will be handling juvenile cases.

Ethan is from Prairie Village, Kan. where he attended Shawnee Mission East High School. Ethan earned his Bachelor’s Degree from William Jewell College in Political Science and International Relations and attended law school at the University of Kansas School of

New Faces

Finney County Attorney’s Office

William C. Votypka, joined the Finney County Attorney’s Office in April 2013 as an Assistant County Attorney. He is a graduate of Washburn University and the University of Kansas School of Law. He previously worked in private practice in the Kansas City area and for the U.S. Army JAG Corps at Fort Riley. William has successfully completed the transition west to Garden City, Kan. with his wife, Carrie, and two daughters, Ellie and Charlotte.
Law. Ethan clerked for the Kansas Court of Appeals Central Research Staff and was Assistant State’s Attorney for the Peoria County State’s Attorney’s Office in Peoria, Ill. where he prosecuted Felony and Misdemeanor DUI and Felony and Misdemeanor Domestic Violence. Ethan will be prosecuting general adult felony cases.

Jacob was born and raised in Kansas City. He graduated from the Hyman Brand Hebrew Academy. He received a B.A. in philosophy from the University of Missouri—Kansas City and a J.D. from the University of Kansas School of Law. Jacob comes to Wyandotte County after having spent two years with the Ford County Attorney. He handles a general criminal caseload.

News

The Wyandotte County District Attorney’s Office is pleased to announce the creation of a diversion unit. The diversion unit will be managed by Candace Golubski. Candace is from Kansas City, Kan. She earned her bachelor’s degree in Management and Human Relations from MidAmerica Nazarene University and is currently working toward a Master of Public Administration from the University of Kansas. Candace has served in the District Attorney’s Office since January 2011. Prior to that, she worked for the Kansas City Kansas Police Department Training Academy.

Retirement

Dennis Jones retired from the ranks of Kansas prosecutors on Friday, Oct. 25, 2013. Dennis ends his career in prosecution as an Assistant Attorney General in the Office of Attorney General Derek Schmidt. Jones served as Kearny County Attorney from Oct. 1, 1988 until Jan. 14, 2013. He was an assistant county attorney and city attorney prior to becoming a county attorney. His motto was a simple one: “Fighting crime and social injustice; battling to protect and preserve our cherished rural way of life!” That is what he did for almost 30 years.

KCDAA Milestones

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2014 Deadlines:
Spring 2014: March 5
Summer 2014: July 9
Fall 2014: October 22
This article will answer three questions regarding the recent amendments to the Hard 50 law: 1) Why was the statute changed? 2) How does the new law apply to murders committed prior to September 6, 2013? 3) How does the new law apply to murders committed on or after September 6, 2013?

Why was the statute changed?

On June 17, 2013, the United States Supreme Court decided *Alleyne v. United States*, 570 U.S. ___, 133 S.Ct. 2151, ___ L.Ed.2d ___ (2013). In *Alleyne*, the Court held any fact that increases the prescribed range of penalties to which a criminal defendant is exposed must be submitted to a jury and found to exist beyond a reasonable doubt, including factors increasing the minimum sentence.\(^1\) In doing so, the Court overruled *Harris v. United States*, 536 U.S. 545, 122 S.Ct. 2406, 153 L.Ed.2d 524 (2002). Because the Kansas Supreme Court had repeatedly relied on *Harris* in upholding the Hard 50 law prior to *Alleyne*, *Alleyne* left the continuing viability of that case law, and thus the validity of Hard 50 sentences, in question. See e.g. *State v. Warledo*, 286 Kan. 927, 954-55, 190 P.3d 937, 956 (2008); *State v. Astorga*, 295 Kan. 339, 284 P.3d 279 (2012), vacated and remanded by ___ U.S. ___, 133 S.Ct. 2877 (2013) (a Hard 50 case which was vacated by the United States Supreme Court and remanded in light of *Alleyne*).

Due to concerns over *Alleyne’s* potential impact on Kansas’ Hard 50 law and a desire to protect victims’ families from such uncertainty, Kansas Attorney General Derek Schmidt, supported by the KCDAA and multiple law enforcement agencies, requested the governor call a special session to repair any damage to the Hard 50 law created by *Alleyne*. Agreeing with the importance of closing any loopholes created by *Alleyne*, the governor and the Legislature swiftly heeded the Attorney General’s request, and the special session began on September 3, 2013. The new law, proposed by the Attorney General with the support of the KCDAA and other law enforcement agencies, was unanimously adopted by the Legislature, approved by the governor, and became effective on Sept. 6, 2013.

How does the new law apply to murders committed prior to September 6, 2013?

The Legislature made it explicitly clear that subsection (c) of K.S.A. 21-6620 is a procedural rule intended to apply retroactively to any case not yet final prior to *Alleyne*. K.S.A. 21-6620(d). Thus, even if the premeditated first degree murder was committed prior to September 6, 2013, a Hard 50 sentence may still be available under the new statute. Just as with the previous Hard 50 law, in the retroactive subsection of the new law, one or more aggravating circumstances, found in K.S.A. 21-6624, must be present for the crime to be Hard 50 eligible. But, under the new law, the jury will take the place of the judge in finding the existence of such aggravating circumstances and in weighing the existence of the mitigating and aggravating circumstances to determine whether the Hard 50 sentence should be imposed. K.S.A. 21-6620(c)(4). The new law also permits the defendant to waive his or her right to have the jury decide the sentence. K.S.A. 21-6620(c)(2). In such cases, the court will act as the trier of fact instead of the jury.

Cases Awaiting Trial or Sentencing

For cases involving a murder committed prior to September 6, 2013, in which the trial or sentence has not yet occurred, subsection (c) of K.S.A. 21-6620 will apply. The prosecution will be required to give the defendant reasonable notice of its intent to seek the Hard 50. K.S.A. 21-6620(c)(3). Once the defendant is convicted of first degree premeditated murder, a separate sentencing proceeding will be held. K.S.A. 21-6620(c)(1). Prior to the

Footnotes

1. But, the *Alleyne* Court specifically noted, “Our ruling today does not mean that any fact that influences judicial discretion must be found by a jury. We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment.” 133 S.Ct. at 2163.
proceeding, the defendant is required to provide discovery on any evidence supporting the existence of any mitigating factors. K.S.A. 21-6620(c)(3).

At the proceeding, the trier of fact will determine whether one or more aggravating circumstances exist beyond a reasonable doubt and whether the existence of such aggravators outweighs the existence of any mitigating circumstances. K.S.A. 21-6620(c)(5). If the jury is the trier of fact, the same jury can be used for the trial and the proceeding. K.S.A. 21-6620(c)(2). But if the jury is discharged prior to the proceeding, a new jury must be impaneled. K.S.A. 21-6620(c)(2).

During the evidentiary portion of the proceeding, evidence is admissible so long as it is probative, not obtained in violation of the Kansas or United States Constitution, and the defendant is afforded a fair opportunity to rebut any hearsay statements. K.S.A. 21-6620(c)(3). The rules of evidence do not necessarily apply. Id. Further, any testimony by the defendant is protected and cannot be used against the defendant in any subsequent criminal proceedings. Id.

After the evidentiary portion of the proceeding has concluded, oral arguments shall be permitted and jury instructions shall be given. K.S.A. 21-6620(c)(3)-(4). If the aggravating circumstance is the existence of one or more prior convictions for “a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another,” K.S.A. 21-6624(a)), and is proven by a certified journal entry of the prior conviction, then the jury shall be instructed “that a certified journal entry of a prior conviction is presumed to prove the existence of such prior conviction or convictions beyond a reasonable doubt.” K.S.A. 21-6620(4).

The trier of fact will then designate any aggravating circumstances it found in writing. K.S.A. 21-6620(5). If the trier of fact finds the aggravating circumstances outweigh the mitigating circumstances, the Hard 50 is imposed. Id. If the trier of fact does not make the requisite finding, a Hard 25 sentence will be imposed. Id.

Natalie Chalmers is an Assistant Solicitor General at the Attorney General’s Office. If any prosecutors have questions regarding the Hard 50 law or this article, she may be contacted at natalie.chalmers@ksag.org or at (785) 296-2357.

Cases on Appeal

For the Hard 50 cases pending on appeal, it is the State’s position that the prior Hard 50 law is constitutional. Deputy Solicitor General Kristafer Ailsieger’s supplemental brief in Astorga2 (Appellate Case No. 10-103083-S), addresses the State’s arguments as to why Alleyne should not affect the constitutionality of the previously imposed Hard 50 sentences. The brief also addresses why the new Hard 50 law is a procedural change that can apply retroactively. Due to the length of the arguments, they will not be repeated in this article.

If the Kansas Appellate Courts find a Hard 50 sentence unconstitutional and vacates the sentence, K.S.A. 21-6620(e) permits the State to resentence the defendant under the above outlined procedure set forth in K.S.A. 21-6620(c). The same is true if a conviction used to impose a Hard 50 sentence is overturned on appeal. K.S.A. 21-6620(d)-(e). Because the jury will have been discharged prior to the resentencing, a new jury will have to be impaneled for resentencing. K.S.A. 21-6620(c)(2).

Final Convictions

The vast majority of cases in which the appeal is final should not be affected by Alleyne or the new Hard 50 law because it is extremely doubtful that Alleyne will apply retroactively. See, e.g., Simpson v. United States, 721 F.3d 875, 876 (7th Cir. 2013) (“Alleyne is an extension of Apprendi v. New Jersey, 530 U.S. 466 (2000). The [United States Supreme Court has] decided that other rules based on Apprendi do not apply retroactively.

For the Hard 50 cases pending on appeal, it is the State’s position that the prior Hard 50 law is constitutional. Deputy Solicitor General Kristafer Ailsieger’s supplemental brief in Astorga, address...
on collateral review. [Citation omitted.] This implies that the Court will not declare Alleyne to be retroactive....”); In re Payne, No. 13-5103, ___ F.3d ___ (10th Cir. Sept. 17, 2013), 2013 WL 5200425 at *1-2 (same); K.S.A. 21-6620(d) (the law does not apply to convictions and sentences final prior to Alleyne unless those convictions or sentences are successfully changed through a collateral attack). However, if a conviction or sentence is overturned in a subsequent collateral proceeding, such as a K.S.A. 60-1507 proceeding based on ineffective assistance of counsel, the statute permits resentencing under the retroactive portion of the law. K.S.A. 21-6620(d).

How does the new law apply to murders committed on or after September 6, 2013?

Subsection (b) of K.S.A. 21-6620 is the prospective portion of the new law. This means that for cases with a premeditated murder committed on or after September 6, 2013, subsection (b) of K.S.A. 21-6620 will apply. This section is similar to the upward departure statute in that the jury will only have to decide whether one or more aggravating circumstances exist beyond a reasonable doubt. K.S.A. 21-2260(b)(5). If the existence of one or more aggravating circumstances is found beyond a reasonable doubt, the default sentence is a Hard 50 sentence. K.S.A. 21-6620(6); K.S.A. 21-6623. A Hard 25 sentence will only be imposed if the court finds substantial and compelling reasons exist requiring the imposition of a Hard 25 sentence. K.S.A. 21-6620(6). Thus, the law is similar to a departure statute in that, once an aggravator is found, the default sentence is a Hard 50, but the court can choose to impose the lesser Hard 25 sentence if substantial and compelling reasons exist for the imposition of the lesser sentence.

As for the procedure used by the jury, after the prosecutor gives reasonable notice of its intent to seek the Hard 50, and after the defendant has been convicted of premeditated first degree murder, a separate proceeding will be held for the jury to determine whether an aggravating circumstance exists beyond a reasonable doubt. K.S.A. 21-6620(b)(1). The jury determination can be waived by the defendant. K.S.A. 21-6620(b)(2). In such cases, the court will determine whether one or more aggravating circumstances exist beyond a reasonable doubt. Id. If the defendant does not waive the jury determination, the trial jury can be used in the proceeding. Id. Individual jurors can be excused if they are unable to serve during the proceeding and can be replaced by alternate jurors that were impaneled for the trial jury. Id. The jury can be fewer than 12 jurors, but must consist of at least six jurors. Id. If the jury is discharged prior to the proceeding, a new jury must be impaneled. Id.

At the proceeding, the prosecutor can only admit evidence made known to the defendant prior to the proceeding. K.S.A. 21-6620(b)(3). There is no exemption from the rules of evidence, and no evidence obtained in violation of the Kansas or United States Constitution is admissible. Id. If the defendant testifies, the testimony is protected and cannot be used against the defendant in a subsequent criminal proceeding. Id.

At the conclusion of the proceeding, oral argument shall be permitted and written instructions will be provided. K.S.A. 21-6620(b)(3)-(4). If the aggravating circumstance is the existence of one or more prior convictions for “a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another,” (K.S.A. 21-6624(a)), and is proven by a certified journal entry of the prior conviction, the jury shall be instructed “that a certified journal entry of a prior conviction is presumed to prove the existence of such prior conviction or convictions beyond a reasonable doubt.” K.S.A. 21-6620(4).

The trier of fact will then designate any aggravating circumstance found beyond a reasonable doubt in writing. Id. If the trier of fact is unable to find the existence of any aggravating circumstances beyond a reasonable doubt, a Hard 25 sentence will be imposed. K.S.A. 21-6620(b)(5).

In summary, both the retrospective and the prospective subsections of the new Hard 50 law satisfy Alleyne’s requirement that any fact that increases the prescribed range of penalties to which a criminal defendant is exposed must be submitted to a jury and found to exist beyond a reasonable doubt. Although the subsections have many overlapping provisions, their differences are sufficient and care must be taken to apply the proper procedure set forth in the new law.
Extended Juvenile Jurisdiction Prosecution: Where Plain Language Can Complicate Case Outcomes

by Joan Lowdon, Assistant Leavenworth County Attorney

At the KCDAA conference in October, I had an interesting conversation with another attorney about juveniles and the nebulous world of extended jurisdiction juvenile prosecution. It is not that the statutes themselves are confusing. They are not. As a matter of fact, it would be hard to make them any more unambiguous than what they are. The complications surrounding EJJ sentencing and the violations that subsequently occur involve individuals deciding to ignore the blatantly plain language of relevant statutes.

So what is extended juvenile jurisdiction prosecution or EJJ prosecution? It is the step between keeping a juvenile offender in juvenile court and certifying the juvenile as an adult. Should a court grant a motion for EJJ prosecution, and the juvenile later be found guilty, the court imposes both a juvenile sentence and an adult sentence. The execution of the adult sentence is stayed on the condition that the juvenile offender, 1) not violate the provisions of the juvenile sentence and 2) not commit a new offense. If the juvenile offender successfully completes the juvenile sentence, the adult sentence is never served. If, however, the juvenile offender either fails to abide by the terms of the juvenile sentence or commits a new offense while still serving the juvenile portion of the sentence, the court MUST revoke the stay of the underlying adult sentence and the juvenile must then serve out the previously imposed adult sentence. In theory, the process is a simple one. In fact, it turns out some district courts try to make it more difficult than it needs to be.

K.S.A. 38-2347 (a)(3) provides the statutory framework for commencing an EJJ prosecution. It starts with a motion filed by the county or district attorney or their designee “at any time after commencement of proceedings under this code against a juvenile offender and prior to the beginning of an evidentiary hearing at which the court may enter a sentence…” If the juvenile charged is 14 or older and falls under one of five offensive groups, the burden is on the juvenile to rebut the designation of an EJJ prosecution by a preponderance of the evidence. K.S.A. 38-2347(a)(4). In all other circumstances, the burden of proof is on the prosecutor to prove the juvenile should be designated as an EJJ. In making such a determination, the court shall consider the factors listed in K.S.A. 38-2347(e)(1).

Based on what I was hearing at the KCDAA conference, the issue is not in convincing the judges of the district court to allow for an EJJ prosecution, nor in the initial sentencing phase. The problems arise where the juvenile has violated the terms of the juvenile sentence or committed a new offense. Some courts then begin to hedge as to what should be done. If the court is following the statutes, there should not be any hesitation. When a court finds, by a preponderance of the evidence, that the juvenile offender committed a new offense or violated one or more conditions of the juvenile’s sentence, the court SHALL revoke the juvenile sentence and order the imposition of the adult sentence previously ordered. K.S.A. 38-2364(b). The ONLY way to modify the adult sentence previously ordered is if the county or district attorney agrees to the modification of the previously ordered sentence. Id. Absent that agreement, the court has no option but to impose the previously ordered adult sentence.

Despite the plain language of the statute, there have been courts that have decided not to follow the statutory language. In addition, there have been courts that have abided by the law as written and juvenile offenders who have contested the imposition of the previously ordered adult sentence. This seems to be a reoccurring issue within EJJ prosecution at both the district court and appellate court levels.

In an extended jurisdictional juvenile process, the Court of Appeals has considered the question of whether a court can modify the adult sentence once it has revoked the stay of the adult sentence on several occasions. Most of these opinions were unpublished. In July 2012, the Court of Appeals considered whether a juvenile’s due process rights had been violated by a lower court when that court denied the juvenile’s motion for dispositional or durational departure before revoking the stay on his adult sentence. In re R.L.R., 281 P.3d 179 (Kan. App. 2012 unpublished). R.L.R. was granted...
extended jurisdictional juvenile prosecution in June 2004. He was given an adult sentence of 216 months and was sent to the juvenile correctional facility on his juvenile sentence. While on conditional release, the State filed a motion to revoke the conditional release. Immediately prior to the revocation hearing, R.L.R. filed a motion for dispositional or durational departure. The district court held that it did not have jurisdiction to consider the motion and that its only option was to order him to serve the adult sentence of 216 months.

The Court of Appeals discussed that the sentencing of R.L.R. is governed exclusively by the statutes detailing the handling of extended jurisdictional juvenile proceedings. The Court of Appeals concluded that “[t]he district court in this case correctly held that it had no option to consider R.L.R.’s motion for dispositional or durational departure. The statutes and case law covering the extended jurisdiction juvenile proceedings are clear. See K.S.A.2011 Supp. 38–2364; In re E.F., 41 Kan. App.2d 860; In re J.H., 40 Kan.App.2d 643.” In re R.L.R. at 3. This was the very issue brought by In re E.J.D., 304 3.Pd 364, __Kan.App.2d__ (2013) (2013 WL 3970205). He argued that the district court could have considered his motion for durational departure despite the fact that he did not file the motion for departure until he was alleged to have committed a new offense while at the youth correctional facility. The district court has “no option” to consider a motion for dispositional or durational departure. In re R.L.R. at 3. In following the decision of In re R.L.R., the Court of Appeals likewise decided that E.J.D. did not timely file any motion for departure. The appellate court held that E.J.D. had the right to move for a downward durational departure of his adult sentence at the time he was (originally) sentenced, but under his EJJ prosecution he failed to do so. In re E.J.D. at 5. To do so at the time of an alleged violation was simply too late.

The application of K.S.A. 22-3716(b) in extended jurisdiction juvenile proceedings was considered and rejected in State v I.A., 255 P.3d 1228 (Kan. App. 2011 unpublished). In the majority opinion, Judge Atcheson writes that K.S.A. 22-3716(b) and K.S.A. 38-2364 “establish parallel process, not dovetailed ones. They are not meant to operate in tandem but independently with two different groups of transgressors. K.S.A. 22-3716 deals with those already in the adult criminal justice system who have violated the terms of probation granted as a part of a sentence previously imposed in that system.” Id. at 6. (Emphasis added.) Judge Atcheson goes on to say that K.S.A. 38-2364 “deals with juvenile offenders who have violated the terms of a juvenile adjudication and, therefore, receive an adult sentence; but they have not violated the adult sentence – the event that triggers the application of K.S.A. 22-3716.” Id. Throughout the majority opinion, it is clear that the Court of Appeals does not believe that K.S.A. 22-3716 is applicable to persons who have been sentenced as an extended jurisdiction juvenile. The Court comes to this opinion through the plain language of both statutes. “The language governing extended jurisdiction juvenile proceedings seems plenty clear.” Id. at 4. “[T]he language of K.S.A. 22-3716 shows that it cannot reasonably be invoked as some sort of mitigative (sic) add-on to the extended jurisdiction juvenile process.” Id. at 5. The Court also comes to this opinion through consideration of legislative intent.

Nothing in K.S.A.2010 Supp. 38–2364 even hints that the juvenile court might act under K.S.A. 22–3716 to mitigate the contingent adult sentence imposed as part of the extended juvenile jurisdiction. The statute outlines the juvenile process in detail and contains several cross-references to other statutory provisions, including one in the criminal code. Had the legislature intended to transplant or incorporate the provisions of K.S.A. 22–3716 from the code of criminal procedure into K.S.A.2010 Supp. 38–2364, it would have specifically identified the statute for that purpose. The omission of any such reference is telling, especially given the legislature’s careful attention to the use of other statutory cites in outlining how the extended juvenile jurisdiction process is supposed to work. State v I.A. at 4.

The Court of Appeals in State v I.A. has considered and rejected the application of K.S.A. 22-3716 in extended jurisdiction juvenile proceedings.
In re F.C.P. 260 3.Pd 1249 (Kan. App. 2011 unpublished), brought to the court the question of whether the district court had discretion in continuing with the juvenile sentence and not imposing the adult sentence when the juvenile stipulated that he had not abided by the terms of the juvenile sentence. The Court of Appeals wrote,

But the plain intent of the statute is that a juvenile who fails to abide by the conditions of the juvenile sentence loses the benefit of that option and must then serve the adult sentence that had been stayed. Had the legislature meant to grant the juvenile court the discretionary authority to continue the stay of the adult sentence for an offender stipulating to violations, it would have said so.

The absence of any language conferring that sort of substantive authority on the juvenile court wholly undercuts F.P.C.’s argument. A court should not and really cannot infer from legislative silence judicial discretion that would function in a way contrary to the otherwise clear purpose and intent of a statute. Id. at 3.

This court upheld the district court’s decision revoking the stay of the adult sentence.

In January 2013, the Court of Appeals again took up the issue of whether a previously imposed underlying adult sentence can be modified in In re J.D.H., 48 Kan.App.2d 454 (2012). “Other panels of this court have already interpreted this statute several times, and in each case the panels came to the same conclusion: the statutory language prevents the district court from doing anything other than imposing the underlying adult sentence.” Id. at 5.

November 2013, saw a juvenile, A.M.M.-H., attempting to argue that his conditional release violations did not amount to a violation of the “juvenile sentence” he was ordered to serve so the district court had no authority to revoke the stay on his adult sentence. The Court of Appeals found his argument to be “unavailing.” In the Matter of A.M.M.-H., __ Kan.App.2d __ (2013) (2013 No. 109,355). In this particular case, A.M.M.-H., was sentenced under EJJ proceedings where he was ordered to serve 24 months incarceration at the juvenile correctional facility with 24 months aftercare. For the adult sentence, A.M.M.-H. was ordered to serve 59 months at the Department of Corrections. A.M.M.-H. completed the 24 months at the juvenile correctional facility. Upon release, he signed conditions of conditional release. He appeared in front of the district court where he was ordered to follow all conditions of conditional release. Within a few months, a warrant went out for his arrest. The State filed a motion to revoke A.M.M.-H.’s juvenile sentence and lift the stay on the previously imposed adult sentence. The district court held an evidentiary hearing, granted the State’s motion and ordered A.M.M.-H. into the custody of the Department of Corrections for 59 months.

Upon appeal A.M.M.-H. argued that the conditions of his conditional release were not conditions of his juvenile sentence and therefore he did not violate the conditions of sentence. Part of the juvenile’s argument revolved around the idea that the terms and conditions of conditional release are set by the commissioner of the juvenile justice authority, not the courts. The Court of Appeals relied upon In re R.L.R., 281 P.3d 179 (Kan. App. 2012 unpublished), among other cases, in rejecting the juvenile’s contentions that conditional release does not amount to the “juvenile’s sentence.” The Court of Appeals noted that part of A.M.M.-H.’s sentence, as ordered by the court, included 24 months of aftercare. As such, the aftercare is still a component of the juvenile’s sentence. In the Matter of A.M.M.-H., __ Kan.App.2d __ (2013) (2013 No. 109,355). In addition, when A.M.M.-H. was released from the juvenile correctional facility, he appeared in front of the court which ordered him to follow the provisions of his conditional release, a further indication that the terms of conditional release were incorporated as part of the “juvenile sentence.”

A.M.M.-H. also argued that K.S.A. 38-2375 does not allow for the stay of an adult sentence to be revoked when he violated his conditional release. The appellate court, however, turned to K.S.A. 38-2369(a)(4), read in conjunction with K.S.A. 38-2364(b), in rejecting his argument.

In every recent appellate court case on the issue of K.S.A. 38-2364, all the panels have come to the same conclusion: Once there has been a violation of the juvenile sentence or a new crime that was committed, the stay of the adult sentence must be
The Fifth Amendment’s protections against compelled self-incrimination are nearly as old as the United States Constitution itself, but it was arguably the United States Supreme Court’s decision in *Miranda v. Arizona* which gave full force to those protections. Now, almost 50 years after that landmark ruling, a new decision by the court, *Texas v. Salinas*, allows prosecutors in some instances to comment to the jury on the defendant’s refusal to answer questions from investigators when that person was neither in custody nor given the Miranda warnings. This article will examine *Salinas* and several other right to counsel or right to silence decisions handed down by the Supreme Court in the past few years. Collectively, these cases have quietly brought about significant changes in a criminal suspect’s rights to counsel and silence in a very short period of time.

In *Salinas*, the defendant voluntarily accompanied Houston police to the police station and answered questions for almost an hour about a homicide which they were investigating. Officers had requested that he come to the police station “to take photographs and to clear him” as a suspect in the case. During the course of the interview, he voluntarily handed over his shotgun for ballistics testing, but when officers asked if the shotgun shells found at the murder scene would match his shotgun, he declined to answer, “looked down at the floor, shuffled his feet, bit his bottom lip, clenched his hands in his lap, [and] began to tighten up.”

After the defendant sat silent for a few moments, the officer asked additional questions which the defendant then answered.

During closing arguments at the defendant’s murder trial, the prosecutor mentioned his reaction to the question about the shotgun shells, commenting that an innocent person would have reacted differently, protesting his innocence. Based in part upon this evidence, the defendant was convicted of murder and given a 20-year prison sentence. He objected at trial contending that the prosecution’s use of his silence and reaction to the questions violated his rights against self-incrimination under the Fifth Amendment. In rejecting this claim, the Texas Court of Criminal Appeals held that the Fifth Amendment’s protections are against compelled self-incrimination, but a person who voluntarily cooperates with police is not being compelled. Thus, a comment by the prosecution on that person’s refusal to answer a specific question does not impermissibly burden their right to remain silent.

Footnotes
2. _U.S. _, No. 12-246 (June 17, 2013)(slip opinion).
Although the Supreme Court accepted the case to resolve the question of whether and when the prosecution may comment upon one’s invocation of the right to silence during a voluntary, pre-arrest interview, the plurality opinion in fact dodged that question holding instead that the defendant never explicitly invoked his right to remain silent. Relying upon earlier cases where one who is in custody and given the Miranda warnings must unambiguously invoke the right to silence or right to counsel, Justice Alito’s opinion, joined by Chief Justice Roberts and Justice Kennedy, applied the same standard to one voluntarily submitting to non-custodial police questioning. “So long as police do not deprive a witness of the ability to voluntarily invoke the privilege, there is no Fifth Amendment violation. Before petitioner could rely on the privilege against self-incrimination, he was required to invoke it. Because he failed to do so, the judgment of the Texas Court of Criminal Appeals is affirmed.”6 Left unanswered by this opinion is whether, had the defendant replied to the question about his shotgun that he wished to terminate the interview and say no more, the prosecution could have used that fact as evidence in its case in chief.

COMMENT ON A DEFENDANT’S SILENCE BEFORE AND AFTER ARREST: CURRENT LAW

The exact contribution which Salinas makes to this body of decisional law is best understood through a quick review of the prior cases. The Supreme Court first held in Griffin v. California7 that a criminal defendant’s Fifth Amendment rights are violated by commenting to the jury about his failure to take the witness stand and testify in his own defense. In Doyle v. Ohio,8 the court extended this rule to situations where the defendant invokes the right to silence at the time of arrest, but then chooses to testify at his trial and provide an exculpatory story to the jury. The prosecutor’s cross examination of the defendant about his silence after being arrested and after receiving the Miranda warnings was held to violate the due process clauses of the Fifth and Fourteenth Amendments.9 However, the court in a subsequent pair of cases found no violation of one’s rights when a defendant is impeached about his silence prior to receiving the Miranda warnings, first in Jenkins v. Anderson10 involving a suspect’s silence prior to being arrested, and then two years later in Fletcher v. Weir11 involving a suspect’s silence after being arrested but prior to being given the Miranda warnings. Note that all of these cases concern impeaching a testifying defendant with his prior silence. Salinas marks the first time the Supreme Court has allowed the use of pre-arrest, pre-Miranda silence in the state’s case-in-chief, regardless of whether the defendant chooses to take the witness stand.

These Supreme Court constitutional cases must be read in conjunction with Oklahoma cases involving the admissibility of pre-arrest silence under the law of evidence. In Farley v. State12 the Court of Criminal Appeals found reversible error where the prosecutor cross examined the defendant about why he did not turn himself in to police upon learning a warrant had been issued for his arrest. Acknowledging that no constitutional violation had occurred under Jenkins, the court nonetheless found that because of the various possible explanations for not turning oneself in, the defendant’s failure to do so was irrelevant under Section 2401 of the Oklahoma Evidence Code. However, more recent Oklahoma cases have either distinguished or ignored Farley and more closely followed the constitutional analysis from the Supreme Court’s jurisprudence.13

RELATED DEVELOPMENTS IN A DEFENDANT’S RIGHT TO SILENCE/COUNSEL

To understand the other recent changes in this area of law, it is helpful to recall the three constitutional provisions giving rise to the rights to counsel and silence. The Fifth Amendment provides that no person “shall be compelled in any criminal

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It is triggered by the convergence of custody and interrogation, and is not limited to the specific offense for which the suspect is being detained and/or questioned. The second of these provisions is the Sixth Amendment and its specific right to counsel. This right attaches only upon “the initiation of adversary judicial criminal proceedings — whether by way of formal charge, preliminary hearing, indictment, information, or arraignment,”\(^{14}\) and applies only to the charged offense and no other. Third is the Fourteenth Amendment’s Due Process Clause and its requirement that any statement, whether custodial or not, be made voluntarily and not as the result of any undue coercion or any promise or threat.\(^ {15}\) This requirement – that any statement used against a defendant be voluntary — applies regardless of whether the suspect was in custody.

THE DEFINITION OF CUSTODY UNDER THE MIRANDA DOCTRINE

The essential holding of Miranda is that when a suspect is in custody and interrogated, no statement he makes may be used against him in the state’s case-in-chief unless he was first advised of his rights and voluntarily waives those rights. Only when these two factors, custody and interrogation, are present are the dictates of Miranda triggered. Four of these recent cases involving Miranda directly address the issue of when an individual is in custody for purposes of the Miranda doctrine.

In Maryland v. Shatzer,\(^ {16}\) the court for the first time addressed the issue of whether one who is incarcerated may nonetheless not be in custody for purposes of Miranda. In that case, the defendant was serving time in prison when a detective attempted to question him about the sexual abuse of a child which occurred prior to his incarceration. The defendant invoked his right to counsel and the interview was immediately terminated, as is required by Edwards v. Arizona\(^ {17}\) holding that once the right to counsel is invoked, police may not reinitiate contact with the defendant unless his attorney is present.

Two and one-half years later a different detective again approached the defendant to question him about the child abuse charges, but this time the defendant waived his rights and answered the detective’s questions. The majority opinion held that although he had been incarcerated during the entire relevant time period, there was a break in custody for Miranda purposes between the two interrogation sessions because the defendant had been released back into the general prison population.

Shatzer’s experience illustrates the vast differences between Miranda custody and incarceration pursuant to conviction. At the time of the 2003 attempted interrogation, Shatzer was already serving a sentence for a prior conviction. After that, he returned to the general prison population in the Maryland Correctional Institution–Hagerstown and was later transferred, for unrelated reasons, down the street to the Roxbury Correctional Institute. Both are medium-security state correctional facilities.

. . .

Inmates in these facilities generally can visit the library each week, have regular exercise and recreation periods, can participate in basic adult education and occupational training, are able to send and receive mail and are allowed to receive visitors twice a week. His continued detention after the 2003 interrogation did not depend on what he said (or did not say) to Detective Blankenship, and he has not alleged that he was placed in a higher level of security or faced any continuing restraints as a result of the 2003 interrogation. The “inherently compelling pressures” of custodial interrogation ended when he returned to his normal life. (citations omitted)

The Shatzer decision also settled for the first time how long a break in custody must be before the protections of Edwards dissolve, allowing officers to reinitiate contact with the defendant. This issue is


treated more thoroughly below.

Two years after Shatzer, the court again had occasion to visit the issue of how prison incarceration affects one’s custodial status. In Howes v. Fields the court refused to adopt a bright-line rule that anytime a prison inmate is separated from the general population for questioning, the encounter is automatically custodial requiring Miranda warnings. In that case the inmate was taken to a conference room and questioned for several hours by deputies. He was told more than once he was free to leave and could go back to his cell whenever he wanted, and at one point when he became agitated and began to yell he was told by one of the deputies that if he did not want to cooperate he could leave. In refusing to fashion an absolute rule governing prison interrogations, the court stated:

When a prisoner is questioned, the determination of custody should focus on all of the features of the interrogation. These include the language that is used in summoning the prisoner to the interview and the manner in which the interrogation is conducted. See Yarborough, 541 U. S., at 665. An inmate who is removed from the general prison population for questioning and is “thereafter . . . subjected to treatment” in connection with the interrogation “that renders him ‘in custody’ for practical purposes . . . will be entitled to the full panoply of protections prescribed by Miranda.”

Another of the Supreme Court’s recent decisions in this area makes clear that one’s status as a juvenile must be considered when determining whether they were or were not in custody at the time of questioning. In J.D.B. v. North Carolina, a 13-year-old was taken from his afternoon social studies class and questioned by the school police officer in a conference room without being advised of his rights. Although the Supreme Court has repeatedly stressed that the issue of custody is an objective test which does not depend upon the subjective factors of individual defendants, it nonetheless held that status as a minor should be factored into the equation.

Reviewing the question de novo today, we hold that so long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test. This is not to say that a child’s age will be a determinative, or even a significant, factor in every case.

It is, however, a reality that courts cannot simply ignore.

In Bobby v. Dixon, a man suspected in the disappearance of his friend had a chance encounter with police at the police station. The officer administered Miranda warnings and attempted to question the suspect about the murder, but the suspect immediately stated he wanted a lawyer and was allowed to go on his way. When officers reinitiated contact about five days later he waived his rights and made a statement. The Sixth Circuit Court of Appeals, applying the rule of Edwards v. Arizona, held that because he had once invoked his right to counsel, officers could not seek and obtain a Miranda waiver from the defendant without his attorney present. In a per curiam opinion, the Supreme Court reversed because the defendant was not in custody during this chance encounter at the police station and therefore Miranda did not apply. Thus, the giving of the warnings by the officer and his attempt to invoke the right to silence were both legal nullities, because a defendant cannot anticipatorily invoke his rights prior to the time he is taken into custody.

INVOKING AND WAIVING THE RIGHT TO SILENCE

One of the more interesting recent changes to this body of law has to do with invoking and waiving one’s right to remain silent. In Berghuis v. Thompkins a murder suspect was arrested, given the Miranda warnings and declined to sign a form

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19. _Id._ At 1192.
22. _Id._ At 29.
acknowledging he understood his rights. There was conflicting testimony about whether he verbally acknowledged understanding his rights. Police questioned him for about three hours, during which he sat mostly silent except for a one word or short answer to a few questions.

About two hours and 45 minutes into the session, a detective asked the defendant if he believes in God and has asked God to forgive him for murdering the victim, whereupon he got tearful and replied ‘yes.’ After conviction the defendant on appeal claimed that by remaining silent for a significant period of time, he had invoked his right to silence and that continued questioning by police violated that right. Justice Kennedy provided the fifth vote in a 5-4 ruling holding that simply being silent is not sufficient to invoke one’s right to silence; an unambiguous request to remain silent is required in order to invoke the right thus precluding officers from continuing their questioning. Although the court held almost 20 years ago that invoking the right to counsel requires an unambiguous request for a lawyer, the Berghuis case is the first time that requirement has been applied to the right to silence.

There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously. A requirement of an unambiguous invocation of Miranda rights results in an objective inquiry that “avoid[s] difficulties of proof and ... provide[s] guidance to officers” on how to proceed in the face of ambiguity. Davis, 512 U.S., at 458–459, 114 S.Ct. 2350. If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused’s unclear intent and face the consequence of suppression “if they guess wrong.” Id., at 461, 114 S.Ct. 2350. Suppression of a voluntary confession in these circumstances would place a significant burden on society’s interest in prosecuting criminal activity. See id., at 459–461, 114 S.Ct. 2350; Moran v. Burbine, 475 U.S. 412, 427, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).

24. Id. At 2260.

Thompkins did not say that he wanted to remain silent or that he did not want to talk with the police. Had he made either of these simple, unambiguous statements, he would have invoked his “right to cut off questioning.” Mosley, supra, at 103, 96 S.Ct. 321 (quoting Miranda, supra, at 474, 86 S.Ct. 1602). Here he did neither, so he did not invoke his right to remain silent.24

Also at issue in the Berghuis case was whether the defendant had waived his right to remain silent. For the first time ever, the Supreme Court recognized that a waiver of one’s right to remain silent need not be expressed but may be implied from evidence that he was advised of the rights, understood them, and then undertook a course of conduct consistent with a waiver such as answering some questions. The court stressed that merely advising a suspect of his rights and then commencing the questioning is not sufficient to find an implied waiver even if the suspect responds with answers; there must be some evidence that he or she understood the rights.

The practical effect of these two holdings from the Berghuis case is that when a suspect has been advised of his rights and indicates he understands them, officers may ask questions even if the suspect has not specifically indicated he will waive his rights and even if he sits silently during the initial phase of the questioning. However, to be admissible the statement must still be voluntarily made and not the product of coercion or threats since the Fourteenth Amendment’s due process clause applies regardless of custody and regardless of which other rights have been invoked or waived.

REINITIATING INTERROGATION AFTER RIGHTS ARE INVOKED

The ability of police officers to reinitiate contact with a suspect who has invoked his Miranda rights is another area of significant change over the past few years. As noted above, it has long been the rule that when a suspect invokes his right to remain silent or his right to counsel, all questioning must cease. When he has unambiguously invoked his right to silence, police must “scrupulously honor” that request but may return later and attempt to resume the questioning.25 Conversely, when it is the right to
counsel which is invoked, police may not reinitiate that contact until the suspect’s lawyer is present.26

Because it is the convergence of custody plus interrogation which triggers the protections of \textit{Miranda}, many courts and practitioners have long assumed that police may question a defendant who has properly invoked his right to counsel if that person is released from police custody. However, in \textit{Maryland v. Shatzer},27 discussed above for its holding on what constitutes custody, the Supreme Court for the first time ever also set a specific length of time which must pass before police may attempt to question a suspect who has invoked his right to silence and then been released from custody. The court balanced the need for protecting a suspect during custody and its lingering effects against the illogical notion that one who invokes the right to counsel while in custody is forever immunized from police interrogation even after they have been freed from custody.

“It seems to us that period is 14 days. That provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.”28

\begin{footnotes}
\item[27] \textit{Maryland v. Shatzer}, 130 S.Ct. 1213, 175 L.Ed.2d 1045 (2010).
\item[28] \textit{Shatzer}, 130 S.Ct. at 1223.
\end{footnotes}

\begin{boxedtext}
\textbf{About the Author}

Scott Rowland is a career prosecutor who currently serves as First Assistant District Attorney in the Oklahoma County District Attorney’s Office. He frequently lectures throughout the United States in areas of criminal law and criminal constitutional procedure. Scott was recently named 2013 Outstanding Prosecutor by the Oklahoma District Attorneys’ Association. He is a 1994 graduate cum laude of the Oklahoma City University School of Law.
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\section*{Court Interprets Aid to Indigent Defendants Statute as Guaranteeing More Rights than Miranda}

\textbf{BEFORE A VOLUNTARY CONFESSION MADE AFTER FIRST APPEARANCES IS ADMISSIBLE}

\begin{footnotes}
\item[2] The Sixth Amendment provides in part, “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, . . . and to have the Assistance of Counsel for his defence.”
\item[3] \textit{State v. Appleby}, 289 Kan. 1017, 1044, 221 P.3d 525 (2009). Appleby states that this right also applies on arraignment, or on arrest on a warrant and an arraignment.
\item[4] The 5th Amendment right to counsel, which is protected by \textit{Miranda v. Arizona}, is not offense specific. \textit{State v. Walker}, supra at note 1, 276 Kan at 944.
\end{footnotes}

By Steven J. Obermeier, Master District Attorney, Johnson County District Attorney’s Office

As discussed in Scott Rowland’s article, the 5th Amendment to the U.S. Constitution guarantees the right against self-incrimination. This includes the right to remain silent and the right to have a lawyer present during custodial interrogation.1

The 6th Amendment right to counsel,2 however, is more restrictive. It attaches on the filing of formal criminal charges.3 In contrast to the 5th Amendment right to counsel,4 the 6th Amendment right to counsel is offense specific. It does not attach to uncharged offenses, and it cannot be invoked once for all future prosecutions.5

The Kansas Supreme Court recently faced an appeal involving the admissibility of a confession that was made after the defendant had been charged with two felonies, appeared with counsel, and had requested appointed counsel at his first appearance. But the court raised a new issue for the first time on
appeal at the first oral argument. The court decided the appeal based on its interpretation of K.S.A. 22-4503, the statute that addresses the appointment of counsel for indigents charged with a felony. It set a high bar for the waiver of this statutory right to counsel before a custodial interrogation would be admissible.

In State v. Lawson, the defendant was charged with two counts of aggravated criminal sodomy with a child under the age of 14 (K.L. & J.L.). The district court conducted a first appearance, and a defense attorney was present on Lawson’s behalf. Lawson’s application for court-appointed counsel was filed that day. The next day, unaware that Lawson had an attorney, an officer transported Lawson from his jail cell to the police department. The officer gave Lawson oral and written Miranda warnings, which Lawson waived in writing. The officer conducted a polygraph examination. During the subsequent interrogation, Lawson admitted to sexual contact, including oral sodomy, with J.L. in 2007.

It appears that the confession was erroneously admitted at Lawson’s trial, based upon Michigan v. Jackson. But shortly after Lawson’s trial, the U.S. Supreme Court overruled Michigan v. Jackson in Montejo v. Louisiana. And the general rule is that a change in the law such as Montejo applies to cases like Lawson’s, which are pending on direct review.

Lawson’s confession would have been admissible under the Montejo/6th Amendment analysis. Lawson instead argued on appeal that the Court should interpret § 10 of the Kansas Constitution Bill of Rights more strictly than the Montejo Court interpreted the 6th Amendment. In fact, the first mention of K.S.A. 22-4503 was made at the first oral argument in Lawson by the justice who wrote the opinion. The justice commented, “If this (the post-first appearance confession) is a ‘stage of the proceeding,’ I’m not certain why we’re jumping off into Constitution Land because we have a statute.” Counsel for Lawson thought the statutory argument would be a perfectly valid reason to suppress Lawson’s statement, though it was not

7. K.S.A. 22-2901 states when an arrest is made in the county where the crime charged is alleged to have been committed, the person arrested shall be taken without unnecessary delay before a magistrate of the court. The magistrate shall fix the terms and conditions of the appearance bond upon which the defendant may be released.
9. Michigan v. Jackson, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986). The defendants in Jackson were in custody prior to and after invoking their right to counsel at arraignment. The police were aware that counsel had been appointed. The questioning both before and after the arraignment concerned the same charges. The Court held that, once the right to counsel has been asserted at the arraignment, the police may not conduct further interrogation without counsel present and any waiver of defendant’s right to counsel is invalid if made in response to police-initiated interrogation. 475 U.S. at 629–36, 106 S.Ct. at 1407–11.
11. Montejo v. Louisiana, 556 U.S. 778, 797, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009) (“Michigan v. Jackson should be and now is overruled.”). When this Court creates a prophylactic rule to protect a constitutional right, the relevant “reasoning” is the weighing of the rule’s benefits against its costs. Jackson’s marginal benefits are dwarfed by its substantial costs. Even without Jackson, few badgering-induced waivers, if any, would be admitted at trial because the Court has taken substantial other, overlapping measures to exclude them. Under Miranda, any suspect subject to custodial interrogation must be advised of his right to have a lawyer present. Under Edwards, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), once such a defendant “has invoked his [Miranda] right,” interrogation must stop. And under Minnick v. Mississippi, 498 U.S. 146, 153, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990), no subsequent interrogation may take place until counsel is present. These three layers of prophylaxis are sufficient. On the other side of the equation, the principal cost of applying Jackson’s rule is that crimes can go unsolved and criminals unpunished when uncoerced confessions are excluded and when officers are deterred from even trying to obtain confessions. The Court concluded that the Michigan v. Jackson rule does not “pay its way,” and thus the case should be overruled. 129 S.Ct. at 2088-91.
13. “In all prosecutions, the accused shall be allowed to appear and defend in person, or by counsel...”
15. Four justices concurred in the Lawson opinion, and three concurred in the result. 296 Kan. at 1100.
an argument that counsel had thought of.\textsuperscript{17} After this first oral argument,\textsuperscript{18} the court ordered reargument and supplemental briefing on five specific questions that were not addressed in the initial briefs.\textsuperscript{19}

After a supplemental briefing and a second oral argument, the \textit{Lawson} court stated that the right to counsel has been codified in K.S.A. 22-4503,\textsuperscript{20} which provides that a defendant charged with any felony is entitled to have the assistance of counsel at every stage of the proceedings against such defendant.\textsuperscript{21} After a defendant has invoked this statutory right to counsel, a police-initiated interrogation of the defendant is a stage of the criminal proceedings at which the defendant is entitled to the assistance of counsel.\textsuperscript{22} But determining that K.S.A. 22-4503 entitled Lawson to the assistance of counsel at his polygraph interview did not resolve the issue of a waiver of the statutory right to counsel.\textsuperscript{23}

The \textit{Lawson} court held that the defendant’s signature on a \textit{Miranda} waiver form during the police-initiated custodial interrogation after the K.S.A. 22-4503 right to counsel had attached was \textit{not} a valid waiver of the defendant’s entitlement to the assistance of counsel. After this statutory right to counsel has attached, the defendant’s uncounseled waiver of that right will not be valid unless: (1) it is made in writing; and (2) on the record in open court.\textsuperscript{24} The \textit{Lawson} court applied the suggested ABA Standards that trial judges use when the defendant wants to represent himself. The court stated, “A \textit{Miranda} rights waiver form, addressing the defendant’s Fifth Amendment right to remain silent, simply cannot be an adequate substitute for the waiver procedure we require of our learned trial judges.”\textsuperscript{25} The court reversed Lawson’s convictions and remanded the case for a new trial. It held the district court erred in refusing to suppress the uncounseled statement Lawson made during the police-initiated interrogation after Lawson had invoked his right to the assistance of counsel under K.S.A. 22-4503.\textsuperscript{26}

18. One of the justices asked if the Kansas Supreme Court could decide this based in the statute since appellate counsel raised the constitutional question and did not raise the statutory issue. See note 16, \textit{supra}, oral argument at 6:15-6:24.
19. See Supplemental Brief of Appellant and Supplemental Brief of Appellee. The supplemental briefs discuss the five questions, which related to the history of K.S.A. 22-4503(a), how a waiver of the right to counsel under the statute can be made, and whether it can be made absent an opportunity for the accused to consult with counsel about the waiver, whether a waiver of \textit{Miranda} rights under the 5\textsuperscript{th} Amendment is effective as a waiver of the statutory right, and whether \textit{Michigan v. Jackson} changed the constitutional law of Kansas with respect to whether a represented defendant could waive the presence of counsel at a police interrogation.
20. K.S.A. 22-4503(a) is in Article 45 Of Chapter 22, which deals with Aid to Indigent Defendants. It provides in part, “A defendant charged by the state of Kansas in a complaint, information or indictment with any felony is entitled to have the assistance of counsel at every stage of the proceedings against such defendant and a defendant in an extradition proceeding, or a habeas corpus proceeding pursuant to K.S.A. 22-2710 and amendments thereto, is entitled to have assistance of counsel at such proceeding. . . .”
22. \textit{Id}. at Syl. ¶ 6.
24. \textit{Id}. at Syl. ¶ 7.
The Kansas State Board of Nursing (KSBN) licenses over 70,000 individuals as Registered Nurses, Licensed Practical Nurses, and Licensed Mental Health Technicians. Whether residing in Kansas or not, these individuals are working in Kansas facilities and homes and providing care to Kansas healthcare consumers. Those consumers deserve and need protection from incompetent and unscrupulous practitioners. The impact on Kansas consumers is both financial and physical. The KSBN recognizes that it bears the primary charge in the state of providing that protection, however our experience has shown that district and county attorneys often assist in that process through criminal prosecution of nurses.

The KSBN investigates an average of 3,000 complaints per year. National statistics estimate that 80% of cases involve the direct use of drugs/alcohol by licensees/applicants or harmful judgment scenarios fueled by its use. A great number of those cases involve the theft and use of a patient’s medications as well as the illegal use of prescription and non-prescription drugs. Based on diversion of prescription medication alone, the financial cost to the public and private medical insurers has been estimated to be in the billions of dollars. DUls also represent a significant number of cases that we see. The newest trend in licensing cases involves the sexual exploitation of patients through inappropriate relationships or the photographing and posting of nude photographs of patients and their body parts. Some of these offenders carry a diagnosis of sexual addiction.

Mental and physical impairment of health care providers significantly impacts their personal health and the care they provide to consumers. Drug or alcohol impairment takes an ever increasing toll over time on the mental abilities of health care practitioners leading to impaired and dangerous judgments in providing care to consumers. Identifying, monitoring, disciplining, and rehabilitating licensees where possible became a priority for the legislature in 1986. As part of tort reform, they passed the Kansas Risk Management Act (see KSA 65-4921 et.seq). Along with a mandatory reporting requirement, this act authorizes each health care regulatory agency to contract for an impaired provider program (IPP). KSA 65-4924 is the specific statute focusing on impaired providers. Impairment is defined as covering physical or mental disabilities, including deterioration through the aging process, loss of motor skill or abuse of drugs or alcohol. The KSBN contracted for its first IPP in 1989. The program has been in existence since that time with only one provider change. The current program is called the Kansas Nurses Assistance Program (KNAP) and the vendor providing the service is Heart of America Professional Network (HAPN).

The KNAP program is a professional assistance program designed to assist all nurses and mental health technicians who have a problem or illness that could impair their ability to practice safely. It is open to any applicant for licensure or currently licensed nurses in Kansas. Like the Federal laws protecting privacy of those seeking treatment, it is designed to foster an environment of seeking assistance and recovery, but it takes one more step as it is also designed to monitor recovery process in order to protect the consumers from those licensees who cannot or do not choose to be successful in recovery. The program can receive referrals on impaired nurses from any source. They can help set up evaluations for impairment to rule out/in problems or they can receive nurse’s cases for monitoring that have
The fall National District Attorneys Association Board of Directors meeting was held November 7-9 in San Antonio, Texas. The meeting was intended to be a strategic planning session to map out the future of the NDAA. President Henry Garza led a small committee of prosecutors in a daylong session to determine the direction of the association. The planning session was very successful; many goals were determined. However, no strategic process is complete until the execution methods are set in place. To this end, the Strategic Planning Committee identified areas of concern and began to appoint NDAA members to necessary subcommittees. Members of the subcommittees have assignments to follow up on before the spring meeting. Final action is not expected until the annual board meeting in July.

The most surprising moment of the meeting was when the executive director, Scott Burns, tendered his resignation to the board. Burns has served as executive director since March 2009. He will remain in his position until January 2014. He intends to return to his native Utah to help with the family business and take care of his mother. The executive board has already advertised the position. It is expected that a new executive director will be hired at the spring board meeting in March.

The board of directors also received report of the following hearings and issues being held on Capitol Hill:

- **Stand Your Ground Laws** - Congress had been holding hearings on the various “stand your ground” state laws and the implications to public safety and civil rights. Because such laws are states’ rights issues, no action is expected by Congress. The oversight hearings were thought to be a media event tied to all the publicity of the Trayvon
Martin/ George Zimmerman trial.

- **Gun Control** – No new legislation is expected to be presented to congress on gun control. While it is always a popular topic, the issue appears to be dead on Capitol Hill.

- **Marijuana Decriminalization** – Much discussion took place regarding Attorney General Eric Holder’s public announcement that he has instructed U.S. Attorneys to not enforce low level drug crimes. The NDAA had responded to the public announcement by saying that Holder’s statement has little effect on the war on drugs because America’s state and local prosecutors do over 95% of the criminal prosecutions in our country. The House oversight committee had begun looking into this apparent decriminalization of marijuana by DOJ, but those efforts ended with the federal government shutdown last October.

- **John R. Justice Loan Repayment Program** – It appears that the John R. Justice student loan repayment program for prosecutors will survive federal budget cuts. While many longtime programs will be on the chopping block, the repayment program should make it in to the 2014 federal budget.

We also learned that the Trial Tactics classes planned for the University of Utah campus have been delayed. The funds earmarked for these classes will not be released by the federal government until further conditions for spending the money are finalized. We anticipate that the classes will be held, but the schedule is delayed.

Finally, Kristine Hamann of the Department of Justice led a discussion on national prosecution standards. Currently, any national discussion on the work of prosecuting attorneys cites the American Bar Associations standards on prosecution as “best practices.” As part of our strategic planning, the board has decided that any reference to prosecution standards should refer to the standards created by the NDAA. These standards were created long ago and can be found at www.ndaa.org. Hamann was very informative, and we look forward to bringing her to Kansas for CLE.

San Antonio was a wonderful venue to hold the board meeting. The meetings were held in the historic St. Anthony’s Hotel, located just one block off the popular River Walk. The Alamo was only two blocks away and provided a wonderful history lesson.

On February 10-12, the annual Capitol Conference will be held in Washington D.C. NDAA board members and representatives will be flooding Capitol Hill and meeting with Senators and Representatives to lobby for programs that will benefit America’s prosecutors.

The spring board meeting is being held in Memphis, Tenn. March 13-15. The summer board meeting will be July 18-20 with the CLE conference July 20-23, both in Denver, Colo. See you there.

The sights of San Antonio at night - left: Alamo, right: San Antonio River Walk.
2013 KCDAA Fall Conference, October 14-15 - Photos
by Angela Wilson, Senior Assistant District Attorney, 18th Judicial District of Kansas

Awards Luncheon

SAVE THE DATES!

2014 KCDAA Spring Conference
June 12-13, 2014
Hyatt Regency, Wichita, KS