

The Kansas Prosecutor



The official publication of the Kansas County and District Attorneys Association

Volume 11, No. 3, Fall/Winter 2014



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

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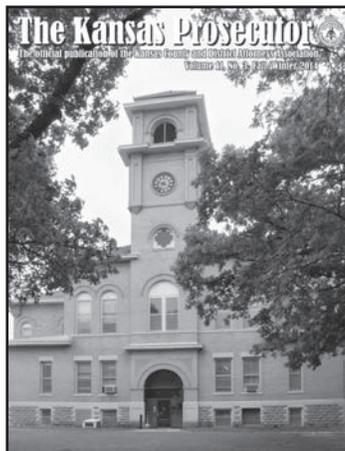
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The Elk County Courthouse was erected in 1907. It
 was designed by the architectural firm of George E.
 McDonald. The Morse Contracting Company built
 this National Register of Historic Places property.
 The previous courthouse burned in 1906.

The courthouse is located at
 225 E. Washington
 Howard, KS 67349

*Photo by John D. Morrison, Prairie
 Vistas Photography*



President's Column

by Marc Goodman, KCDA President
Lyon County Attorney

A Constant Learning Experience

By the time this article goes to press and is sent out, I will have assumed the role of President of our Association. The years since I said I would accept a director's position passed, what seems quickly now, and included the year I was chair of the Legislative Committee. A director, and then officer's position, all seemed so simple at the time.

Simple is a false word. What I have instead found is a constant learning experience... a wealth of information sharing... travels and travails through the legislature... superior colleagues and good friends... and an astounding camaraderie.

When asked what I hoped for in my year in office, I raced through thoughts on legislation and a host of other topics. However, I quickly settled on my hopes for prosecutors in Kansas as a whole. All of us should be doing all we can to develop and strengthen public trust in not only our integrity, but in our abilities.

In late 2000, after winning a primary in August in Lyon County, I attended a National District Attorney Association (NDAA) conference for elected officials in Utah. One of the first sessions began with a quote from Berger v. US, 295 U.S. 78 (1935):

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor – indeed, he should do so. But while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain

from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

It is fair to say that the average jury, in a greater or lesser degree, has confidence that these obligations which so plainly rest upon the prosecuting attorney, will be faithfully observed.

[Consequently, improper suggestions, insinuations, and especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.]

In turn, I then re-read my oath on my certificate of admission; I discovered the prosecutorial standards as written and distributed by the NDAA. It all made perfectly natural sense and embodied every belief I held to the law, and to the government attorney, especially the prosecutor. I felt that pride and zeal at the role I would take. I was and remain humbled I was actually elected by the People.

Regrettably within days I was in adversarial arguments with prosecutors from some jurisdictions who advocated a “convict at any cost” mentality. I took office and in the first year read opinion after opinion viscerating prosecutors for misconduct. Ethical opinions were critical. Our citizenry was bombarded with everything prosecutors do wrong. Twenty-four hour television left us open to constant attack. All the news cloaked prosecutors as the villain in executing innocent defendants and with all that I still believed we could hold the public's trust.

Today, the opinions from the appellate courts are still full of discussion of misconduct. The protections of the Constitution become broader and broader. Our duties required by such cases as Brady v. Maryland, 375 US 83 (1963), and Giglio v. United States, 405 US 150 (1972), are expended more and

more to place requirements on prosecuting in the presentation of their case. Some Courts in Kansas are now paying greater heed to the reporting of ethical violations, or of insisting on self-reporting. The innocence projects have been gaining more and more momentum, yet the press does not report results correctly but seems to focus on any form of prosecutorial misconduct, or the misconduct of police or government laboratories. Yet I still believe the citizenry wants to believe in us.

In the next year, to renew and develop that trust, it is my hope that we, as prosecutors, and as an Association, can continue and expand upon the following:

1. Elected county and district attorneys can be certain to educate and train their trial attorneys of the allowed actions and arguments in trial... we need hear no more appellate opinions which rebuke and implore that “when will you ever learn”.
2. Kim Parker, Sedgwick County, has worked with and supported a resolution adapted by the American Bar Association in August 2010, urging courts to differentiate between “trial error” and “prosecutorial misconduct”. (Recommendation 100B)

This differentiation is being posited to the Supreme Court of Kansas.

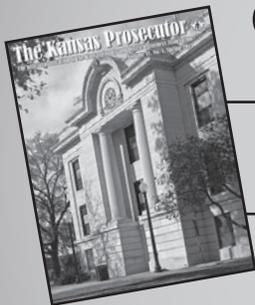
3. John Settle, Pawnee County, and Jerry Garman, Wyandotte County, have attended a regional “Best Practices” conference in St. Louis, Missouri, with several other State representatives to begin development of best practices for prosecutors.
4. I have asked Chris McMullan, Assistant District Attorney in Johnson County, as chair of the CLE committee, to look at CLE programs for evidence and trial practice.

It is my sincere hope and objective that KCDAA can promote and develop proactive measures to stem negativism. I have no question that our citizenry can be assured their faith in prosecutors was never in doubt.

I trust that the new or young prosecutors will fully engage themselves in the KCDAA in order to carry on our traditions. If we are to maintain and develop our high values and standards, we must have the active involvement of younger attorneys. Institutional memory is of no value if we cannot leave it to someone.

Thus, I trust that next year we will all be proactive. 

Do you have an article idea you would like to know more about? We can try to find a writer, if you have an idea. Or do you want to submit an article?



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

**2015 Deadlines:
Spring 2015 - March 4
Summer 2015 - July 8
Fall 2015 - October 28**



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



Executive Director's Message

by Steve Kearney, KCDA Executive Director

KCDAA 2014 Year in Review

2014 was another successful year for the Kansas County and District attorneys Association! With an active membership and engaged Board of Directors, the Association has continued to move professional prosecution forward in the state of Kansas.

The KCDA legislative agenda for the 2014 session met with enthusiastic response from the legislature attributed in no small part to the work done by the KCDA legislative committee and Board of Directors both prior to and during the session itself. The agenda which included: HB 2445 (discovery given to defense rather than the defendant individually); Sub. for HB 2442 (enhanced penalty for repeat flee and elude); and SB 329 (statute of limitations for juvenile offenses) was introduced early to provide ample time for full vetting and discussion with stakeholders and legislators.

The legislative committee and Board of Directors wisely chose to bring forward a limited legislative agenda anticipating issues being brought forth by others affecting prosecution that would require KCDA attention and input. While many organizations found time to grumble about the slow start to the 2014 session, the KCDA had no such complaint. The first week of the session saw hearings on further refinement of the hard 50 law carrying over from the Special Session of 2013 coupled with hearings on the abolishment of the death penalty.

In addition to providing input into the frenetically paced 2014 legislative session, the KCDA continued its other important work outside the legislative arena on behalf of prosecutors and the administration of justice in Kansas. In June the membership was provided two days of continuing legal education pertaining to recent changes in the law resulting from the 2014 legislative session; installment three of the nationally recognized "Ethics: The Movie" presented by Tom Lockridge, Kentucky Commonwealth Prosecutor and the Hon.

Steve Wilson, Kentucky Circuit Judge; with the keynote presentation by John Bobo, former prosecutor and author of "The Best Story Wins" and now Senior Director of Racing Operations and Substance Abuse Programs and legal counsel for NASCAR; in addition to presentations by our own talented prosecutors across the state.

Following the June conference and throughout the remainder of the summer, legislative RFPs were received and prioritized by the KCDA legislative committee for the 2015 legislative session. Prior to the fall conference and continuing legal education seminar, the Board of Directors acted on the recommendations of the legislative committee and adopted once again a narrow and focused legislative agenda in anticipation of a busy 2015 session. Bills for inclusion in the 2015 agenda include the following:

1. A statutory fix in response to the *Murdock* decision
2. Updates to the search warrant statutes
3. Adding strangulation to the definition of aggravated battery

In the two days immediately following the fall board meeting, the membership was treated to another high quality continuing legal education program including a presentation by Robert Blecker, criminal law professor at New York Law School and leading expert on the death penalty. Blecker was the subject of the feature and TV documentary "Robert Blecker Wants Me Dead." He formerly prosecuted corruption in New York's criminal justice system as a Special Assistant Attorney General, and has been the sole keynote speaker supporting the death penalty at several major national and international conferences.

In addition to these achievements, the KCDA's sister organization, the Kansas Prosecutors Foundation, continued to make strides in its work 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. Those works include providing scholarships for students interested in pursuing prosecution or public law at both Washburn School of Law and KU School of Law. The foundation board at its fall meeting voted to increase the amount of the annual scholarships, and began an annual meet and greet at each law school with students and faculty to help facilitate interest in public service.

Several changes in association leadership took place at the fall meeting including the election of Charles Branson, the Douglas County District Attorney to the Board of Directors. Additionally, long time KCDAA board member and immediate past president Mark Frame concluded his service as a member of the Board of Directors.

Two other major changes in KCDAA leadership were the passing of the mantle for the CLE Committee Chairmanship from Sedgwick County Chief Attorney Justin Edwards to Johnson County Chief Deputy District Attorney Chris McMullin. The Legislative Committee chairmanship was also passed on from Lyon County Attorney Mark Goodman to Leavenworth County Attorney Todd Thompson as Mark Goodman takes over as president of the organization for 2015.

The KCDAA and its sister organization continue their commitment to provide the best possible public policy development, continuing legal education, and community involvement received by any prosecutors in the United States. We are blessed in Kansas with talented and dedicated prosecutors whose sole focus is the pursuit of justice on behalf of the citizens of the state of Kansas. Thank you all for your service! 🇺🇸



Legislator's Column

by Senator Greg Smith

Perception - It's Reality

In South Carolina, where I started my police career, officers were responsible for prosecuting most misdemeanor cases. The Solicitor's Office (the Southern version of a County or District Attorney) did not prosecute these cases. This meant that the police officer or deputy sheriff prosecuted simple assault, battery, disorderly conduct, domestic violence, DUIs, and misdemeanor theft cases. Officers laid the foundation for the breathalyzer operator's qualifications in court, conducted voir dire of jury pools, as well as prosecuted the case. When I reached the rank of Lieutenant, I presented cases to the grand jury, which were prosecuted by the Solicitor's Office in General Sessions Court (County Courts). It was a fascinating education, and I am grateful I was able to experience it.

I have had the privilege of serving on both the House and Senate Judiciary Committees in my time in the Kansas Legislature. I've watched the makeup of the committees change from a lawyer majority to a lawyer minority, particularly in the Senate. I am not a lawyer. I'm a police veteran. My life experience allows me to bring unique perspectives to the Senate Judiciary Committee and in my role as Vice-Chair, I leverage those experiences as we argue, debate, and discuss the issues that come before our committee. The change in the committee makeup has been one that makes better law for Kansas, in my opinion.

When I served on the House Judiciary Committee, it was a lawyer dominated committee. I remember hours of debate over the placement of

a comma or semi-colon. I listened, watched, and even participated in these debates over the proper placement of punctuation. This is not something that a deputy sheriff or police officer is concerned with. They care about arresting the bad “guy” and seeing him/her go to jail or prison for the crime committed. Law enforcement is concerned with the *intent* of the law much more than they are concerned with the letters (or punctuation) of the law. Most citizens are as well. If you doubt that, just look at the popularity of crime dramas as entertainment. These shows don’t deal with the reality of the procedures that either police or attorneys are required to follow in real life. The appeal of the show is in the **perception** that the intent of the system is to put bad guys away for their crimes and they do – on television and real life – in the vast majority of cases. *Perception equals reality.*

My South Carolina experiences led me to be a student of the law. I read and re-read, studied and re-studied the statutes as well as the case law (a large amount of criminal law in South Carolina is common law) so I could be effective. I continue to do the same in my role as Vice-Chair (non-lawyer) of the Senate Judiciary Committee.

I’ve taken the time to explain this to you to lay the foundation for my next statement. The perception of the people of Kansas, particularly the survivors of violent crime, is that the Supreme Seven don’t understand the intent of the law. *The perception is the reality.* The Supreme Seven seem more concerned with grammar and punctuation. The Legislature of 2015 is faced with fixing the Supreme Seven’s misinterpretation of Legislative intent. That perception, justified or not – and I believe it is justified – has made your job, and mine, even harder.

Let’s look at what has been served up for the Kansas Legislature in the upcoming session:

- *State v. Murdock*, No. 104,533 (May 2, 2014) (Calculation of criminal history with out-of-state convictions committed prior to enactment of the Kansas Sentencing Guidelines Act.)
- *State v. Reiss*, No. 102,071 (May 2, 2014). (Investigative detentions.)
- *State v. Powell*, No. 102,749 (June 6, 2014). (Search warrants for biological material under KSA 22-2502)

- *State v. Jonathan Carr*, No. 90,198 (July 25, 2014). (Overturn of Death Sentence)
- *State v. Reginald Carr*, No. 90,044 (July 25, 2014). (Overturn of Death Sentence)

The number one core function of government is public safety. Every one of these opinions has made Kansas less safe. Space limitations don’t allow me to go into detail on each case but the quick summation is - *Murdock*, *Powell*, and *Reiss* have already been examined by the first meeting of the 2014 Special Committee on Judiciary. *Murdock* will be addressed by the Legislature. *Reiss* is a troubling opinion and could impair the ability of the police to investigate crime. It is also the most troubling in finding a means to address the issue. *Powell* will also likely be tackled by the Legislature. The two *Carr* opinions are, in my opinion, the most egregious. Kudos to Justice Moritz for her dissenting opinion:

“The people of Kansas, through the legislature, enacted a death-penalty scheme that comports with the Eighth Amendment and demonstrates the people’s collective belief that death is the appropriate punishment for murder in certain circumstances. I am convinced Reginald Carr received a fair trial and that the jury imposed a sentence of death because it understood that his horrendous crime called for that sentence. Because I would affirm Reginald Carr’s death sentence, I dissent.”

The Kansas Supreme Court continually demonstrates that they apparently do not believe that the intent of the Kansas death penalty is to administer “appropriate punishment in certain circumstances” despite the wishes of the people of Kansas evidenced by the laws passed by their Legislature. The court is more concerned with “punctuation and grammar.” It makes your job harder as a prosecutor. It makes Kansas less safe.

It is my honor to serve in the Legislature. My passion is to support the victims of crime, the men and women of law enforcement, and the men and women who day in and day out work tirelessly for the people of Kansas prosecuting those who chose to violate the intent of the law made by the people of Kansas. If I can be of assistance, please contact me. I look forward to working with you this session. 🙏

Protecting the Rights of All in the Search for Justice

Prosecutors from Nine States Gather to Study and Share Best Practices



This fall, prosecutors from Arizona, Illinois, Kansas, Michigan, Minnesota, Missouri, New York, South Dakota, and Wisconsin met at the Circuit Attorney's Office in St. Louis for a regional "Best Practices for Justice" Summit.

Prosecutors take an oath of office to protect the rights of the victims, the innocent and of the accused. Over the last few years, prosecutors from across the country have been meeting to discuss "best practices" within the criminal justice system.

Wyandotte County District Attorney Jerome A. Gorman and Pawnee County Attorney John M. Settle represented Kansas by attending the Summit on behalf of the Kansas County and District Attorneys Association's (KCDAA) Best Practices Committee.

"As prosecutors, we are committed to working to insure the criminal justice system will protect the rights of all citizens, including victims and defendants," said Gorman. "Our Kansas committee has been working diligently to identify processes and policies which Kansas prosecutors and law enforcement agencies can use to improve our justice system."

"Kansas prosecutors have a long standing

commitment to the improvement of our justice system," adds Marc Goodman, Lyon County Attorney and KCDAA President. "Our Kansas Best Practices committee is an avenue to continue our efforts to identify such Best Practices policies to protect the rights of all citizens and the integrity of our criminal justice system."

The "Best Practices for Justice" Summit allowed the Kansas prosecutors to confer with others from around the region who also care deeply about justice and desire to find ways to improve the criminal justice system. Other states are now in the process of creating or establishing their own versions of a "Best Practices Committee."

The Summit focused on exploring different elements of the criminal justice system to ensure prosecutors are best equipped to fulfill their obligations under the law. Various topics were discussed, including the gathering of forensic and digital evidence, overall ethics and crime prevention.

This regional summit in St. Louis was the second in a series of four to be held throughout the country. The initiative is funded by the Bureau of Justice Assistance within the U.S. Department of Justice. Kristine Hamann, Visiting Fellow at the Bureau of Justice Assistance, is leading the initiative. Hamann is also a former Assistant District Attorney in Manhattan, New York. 



KCDAA Award Winners

The Kansas County and District Attorneys Association (KCDAA) is pleased to announce its annual award winners: Christina Trocheck – Prosecutor of the Year and Jerome Gorman – Lifetime Achievement Award. The award winners were honored during the 2014 KCDAA Fall Conference Awards Luncheon on Monday, October 13 at the Sheraton in Overland Park, Kan.

2014 Prosecutor of the Year Christina Trocheck Assistant Saline 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.

Christina Trocheck graduated from Wichita State University in 1991 with a Bachelor of Science in Administration of Justice. She received her Juris Doctor from Washburn University School of Law in 1995. She started her law career as an intern in the Sedgwick County District Attorney’s office. She became a prosecutor in Saline County in 1995. In 2001, Christina entered private practice. She returned to the Saline County Attorney’s Office in 2006 as an assistant county attorney. Christina prosecutes crimes against children, sexual offenses, and violent felonies, including homicides. She was nominated for her work on several cases in the last year.

Christina’s nomination stated, “[Christina] is an aggressive prosecutor who is not afraid of the challenge of a jury trial. She spends long hours in the office to thoroughly prepare her cases. She has the ability to take a case that comes to us with little evidence and work the case to a conviction.”

In addition to being a prosecutor, Christina provides training at the KHP academy for new recruits, assists other jurisdictions with questions about sex offense cases, and is an active participant in a multi-disciplinary team at the local child advocacy center. Christina also volunteers to prosecute the sexual predator civil commitment cases in Saline County for the Attorney General’s Office. She has handled many cases before the appellate courts this year as well.

Christina is married to Chris, a captain with the Salina Police Department. They have three children: Morgan, Jonathan, and Joshua. In her spare time, Christina likes to spend time with family, travel, and read. 📖



KCDAA Award Winners

2014 Lifetime Achievement Award

Jerome Gorman

Wyandotte County District Attorney

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.

Jerome Gorman is the Wyandotte County District Attorney and joined the DA's office soon after graduation from law school. He has worked cases from juvenile offenders to adult major crime, and he is only the second person to hold the office of District Attorney in Wyandotte County. While working as a prosecutor, Jerry has been the lead prosecutor on a number of high profile criminal cases including two separate murder cases both entitled State v. Marc Sappington. Sappington was prosecuted for three murders in one case, and another murder and attempted murder in the other case. Sappington is in prison.

His nomination mentioned, "On any given day in the office, Jerry can be found coaching and teaching newly minted assistant district attorneys in legal ethics, trial advocacy, and strategic lawyerly thinking. He requires [them] to ride along with police, and every new ADA must attend an autopsy. It is a tribute to Jerry that attorneys who have served as his assistant prosecutors as well as many who prosecuted alongside him when he was an assistant district attorney, have gone on to hold respected positions as judges, assistant United States attorneys, and assistant attorney generals. Their successes have no doubt been molded in some way by Jerry."

In addition to being a prosecutor, Jerry participates in giving legislative testimony on a regular basis to help inform legislators about public safety and offender accountability. He also carries a pager and responds to violent crime scenes at all hours. And, Jerry's name can be found on 686 opinions in the Westlaw Kansas court opinion database.

Jerry is a past president of KCDAA (2002) and currently participates in the CLE committee, homicide section leader, board of editors for the Kansas Prosecutor, NDAA representative for

Kansas, best practices committee, a host of ad hoc committees and projects from nominations to legislative activity, and supports KCDAA through involvement by his assistant prosecuting attorneys as well.

In his community, Jerry is an active member of St. Patrick's Catholic Church, he has coached several youth sports, is a member of the YMCA, has been an adjunct professor at community colleges, and is a frequent guest speaker. Jerry and his wife, Vicki, have been married for 35 years, and have three children and two grandsons. 🇺🇸



Todd Thompson Elected as Kansas CLE Commission Board Chair

Todd Thompson, Leavenworth County Attorney, was elected to a one-year term as Chair of the CLE Commission Board of Directors in July 2014. He is the first prosecutor to hold this position. First elected to the Commission in 2010, Todd is currently serving his second term on the board. Attorneys are eligible to serve two, three year terms. Todd has been very active educating attorneys about the rules governing continuing legal education and was a member of the board during the massive re-write of the rules that went into effect in 2011. In addition, Todd has proudly represented the Kansas CLE Commission as an active participant at several national CLE meetings of CLereg.

“Todd brings a wealth of experience to the board, both as Chair and a member. His perspective as a prosecutor adds diversity to the demographic makeup of the board and those skills needed as a successful prosecutor serve the Commission well. Todd’s ability to be fair and impartial are important qualities when analyzing Commission business. We are excited about his leadership as Chair,” said Shelley Sutton, Executive Director of the Kansas CLE Commission.

Todd Thompson became County Attorney of Leavenworth County, Kansas Jan. 12, 2009. Todd is a native of Leavenworth. His family has lived in the community for more than 160 years. He is a graduate from the University of Kansas and received his Juris Doctor from Washburn University School of Law. Before being elected, Todd was an Assistant County Attorney for Leavenworth County for a period of five years, serving as the head of the Juvenile Division. He is the former president of the Leavenworth Bar Association, is a member of the National District Attorneys Association, and is a member of the Kansas County and District Attorneys



Todd Thompson

Association (KCDAA). In 2013, Todd was selected by Ingram’s magazine to be recognized as one of Kansas City’s 40 under 40. Todd has also proposed multiple bills to the Kansas Legislation which have passed. These bills were all issues impacting his community and the state. He also recently become Chair of the KCDAA Legislative Committee. 

Steve Obermeier Receives Robert L. Gernon Award

In 2005, the Kansas Continuing Legal Education (CLE) Commission established the Robert L. Gernon Award for Outstanding Service to Continuing Legal Education in Kansas. The award is named for Kansas Supreme Court Justice Robert L. Gernon (1943 - 2005), whose career included tireless devotion to the training, education, and professionalism of attorneys in Kansas and across the nation.

This award recognizes an individual or organizations that have been instrumental in providing quality continuing legal education to attorneys in Kansas, and have demonstrated a unique commitment to legal education for lawyers in Kansas. Outstanding service to continuing legal education as a presenter, author, or speaker are among the factors that were considered.

The 2014 Robert L. Gernon Award recipient was Steve Obermeier, Master District Attorney, Johnson County. Steve has practiced law in Olathe as an assistant district attorney since 1985. Throughout his career he has been involved in providing quality continuing legal education to the legal profession throughout the state of Kansas.

In his nomination letter, Daniel McCarroll, Director, Continuing Legal Education for the University of Missouri –Kansas City School of Law, stated “[Steve] always exceeds expectations as a speaker and author in that his presentations are thorough, engaging, and entertaining. He is committed to not simply conveying information, but serving the bar by providing education of the highest quality.”

Steve earned a Bachelor of Science from the University of Kansas and received his Juris Doctor degree at Washburn University School of Law.

KCDAA Milestones

He is a member of the Kansas Bar Association, Kansas County and District Attorneys Association (KCDAA), Johnson County Bar Association, and Washburn Law School Alumni Association.

As a member of the KCDAA, Steve has taught many hours of CLE to the membership in addition to holding the position of Appellate Section Head for the last several years. As the Appellate Section Head, he serves on the KCDAA Legislative Committee as well as the KCDAA CLE Committee, bringing a wealth of knowledge and experience to both committees. Through his work and presentations, Steve is well respected among his peers and often lends his expertise when asked. In 2010, Steve was recognized as the KCDAA Lifetime Achievement Award recipient for dedicating his career to prosecution.

In addition, Don Hymer and Steve team up to present an annual 4-hour CLE for a charitable cause -- Feed the Need for CLE Review of Juvenile Law, Criminal Law and Ethics. They have presented this annual CLE since 2009 and have raised more than \$20,000 for the benefit of local food pantries.

In notifying Steve that he was the 9th recipient of the award, Kansas CLE Commission Executive Director Shelley Sutton wrote, "your expertise and service in providing quality continuing legal education is appreciated by the hundreds of attorneys attending your presentations."

As an author, Steve has written more than 50



Steve Obermeier received the Robert L. Gernon Award from Kansas CLE Commission Board Chair Todd Thompson and Kansas CLE Commission Executive Director Shelley Sutton.

legal articles in the *Johnson County Barletter*, which is published by the Johnson County Bar Association, and he was a contributing author to the three editions of the Kansas Judicial Council's *Kansas Appellate Practice Handbook*. In addition, he has written several articles for the Kansas Prosecutor.

Previous award recipients include:

2013 – Robert Collins, Wichita; 2012 – Cynthia Grimes, Lenexa; 2011 - J. Nick Badgerow, Overland Park; 2010 - Jack Scott McInteer, Wichita; 2009 - Mira Mdivani, Overland Park; 2008 - Sheila Reynolds, Topeka; 2007 - Hon. Robert J. Schmisser, Pratt; 2006 - Philip Bowman, Wichita 

Anniversaries

Wyandotte County Assistant District Attorney **John Knudsen** celebrated his 30th year anniversary with the office this year. He was honored at an Employee Appreciation Ceremony Sept. 11, 2014.

Keith Schroeder, Reno County District Attorney, and **Steve Maxwell**, Senior Assistant Reno County District Attorney, have now been prosecutors for 25 years.



Awards

In June 2014, three prosecutors from the Sedgwick County District Attorney's office received a Certificate of Appreciation Award for service

rendered to the community and citizens of the City of Wichita, Kansas for their work prosecuting a residential burglary ring. The prosecutors receiving the award were Chief Assistant District Attorney **Robert R. Short II** and Assistant District Attorneys **Jason P. Roach** and **Kristi Barton-Edwards**.



Births

Alan Fogleman, Wyandotte County Assistant District Attorney, and his wife, Jen, proudly welcomed their first child, **Lucy Fogleman**. Lucy was born Oct. 13, 2014 and weighed 7 lbs. 11 oz. Mom and baby are doing great.

KCDAA Milestones



Ellen Mitchell's grandson Landon

Ellen Mitchell, Saline County Attorney, is a grandma! Landon Matthew Johns was born to her daughter Allison and Andrew Johns Aug. 25, 2014 in Lone Tree, Colo. He was 7 lbs. 15 oz.



Elenore Pearl Owen

Tabitha Owen, Smith County Attorney, and her husband had their first child Sept. 26. They named their daughter Elenore Pearl Owen. They are thrilled with the new addition to their family!



Marriage

Wyandotte County Assistant District Attorney **Ashley Hutton** got married to Don Stewart. Their wedding was Oct. 30, 2014 in Pleasanton, Kan.



New Faces

Cathleen Abell joined the Finney County Attorney's Office in October upon relocating back to western Kansas from the Kansas City area where she resided and practiced for nearly 20 years. She spent the last 10 years as the Director of Criminal Records for the 16th Judicial Circuit Court in Jackson County, Mo. Prior to that, she was employed as an assistant city prosecutor in Lawrence, and as an investigative specialist with the Kansas State Board of Agriculture in Topeka. She earned her Juris Doctor from Washburn in 1993, and a Bachelor of Arts degree in History/Political Science, with minors in Administration of Justice and English, from Bethany College in 1990. Cathleen is licensed to practice law in Kansas, Missouri, and Colorado, and very happy to be back on the wide open plains near her home county of Gove.

The Wyandotte County District Attorney's Office is proud to announce the hiring of **James Bain**.

James grew up in Volga, S.D. where he attended Sioux Valley High School. He received his bachelor's degree in Speech Communication from Southwest Minnesota State in 2004. James then went to work in the front offices of the arena football teams in Sioux Falls, S.D. and Wichita, Kan. After a total of six years of operating teams, James started law school and eventually earned his J.D. from the University of Kansas School of Law in 2014. While in law school, James interned at Hartman Oil Company, the National Association of Intercollegiate Athletics, and the Wyandotte County District Attorney's Office. James will be prosecuting cases in Wyandotte County's Juvenile Division.



James Bain

Nathan Dickey has joined the team as an assistant county attorney with the Saline County, Kansas Attorney's Office. Nathan graduated from Washburn Law School in May 2014. While in law school he interned for one summer at Kansas Department for Families and Children, one summer for a Veteran's Appeals law firm, and for one year with the City of Topeka Prosecutor's office. Prior to law school, Nathan worked as an electronics technician in a variety of areas for over 25 years, including six years in the U.S. Marine Corps, eight years with the postal service, and several more years in small to mid-size businesses.

The Wyandotte County District Attorney's Office is proud to announce the hiring of **Francis Gipson**. Francis is from Mission, Kan. and graduated from Shawnee Mission North High School. She received her bachelor's degree in Criminal Justice from the



Francis Gipson

University of Wyoming and her J.D. from the University of Missouri-Kansas City School of Law. Francis interned at Wyandotte County DA's office throughout law school where she conducted research and made court appearances. While in law school, Francis served as the program editor for The Urban

KCDAA Milestones

Lawyer. She was a guest speaker at the Johnson County young woman's conference in 2013, as well as the guest speaker for the 2014 Johnson County Community College athletic department banquet. She will be handling juvenile cases in Wyandotte County.

Bill Halvorsen became Chase County Attorney upon the death of longtime Chase County Attorney Bill North (1976-1984, 1996-2014). Halvorsen, who graduated from KU Law School in 1982, served a term as Marshall County Attorney (1984-1988) and Nemaha County Attorney (1988-1990) before a 20-year career as a KBI Special Agent. He also served on the Chase County School Board and Chase County Commission. He is retired from the Kansas Army National Guard.



New Office

After nearly 14 years in prosecution, **John J. Bryant**, Assistant Attorney General, decided to start

his own office. The Bryant Law Office opened for business Nov. 1. Over the last 14 years, John was an Assistant District Attorney for Nick Tomasic and Jerry Gorman in Wyandotte County for about eight years, Deputy County Attorney in Leavenworth for about four years and most recently, he was an Assistant Attorney General for more than two years. Each office was a great experience as he has gotten to handle a number of homicides, drug cases and other violent crimes. In addition to that he's handled numerous cases on appeal to the KS court of appeals and supreme court. It will be a big change to leave public service. Now, he will be handling criminal cases primarily in Wyandotte and Leavenworth counties. John's wife, Kristiane, works in Wyandotte County as a prosecutor, and they have a 1-year-old daughter. John decided it was time to be closer to home.



We want to share your news!



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

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

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

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Next Deadline:
Spring 2015: March 4

The Journey to Become Tenth Circuit Court of Appeals Judge

by Amanda G. Voth, Assistant Attorney General

Although receiving a call from the White House Counsel's Office was not a call Judge Nancy Moritz anticipated, it was a call that made sense, following her extensive experience practicing in federal court, her years on the state appellate bench, and her reputation as a fair adjudicator.

Judge Moritz grew up in Tipton, Kan., a tiny town in the north-central part of the state. There was not a single attorney in town, and it was not until she participated in forensics and debate at Sacred Heart High School in Salina that she realized she wanted to become a lawyer. Upon graduating, she decided to attend Washburn University. After graduating from Washburn with a major in Accounting, Moritz went on to study at Washburn Law School, graduating in 1985.

During law school, Moritz clerked for the Shawnee County District Court judges for 20 hours a week. This clerking experience drew her in, and as a third year law student, Moritz decided she someday wanted to become a judge.

Moritz continued her clerking experience after graduating from law school, working as a research attorney for Justice Harold Herd from 1985 to 1987. From state court, Moritz went on to federal court, where she landed a clerkship with United States District Court Judge Patrick Kelly following a brief phone interview. She clerked for Judge Kelly for two years.

After clerking for more than four years, Judge Moritz decided to go to the private sector. In 1989, Judge Moritz joined the law firm of Spencer Fane Britt and Browne. There, she practiced employment defense litigation, and regularly appeared in federal court. While at Spencer Fane, Moritz decided to start a family and had two baby girls. Five-and-a-half years after starting at Spencer Fane, Moritz accepted a position as a civil litigator at the United States Attorney's Office for the District of Kansas. After litigating in federal district court for five years, she was asked to become the appellate attorney for the entire office. Having never prosecuted criminal cases before, this position offered unique challenges. For the next four years, Moritz often appeared in front of the Tenth Circuit Court of Appeals on both civil and criminal matters.

When the Kansas Court of Appeals expanded

in size, Moritz decided to apply. After applying three times before making it onto the panel and then making the panel twice, Moritz became a Kansas Court of Appeals Judge in October 2004. She served on the Court of Appeals for six years before applying for Kansas Supreme Court Justice, and in November 2010, the governor appointed Moritz to the Kansas Supreme Court.

Moritz's experience while on the bench was colorful. She authored a total of 62 opinions, and either concurred or dissented in 17 others. The cases that came before her ranged from criminal cases, to parental custody cases, to complex civil cases. While on the Kansas Supreme Court, Moritz participated in four death penalty cases. "The death penalty cases are difficult; the legal issues are difficult, they are time intensive, the records are voluminous, and they carry a weighty responsibility," she notes.

Moritz had not been on the Kansas Supreme Court bench for long when she received a call from the White House Counsel's Office, informing her



Judge Nancy Moritz

they had been vetting her for some time and asking whether she would be interested in becoming a Tenth Circuit Court of Appeals Judge. A few days later, she called back and said she was interested. The position “felt like a natural step because of my background,” Moritz states. Fourteen years of her career were exclusively federal practice, and she had significant experience clerking and serving on the courts. The neutral role of the court always came easy for Moritz, and beginning with her clerkship as a law student, she enjoyed the balancing process and weighing the arguments.

Following a very detailed and extremely extensive background check, President Obama nominated Moritz to the bench in August 2013. The

Senate confirmed her nomination in May 2014, and Judge Moritz was sworn in July 30, 2014. Her investiture was held on October 17, 2014.

Reflecting on her professional advancements, Moritz advises young lawyers to challenge themselves, and to constantly grow and change; a piece of advice she took herself, too. “I like change,” Moritz notes. She welcomed change, even on the different courts on which she served. “But I think now I’ll be satisfied for quite a while,” Moritz states, smiling. She has always enjoyed researching and writing, and has always found the law to be interesting. Moritz is also quick to note she has loved all of her past jobs and knows her new job will be no different. 🌐



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State v. Murdock Shakes Criminal History Scoring From Its Moorings

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

Kansas courts have routinely classified pre-1993 offenses as either person or nonperson for criminal history purposes by comparing the offenses to current offenses under the Kansas Sentencing Guidelines Act (KSGA).¹ Person crimes are weighted more heavily than nonperson crimes on the sentencing grid.²

K.S.A. 2013 Supp. 21-6811(e) requires the state to classify a prior out-of-state crime as person or nonperson. In doing so, the rule is set forth in the present tense:

*In designating a crime as person or nonperson comparable offenses shall be referred to. If the state of Kansas does not have a comparable offense, the out-of-state conviction shall be classified as a nonperson crime.*³

If the legislature had intended the state to consider whether the pre-1993 version of the criminal statutes in determining person or nonperson felonies, it would have stated, “if the state of Kansas *did not have* a comparable offense, the out of state conviction shall be classified as a nonperson crime.”⁴ The *Kansas Sentencing Guidelines Desk Reference Manual* is in agreement. “[T]he plain language of K.S.A. 2011 Supp. 21-6811(e) [formerly K.S.A. 21-4711(e)] requires the sentencing court to consider whether Kansas has an offense comparable to the out-of-state crime when determining whether an out-of-state conviction should be classified as a person felony.”⁵

In the controversial case of *State v. Murdock*,⁶ a four-justice majority recently interpreted K.S.A.

21-4711 to mean that all out-of-state convictions which occurred before 1993 should be scored as nonperson felonies.⁷ This results in reduced sentences under the sentencing grid.⁸

According to the dissent:

The majority's holding would mean that almost no crime committed before 1993, no matter how violent or serious, could be specified as a person felony in scoring the criminal history for a crime committed post-1993. This simply is an intolerable result and completely compromises a sentencing structure that has as its primary goal protecting society from its most violent criminals.⁹

Facts in Murdock and Court of Appeals Ruling

Murdock was convicted of two counts of aggravated robbery and one count of robbery. He had three prior robbery convictions in his criminal history. Two of his prior robbery convictions (from Illinois) occurred before 1993 (the year the KSGA person/nonperson distinction went into effect). The district court scored these two out-of-state convictions as person felonies, which placed Murdock in Criminal History Category A. The sentencing court imposed a mid-box sentence of 233 months for a severity level 3 felony. The other counts were run concurrently.

Murdock appealed. He argued that his pre-KSGA out-of-state convictions should have been scored as nonperson felonies. He argued his out-of-state robbery convictions should have been scored as

Footnotes

1. K.S.A. 2013 Supp. 21-6801 *et seq.* (formerly, K.S.A. 21-4701 *et seq.*)
2. K.S.A. 2013 Supp. 21-6809 (formerly K.S.A. 21-4709).
3. K.S.A. 2013 Supp. 21-6811(e) (emphasis added).
4. In *State v. Reese*, __ Kan. __, 333 P.3d 149, 153-54 (2014), the Court interpreted the DUI statute to determine when the prior DUI convictions were scored – at the time of the commission of the offense or at the time of sentencing. The Court interpreted K.S.A. 2011 Supp. 8-1567(j), which referred to “determining whether a conviction is a first, second, third, fourth or subsequent conviction *in sentencing* under this section.” *State v. Reese*, 333 P.3d at 153-54 (emphasis in original.) The *Reese* Court ruled:
That phrasing is consistent with the concept of establishing the prior convictions at the time of sentencing. The provision goes on to say that “only convictions occurring

on or after July 1, 2001, shall be taken into account *when determining the sentence to be imposed....*” (Emphasis added.) K.S.A. 2011 Supp. 8-1567(j)(3). The determination of the sentence to be imposed is made at the sentencing hearing, so that “when” must refer to the time that the sentencing hearing is being conducted.

State v. Reese, 333 P.3d at 153-54. *Reese* supports the argument that “in designating a crime as person or nonperson,” the pre-1993 version of the statutes are not consulted.

5. Kansas Sentencing Commission, *Kansas Sentencing Guidelines Desk Reference Manual 2011* at p. 45.
6. *State v. Murdock*, 299 Kan. 312, 323 P.3d 846 (2014), as modified (Sept. 19, 2014).
7. *Murdock*, 299 Kan. 312 at Syl. ¶ 5.
8. K.S.A. 2013 Supp. 21-6804.
9. *State v. Murdock*, 299 Kan. at 322 (Rosen, J., dissenting).

nonperson felonies because Kansas did not have a comparable person crime designation in 1984 and 1990, at the time the prior convictions were committed, so they should have been classified as nonperson crimes. As a result, this would have placed him in Criminal History Category C, and resulted in a 102-month sentence.

The Kansas Court of Appeals affirmed the sentencing court. The *Murdock* panel held that pre-1993 offenses should be designated based on the current KSGA offenses, reasoning: “Kansas courts have routinely classified pre-1993 offenses as either person or nonperson for criminal history purposes *by comparing the offenses to current guidelines offenses.*”¹⁰ But the Supreme Court deemed the italicized language to be ambiguous in light of *State v. Williams*.¹¹

State v. Williams and its Application in Murdock

Williams did not involve the scoring of pre-1993 out-of-state convictions. In *Williams*, the KSGA sentencing issue was whether to score Williams’ 2001 and 2002 out-of-state identity theft convictions as person or nonperson felonies. At the time Williams committed her identity theft convictions in the state of Washington, the comparable identity theft in Kansas was a person felony.¹² But by the time of Williams’ sentencing in Kansas, identity theft was a nonperson felony.¹³ The *Williams* court cited K.S.A. 21-4711, and ruled that, in classifying the out-of-state crime as person or nonperson, “the comparable offenses in Kansas shall be determined as of the date the

defendant committed the out-of-state crimes.”¹⁴ Since identity theft was classified as a person felony at the time of Williams’ identity thefts in Washington, the Court ruled that the convictions should be scored as person felonies in Kansas.¹⁵

The *Murdock* majority ruled *Williams* was analogous and stated, “In the absence of a statutory directive, we are left with our decision in *Williams* that the comparable Kansas offense should be determined as of the date the out-of-state offenses were committed.”¹⁶ And since Kansas had no person/nonperson designation when *Murdock* committed his Illinois robberies, the four-justice majority ruled that the out-of-state convictions should have been scored as nonperson felonies.¹⁷ Without any discussion concerning stare decisis,¹⁸ the Court overruled prior caselaw that was contrary to its holding.¹⁹ It simply concluded that the solution sat with the legislature.²⁰

The Motion to Reconsider and the Dissent

The State timely filed a motion to reconsider the *Murdock* decision. The motion argued, among other things, that the holding in *Murdock* should be limited to the facts, which solely dealt with scoring post-1993 out-of-state convictions. The Supreme Court granted the motion for rehearing, scheduled the case for oral arguments, and modified its decision. The majority clarified that its opinion applied to out-of-state convictions which occurred before July 1, 1993.²¹

The *Murdock* minority would have adopted the Court of Appeals’ reasoning that such a conclusion leads to an unreasonable result and ignored the purpose

10. *State v. Murdock*, 299 Kan. at 316.

11. *Id.* at 317; *State v. Williams*, 291 Kan. 554, 244 P.3d 667 (2010).

12. K.S.A. 2001 Supp. 21-4018(c) (identity theft is a severity level 7 person felony).

13. The designation of identity theft changed from a person felony to a nonperson felony on July 1, 2005. See L. 2005, Ch. 131, § 2 (amending identity theft to a nonperson felony).

14. *State v. Williams*, 291 Kan. 554, Syl. ¶ 4, 244 P.3d 667 (2010).

15. *State v. Williams*, 291 Kan. at 562.

16. 299 Kan. at 317.

17. The dissent “would distinguish *Williams* and limit its holding to the facts of the case. The prior crimes in question were identity thefts and all committed post-1993 and, thus, subject to a person/nonperson offense designation. ... We were confronted with the question of which designation applies to the prior crimes, not which designation to apply when one does not exist.” *State v. Murdock*, 299 Kan. at 322 (Rosen, J.,

dissenting).

18. Stare decisis operates to promote system-wide stability and continuity by ensuring the survival of decisions that have been previously approved. *Crist v. Hunan Palace, Inc.*, 277 Kan. 706, Syl. ¶¶ 4-5, 89 P.3d 573 (2004) (A court of last resort is not inexorably bound by its own precedents but will follow the rule of law which it has established in earlier cases, unless clearly convinced that the rule was originally erroneous or is no longer sound because of changing conditions and that more good than harm will come by departing from precedent.).

19. *State v. Murdock*, 299 Kan. 312 at Syl. ¶ 5.

20. *State v. Murdock*, 299 Kan. at 319.

21. “We recognize this rule results in the classification of all *out-of-state* pre-1993 crimes as nonperson felonies – an outcome the State characterizes as unreasonable.” *State v. Murdock*, 299 Kan. 312, 319, 323 P.3d 846 (2014), as modified (Sept. 19, 2014).

and design of the KSGA. “To now treat all pre-1993 crimes, 22 years after the enactment of the KSGA, as nonviolent nonperson crimes completely overlooks our sentencing structure, purpose, and design.”²²

The three dissenting justices observed, “It is a result that unexpectedly opens the prison gates to inmates who have a long history of committing violent crimes and pose the greatest threat to the public’s safety.”²³

The Impact of State v. Murdock

The impact of *Murdock* remains unanswered. Does it apply to felons whose sentences have been final for years? Does it apply to cases that were plea negotiated based on criminal history? Does it apply to criminal history determinations that have previously been contested?

The *Murdock* majority did note that the issue was rare.²⁴ But this may be subject to debate, since it is unknown how many sentences in pending cases will be affected and whether the new rule would apply retroactively. Many prosecutors across the state have already received *Murdock*-based motions from inmates who are serving sentences that were imposed years ago.

At the first oral argument in *State v. Murdock*, one justice asked the deputy appellate defender, “if we adopt your position here, would that impact any incarcerated person still serving a sentence in which an out-of-state conviction pre-1993 ... conviction was used ... in the criminal history score that was designated as a person felony and should have been

counted as a nonperson felony?”²⁵

The appellate defender believed that a favorable ruling in *Murdock* would operate prospectively:

In *Williams*, the court noted that this is a substantive change and operates prospectively, so the only people that it would affect would be those people whose cases were pending or on direct appeal at the time of this Court’s decision, so the answer is maybe.²⁶

If the decision has a retroactive effect, the decision will apply to the parties on appeal, all cases pending when the decision is rendered, and all future cases. However, the decision will not apply to cases that have concluded by a judgment or verdict prior to the pronouncement of the overruling decision.²⁷ The law is well settled that state courts are under no constitutional duty to apply their criminal decisions retroactively.²⁸

If a criminal history challenge was previously made on different grounds, then a res judicata-type argument may also apply.²⁹ The answers to those questions remain to be seen. 🗳️

It is the position of the KCDA Board that prosecutors endeavor to have a uniform response to Murdock issues. Therefore an outline of arguments that you may find helpful in this effort is available for your use. Also a Murdock Retroactivity Memo prepared by Steve Obermeier from Johnson County is available. You can find both documents on the KCDA website - www.kcdaa.org. Just login in the upper right, and under the members only tab, click on the page titled “Murdock Responses.” You can download the documents using the links on that page.

22. *State v. Murdock*, 299 Kan. at 323 (Rosen, J., dissenting).

23. *Id.*

24. “The issue is rare because these prior out-of-state offenses were committed before enactment of the Kansas Sentencing Guidelines Act (KSGA), K.S.A. 21-4701 *et seq.*, and the KSGA does not expressly provide how such offenses should be classified.” *State v. Murdock*, 299 Kan. at 313 (emphasis added).

25. <http://www.youtube.com/v/aPbVTk8Yf78?autoplay=1&rel=0> at 13:13 to 13:43

26. *Id.* at 13:44-14:02. Counsel also stated, “The reality is, there’s just not that many people this is affecting as much as it would have 20 plus years ago when the legislature should have originally addressed it.” *Id.* at 14:23-14:42.

27. *Vaughn v. Murray*, 214 Kan. 456, 466, 521 P.2d 262 (1974).

28. *State v. Singleton*, 33 Kan. App. 2d 478, 481, 104 P.3d 424 (2005). See also *State v. Synoracki*, 280 Kan. 934, 935, 126 P.3d 1121 (2006) (Court relied on the rule enunciated

in *Whisler v. State*, 272 Kan. 864, 36 P.3d 290 (2001), cert. denied 535 U.S. 1066 (2002), when denying a motion to correct an illegal sentence based on a case that was final several years before *Apprendi* was decided); *Easterwood v. State*, 273 Kan. 361, 380, 44 P.3d 1209 cert. denied 537 U.S. 951 (2002) (“We did not limit the scope of *Teague* to new rules of criminal procedure, although the issue in *Neer* clearly related to the interpretation of a substantive criminal law statute.”)

29. “Under Kansas law, where an appeal is taken from the sentence imposed and/or a conviction, the judgment of the reviewing court is res judicata as to all issues actually raised, and those issues that could have been presented, but were not presented, are deemed waived. Where a defendant’s claim has not been raised at trial or on direct appeal, such a default prevents the defendant from raising the claim in a second appeal or a collateral proceeding.” *State v. Neer*, 247 Kan. 137, 140-41, 795 P.2d 362 (1990).

Juvenile Offender Law Changes

by Sheri Courtney, Assistant District Attorney, Wyandotte County District Attorney's Office

The Kansas Legislature, primarily at the urging of juvenile justice reform proponents, made several changes to the Revised Juvenile Justice Code during the 2014 legislative session. The legislature appears to be concerned with reducing the number of juveniles in secured detention facilities, but these numbers were on the decline before the legislative action. Some of the changes limit our ability to hold juvenile offenders accountable.

K.S.A. 38-2347 Minimum age for waiver to adult status increased to 12 years old

K.S.A. 38-2347(a)(1) was amended to prohibit any juvenile less than 12 years of age from being prosecuted as an adult. Prior to this, the state could seek to prosecute any juvenile 10 or more years of age as an adult, although for any juvenile under the age of 14 there is the presumption that the offender will remain in juvenile court. The bill originally proposed to set the minimum age at 14. KCDAA opposed the measure for public safety reasons and also as unnecessary due to the statutory presumptions. Concerns were raised about the increasing number of mass shootings in schools nationwide. In one of those tragic cases, the offenders were 11 and 13 years old. The option to waive dangerous offenders, even if youthful, is a tool that should be available to prosecutors to ensure community safety if the unfortunate, but appropriate circumstances arise.

K.S.A. 38-2369 Changes to the Placement Matrix

Once again, the juvenile placement matrix was modified. Changes were made to the existing offender categories and a new category of offenders was created. Departure hearings are now required in some cases. Prior to July 1, 2014, the Serious Offender II included offenders adjudicated of a Severity Level 7-10 Person Felony with one prior felony adjudication. Now a Serious Offender II only includes offenders adjudicated of a Severity Level 7 Person Felony with one prior felony adjudication. These offenders are still eligible for a 9-18 month sentence in the Juvenile Correctional Facility (JCF), with 6-24 months of aftercare. The new Serious Offender III category includes juveniles adjudicated

of Severity Level 8-10 Person Felonies who have a prior felony adjudication. The potential sentence is the same as a Serious Offender II, however offenders in this category can only be sentenced to JCF "if the judge conducts a departure hearing and finds substantial and compelling reasons to impose a departure sentence as provided in K.S.A. 2013 Supp. 38-2371."¹ Such a departure hearing is also required now for Offenders in the Chronic Offender I, II and III categories. These changes apply for offenses committed on or after July 1, 2014.

The original bill proposed to prohibit the commitment of misdemeanants to JCF altogether by removing current misdemeanor offenses from the definition of Chronic Offender III and also to make Serious Offender II, Chronic Offender I, II and III "presumptive probation." This would have also eliminated the ability to place these juveniles in the custody of the Kansas Department of Corrections-Juvenile Services (KDOC-JS) for out of home placement without a departure hearing. The goal of the proponents was to make the juvenile sentencing matrix more similar to the adult sentencing guidelines and reduce the number of commitments to juvenile correctional facilities. KCDAA opposed all of these changes to the matrix on the basis that the juvenile and adult sentencing structures are inherently different for good reason. The proponents appeared to be targeting a problem that does not exist, as the number of JCF commitments has been declining in recent years. Further, they sought to remove an important tool for dealing with chronic misdemeanants when there were already sufficient safeguards to prevent overuse (2 prior misdemeanors, 2 placement failures and a finding that all appropriate community placements have been exhausted were already required to commit these offenders to a juvenile correctional facility). Requiring departure hearings is incongruent with our juvenile system in which there are no presumptive sentences. While they ultimately allowed misdemeanor offenders to remain eligible for a JCF sentence, the legislature still imposed additional

Footnotes

1. K.S.A. 38-2369(a)(2)(C)

restrictions on the Court’s ability to sentence juveniles on the placement matrix.

K.S.A. 38-2370 and 38-2372 Good Time Credit for Minimum Sentences

Provisions in K.S.A. 38-2370 and 38-2372 which required juveniles to serve at least the minimum sentence for the offender category in which they were sentenced were stricken. Now juveniles can earn good-time credit reducing their sentence below the minimum term.

K.S.A. 38-2360 Results of standardized risk assessment tool shall be included in PSI

K.S.A. 38-2360 now provides that when the court orders a presentence investigation after adjudication, the report shall include a summary of the results from a standardized risk assessment tool or instrument. The statute in the Criminal Code, which establishes the Correctional Supervision Fund, was also amended to permit those funds to be used for “the implementation of and training for use of a statewide, mandatory, standardized risk assessment tool or instrument for juveniles adjudicated to be juvenile offenders.”²

K.S.A. 38-2389 Alternative Adjudication Procedure

This new addition to the juvenile code was introduced at the request of the Kansas Judicial Council. The stated purpose is “to provide prosecutors with an alternative means of adjudication for juvenile offenders who present a minimal threat to public safety and both the juvenile and society would benefit from such approach.”³ This is based on the legislature’s findings that “personal and familial circumstances may contribute to the commission of offenses by juveniles who represent a minimal threat to public safety and that in such cases it would further the interests of society and the juvenile to take an approach to adjudication that combines less formal procedures, appropriate disciplinary sanctions for misconduct and the provision of necessary services.”⁴

Under this new section, a county or district attorney may designate a misdemeanor case for alternative adjudication. The designation must be made in the original complaint or within 14 days of filing the complaint. The statute provides that when such a designation is made, the Revised Juvenile Justice Code applies, with numerous exceptions:

- If the court finds during the proceedings probable cause to believe the juvenile is a child in need of care (CINC), the court shall refer the matter to the county or district attorney who shall file a CINC petition and refer the matter to the department for children and families (DCF) for services. If the court finds that the juvenile should be removed from the home, the court can place the child in the temporary custody of DCF or any person other than the parent who is willing to accept temporary custody. If a different judge is presiding over the CINC case, the county or district attorney is required to notify the court presiding over the alternative adjudication offender proceedings of pertinent orders entered in the CINC case.
- A juvenile prosecuted under this section cannot be sentenced to a juvenile correctional facility for the offense or for any violation in the case.
- An adjudication under this section shall not be used against the juvenile in proceedings for subsequent juvenile or adult offenses committed by the juvenile. This means that the alternative adjudication cannot be used to establish an element of, raise the severity level, or enhance the sentence for a subsequent offense.
- The court is required to order the adjudication expunged upon completion of the case and termination of the court’s jurisdiction. Statutory expungement requirements, limitations and disclosure provisions do not apply. The adjudication is also exempted from provisions regarding retention in court files or law enforcement records.
- The juvenile cannot be required to register as an offender as a result of this adjudication.
- The juvenile cannot be prosecuted as an adult

2. K.S.A. 21-6607(e)(2)
3. K.S.A. 38-2389(a)(2)
4. K.S.A. 38-2389(a)(1)

- or under an extended jurisdiction juvenile proceeding.
- If the juvenile is also placed out of the home pursuant to a CINC case, the limitations on continued out-of-home placement do not apply.
- The right to a jury trial does not apply. Any trials under this section shall be to the court.

The county or district attorney may withdraw the designation for alternative adjudication proceedings at any time prior to the beginning of a hearing at which the court could enter an order adjudicating the juvenile as a juvenile offender by notifying the court, the juvenile, the juvenile’s attorney and guardian ad litem, if any, and the juvenile’s parent or legal guardian. Upon withdrawal, the case will proceed and the court must grant a continuance upon request. Adjudications under this section are appealable.

The primary goals of the juvenile justice code are “to promote public safety, hold juvenile offenders accountable for their behavior and improve their ability to live more productively and responsibly in the community.”⁵ The legislative trend seems to be to discourage the use of confinement options without providing other resources with which to accomplish these goals. Fortunately, most of these tools are still available to us now, we just have to work a little harder to access them. However, if the trend continues, public safety and offender accountability may be in jeopardy. 🏠

5. K.S.A. 38-2301

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TAKING A STAND FOR CHILD VICTIMS

by **Debra Cox, Owner, Summit Recruiting, Inc.**

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It's an ordinary day for Nala, my 3-year-old German Shepherd, until I reach for her special "work" collar and vest that carries her special badge, identifying her as a member of the Special Dog Unit of the Tulsa County District Attorney's office. Nala stands alert with ears pointed forward as I put on her uniform, looking up at me with her telling eyes—she knows she will have a special job today, taking care of a child who will need her help. Then it's time to "load up" for our journey to the courthouse. Upon arrival at the Victim Witness Center, Nala checks in for our assignment by putting her front paws up on the reception desk, which bring smiles from the attorneys and staff!

Then it's down to business for Nala as she goes in search of her child in the waiting room, and she seems to know exactly which child is hers to care for on this day. How she knows this, I will never know. There can be a room full of people, and Nala will instantly go right up to her child and family with ears up and eyes alert.

It's pretty amazing to see the instant connection they make as the "German Shepherd lean" goes into full force and Nala visits each family member, giving comfort and love unconditionally as therapy dogs do. When Nala feels certain that her child is calm and OK, she flops to the floor for the belly rub that she knows will surely come from her new friend as they go through this difficult process of the legal system together.

When Nala looks into the eyes of her child victim, the message comes through loud and clear as if she's saying, "You can trust me. I'll be right here

by your side to help you get through this!"

You see, what none of the children whom Nala meets at the Victim Witness Center know about her is that Nala knows a lot about lack of trust. When you meet her these days, Nala will come right up to you, give you a kiss, wiggle and lean on you... but she was nothing like this when I first met her at the Tulsa German Shepherd Rescue facility.

At 8 months old, skin and bones at 42 pounds, and missing 5 inches from a fresh wound to her tail, Nala was nothing like the big, regal German Shepherd I envisioned owning. My friend Nancy, who is my voice of reason where pet adoption is concerned, went with me. I know I can trust her to not let me make rash decisions based purely on emotion.

We sat down on a stump, and Nala slowly crawled over to us on her belly with the saddest eyes that seemed to tell her story of neglect and abuse. She never barked once and just leaned into us. After thinking it over carefully that night, I went back the next day for another look, and Nala adopted me—she jumped into my car and wouldn't get out!

Once I got her home, it was quickly apparent that our life together wasn't going to start out smoothly. Nala spent the first six months hiding from me. Wherever in the house I was, she wasn't. Trust is hard to earn from an abused dog just as it is with children of abuse. But with a lot of love, training, socialization and loads of patience, eventually Nala came out of her shell. It was then that I began to research volunteer work using dogs. In light of Nala's connection with children and my own love

of kids, I knew that I wanted to do something that would significantly help young people in some way. I began talking with everyone in the dog world, and one day a friend suggested looking into court therapy work.

As I own Summit Recruiting, Inc., a legal recruitment firm, I felt this was the perfect opportunity for Nala and me to do volunteer work for the legal community that has been so supportive of me over the last 16 years. So I dove into researching the use of therapy dogs in courtrooms across the country, and I knew for certain that this was exactly where Nala and I needed to be, helping child victims in the court system. Nala and I began the process of registration through Therapy Dogs, Inc. and she was approved to join the Special Dog Unit (SDU) with the Office of the Tulsa County District Attorney.

As one of six team members of the SDU, Nala and I work closely with the prosecutors and victim advocates to help ease the stress of young children in the court process who are involved in abuse or neglect or who have witnessed violence.

The courtroom can be a scary place for anyone, especially children, as they must talk with strangers about sometimes terrible events that have happened or that they have witnessed in their lives. The use of therapy dogs helps the child to relax enough to talk and gives a tactile comfort to the child through touch. The child may feel safer when recalling events in a pre-trial hearing or courtroom, and testimony is improved with the presence of the therapy dog.

The benefits of having these animals available to lend emotional support to children far “outweigh any possible prejudice to the defendant.” (National District Attorneys Association [NDAA], 2007). Studies have proven that the presence of companion animals can lower the blood pressure and human heart rate, and the touch of a therapy dog can change the physiology of a nervous child.

Therapy dog use in the courtroom has become more and more widespread across the country during the past several years. Court therapy dogs are highly trained animals and remain quiet and unobtrusive when accompanying a child on the witness stand, often so much so that a jury is not even aware that the dog is present in the courtroom. In April 2014, Governor Mary Fallin signed House Bill No. 2591 which will go into effect in November 2014,

allowing the use of emotional therapeutic dogs with the proper certification in all of the State Courts of Oklahoma.

This bill was drafted by Steve Kunzweiler, Tulsa County Assistant District Attorney, who was instrumental in developing and implementing the start-up of the Special Dog Unit in Tulsa County. This new law will have a significant impact on the therapy dogs’ ability to help countless child witnesses and victims throughout the State of Oklahoma.

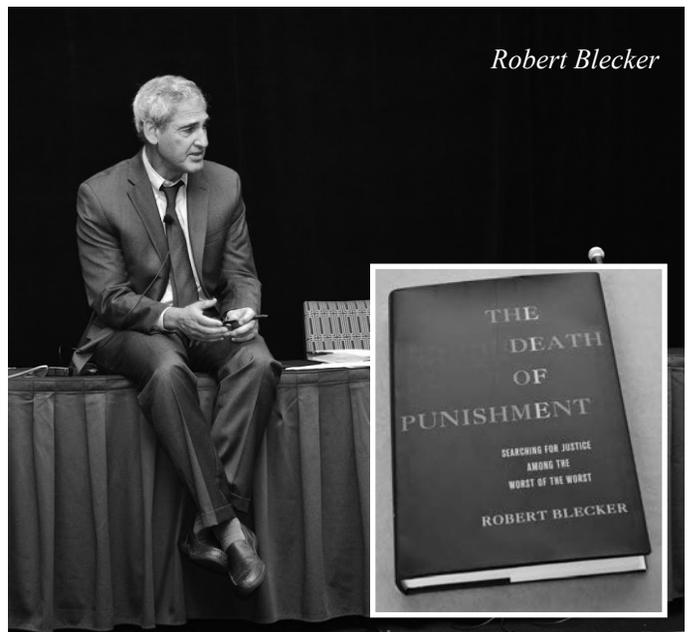
There’s an undeniable bond between children and animals. A walk through almost any neighborhood is proof of this. However, the bond between a therapy dog and an abused child is nothing short of magical to observe, as the animal provides non-judgmental comfort and can ultimately help with the healing process for the child. One of the main objectives of the Tulsa District Attorney’s office is that by the use of the therapy dogs, the children’s memory of the courthouse will be their special dog friend and not the uncomfortable things they’ve had to discuss.

As I’ve heard Steve Kunzweiler so aptly put this when speaking with various groups about the Tulsa County court dog program, “I once heard that ‘D-O-G’ is ‘G-O-D’ spelled backward. It is truly incredible the miracle that these court dogs work with these child victims.”

During one of our most recently assigned cases, Nala and I were in the kids’ playroom with our child witness and her family. After a rousing game of hiding toys for Nala to find, the girl turned to her mother and said, “...Can we get a Nala?” Nala gave her a big tongue-hanging-out grin and sloppy dog kiss, and the girl’s big smile gave us all happy hearts! Court dogs truly do make a difference! 🐕

Debra Cox is the Owner/President of Summit Recruiting, Inc., specializing in legal recruitment since 1998 and a Business Partner with Tulsa Association of Legal Administrators, Tulsa Area Paralegal Association and National Association of Legal Assistants. She is an Advisory Board Member for the University of Tulsa’s and Tulsa Community College’s Paralegal Programs. Debra and Nala are also active members of Karing K-9s, an organization providing volunteer therapy dog services to Tulsa and surrounding areas, as well as the Tulsa City-County Libraries’ PAWs for reading program.

Photos - 2014 KCDA Fall Conference, Oct. 13-14



Robert Blecker

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