

# The Kansas Prosecutor



The official publication of the Kansas County and District Attorneys Association  
Volume 17, No. 1, Fall/Winter 2020



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

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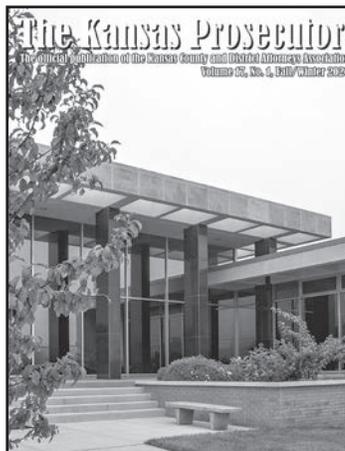
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## About the Cover

The Morton County Courthouse is located in Elkhart.  
 Built: 1963 – 1964  
 Style: Modern  
 Architect: W I Fisher & Company of Wichita  
 Contractor: James Beveridge of Ulysses

The first Morton County Courthouse was designed by J M Anderson and constructed in 1889 in Richfield. The building was destroyed by fire in 1950. The second courthouse was constructed in 1935 as a machine shop and became the courthouse in 1950. The county seat was moved to Elkhart in 1961 and the third and present courthouse was constructed in 1963 to 1964.

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



# Outgoing President's Column

By **Todd Thompson, KCDA's Outgoing President**  
**Leavenworth County Attorney**

## Getting Through The Pandemic together

COVID-19 is affecting the world. It is affecting America. It is making people sick and killing people. It has kept us at home. People are out of work and are hurting; they have lost jobs, money, and freedoms. People are angry, scared, and upset.

The people from 1918 felt something similar when they were hit with the Spanish Flu. People felt similar pains during the depression and at times of war. But we all came together, and we got up and fought. Some symptoms of this downturn are not new in our lifetimes. Failing to understand or listen to each other has always occurred. We have lost our faith in our state and country at other times. When we faced this disconnect and divide, it made us scared to know what would come next. Yet, after these trials, we have always united behind what is right and have acted as one. We have always fought our way through hard times.

COVID-19 has affected our organization and our careers as well. We have faced adversities and continue to face adversities. It has kept us out of the courtrooms and made us re-evaluate how we can accomplish justice. We were scared and divided over some of the issues we as prosecutors face. We needed to come together like never before. We had to find a new way to approach our problems. We had to find our way...and we have done this and will continue doing it. Prosecutors, legislators, the courts, and the governor united to solve some problems we have never faced before. Politics were put aside to solve problems. For us prosecutors, we needed a way to preserve our cases, protect our community, to toll speedy trial time.

We started meetings with our board, elected officials, and the attorney general's office to figure out a resolution to protect the integrity of our cases and the criminal justice system. Legislators and the Chief Justice joined us in brainstorming potential statutory "fixes" necessary to preserve the integrity of the court. We worked together to keep a pause on

speedy trial until we can assure the health and safety of our citizens and all of those who appear in the courtroom on a daily basis. When we saw that an end to the pause was coming too soon, we worked together again, and were able to get an extension.

Due to the teamwork of all branches of government, including quick movement of this organization, we have faced and overcome some of the challenges we have faced as a result of COVID-19. We still have more challenges ahead. But we still have the fortune and ability to put politics aside and continue to work together to preserve our criminal justice system. Like generations before us, we will all prevail. We know we can handle being knocked down, because we know we will just get back up and keep going. We will not only get through this, we will be better, stronger, and smarter. 🙏

*County Courthouse Portraits*



*Morton County Courthouse*

*John D Morrison*  
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# Incoming President's Column

By Brandon Jones, KCDA President  
Franklin County Attorney

## Association News

Wow! 2020 has turned out to be quite an unusual year, but thankfully it is just about over! I greatly missed our Spring and Fall in-person conferences and getting to see and catch-up with everyone this year. That being said, I think the CLE committee and Kearney and Associates did a fantastic job of putting together the online CLE for the fall conference. I hope you all appreciated it and found it valuable. With great news of vaccines on the horizon, it is my sincere hope that we can all be back together, in-person, for the Spring, or at least the Fall, 2021 conferences.

Not only has 2020 been a crazy time of change for how we handle court, and even how we go about our everyday lives, it has also been a time of change for KCDA. Kim Parker has resigned as Prosecutor Coordinator effective the end of 2020. We thank her for her hard work and dedication getting that position up and running. The board is working with Kearney and Associates to further

define this important role and find a replacement for Kim. The new person will definitely have big shoes to fill! There has also been change within Kearney and Associates as Kari Presley is no longer there. Kari has been an instrumental part of KCDA for as long as I can remember, and recently became our association's first ever Presidential Award winner. She will be greatly missed, and we wish her all the best in her future endeavors.

Finally, KCDA will be working extremely hard this legislative session to repeal statutory speedy trial so that we can effectively deal with the enormous jury trial backlog that has been created across the state by COVID-19. We will also be actively pursuing the other items on our legislative agenda. Wishing each and every one of you and your families a very safe and happy holiday season, and wishing everyone a happy, and hopefully much more normal, new year!! 🍀

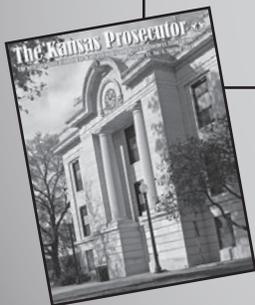
**Do you have an article idea you would like to know more about? We can try to find a writer, if you have an idea.**

**Or do you want to submit an article?**

Send your idea/submissions to Editor Mary Napier at [mary@napiercommunications.com](mailto:mary@napiercommunications.com).

**Next Deadline:**  
**Spring 2021: March 1**

*You can find archives of The Kansas Prosecutor at [www.kcdaa.org](http://www.kcdaa.org).*





## From the Editor

By Mary Napier  
Editor, Kansas Prosecutor

# Magazine Update

I would like to introduce myself as the editor of *The Kansas Prosecutor*. I was the editor of this publication from 2006-2014, so some of you might recognize my name. I have owned my own communications business since 2005, so I have been doing this for 15 years now! It doesn't seem like that long ago that I started my business with the goal of helping small non-profits with their communications and marketing needs. That goal is still true today, and I am looking forward to working with you all again.

As with most things in 2020, the pandemic put items on hold for a period of time. The magazine was one of those casualties, but we are hoping to get it back on track for 2021. With the help of the editorial board, I am confident we can do that and provide a high-quality publication for KCDA members once again.

In this issue, you will see a variety of articles about items of importance from throughout the year, issues revolving around the pandemic (we can't overlook that topic), and some other topics of importance to your jobs as prosecutors.

As we move forward with issues in 2021, we are looking for article ideas, writers, and people who

want to serve on the editorial board. We will be publishing three issues each year moving forward, so we need your help to make that happen. The time commitment requires a conference call to plan each issue, soliciting articles if needed, and looking over a draft of the magazine. You don't have to write something unless you want to!

If you think you don't have time to add one more thing to your plate, but you are interested in helping with the magazine, the time commitment is small. Amanda Voth is the chair of the editorial board, and she and I worked together in the past. We look forward to having some previous and new members on the editorial board as we work on new and fresh ideas. This is your publication, so we need your input.

We will also be soliciting milestone information for the spring 2021 issue, so watch your email for an announcement about submitting your job changes, promotions, baby announcements, marriages, retirements, office moves, etc.

If you are interested in helping with the publication or just want to submit some article ideas, please email [mary@napiercommunications.com](mailto:mary@napiercommunications.com). The spring deadline is March 1. 📧

## **2021 Kansas Prosecutor Deadlines**

**Spring 2021 - March 1**

**Summer 2021 - July 1**

**Fall/Winter 2021 - November 1**

Send your idea/submissions to Editor Mary Napier at  
[mary@napiercommunications.com](mailto:mary@napiercommunications.com).



## Executive Director's Column

By Steve Kearney  
KCDA Executive Director

# Senate Bill 102 Passed

It should come as no surprise that our representation of the KCDA each year before the Kansas Legislature always brings us into controversial matters regarding public policy relating to crime and punishment. As the legislature began this past January, the KCDA board had adopted an ambitious legislative agenda for the organization. As is typical, we began our journey work in coordinating the drafting of those pieces of legislation, working to have them set for hearings, and hopefully get them moving through the process early enough to get ahead and stay ahead of any lightning rod matters that could stall our agenda. Who could have expected the lightning rod would be a pandemic?

As the session wore on and the path to passing several of our agenda items began to crystallize, much like everyone else who was working in and around the 2020 legislature, we found ourselves with a unique and unanticipated problem in the form of COVID 19. Suddenly the prospect of an early recess/adjournment of the 2020 session started becoming a reality as the nature and scope of the pandemic started becoming reality for Kansas and the rest of the world's population. We found ourselves facing a quickly altering legislative process, coupled with executive orders regarding movement of our fellow citizens in the world, and the concept of sheltering in place as the pandemic evolved.

The realization that the practical implications of isolating the population at home and distancing them from each other brought an entirely new set of concerns that heretofore had not been in the mix. Closed courthouses. Trials delayed. Even if open in some fashion, how do you call and impanel a jury for a trial? Would anyone even show up? How do you meet the statutorily required speedy trial limits or suffer the consequences of the release of violent offenders due to the clock running out regardless

of the impossibility? What authority does the court have to adjust court schedules and other deadlines or broaden use of video conferencing, in the face of Emergency Orders resulting from a pandemic?

Enter Senate Bill 102 that had passed the Senate in an original form so innocuous that it was on the consent calendar. SB 102 passed over to the House just as the need to develop answers to the questions above came sharply and abruptly into focus. With aid and assistance of our members, the legislature and the Court, Senate Bill 102 was gutted and in short order developed into a wholly unrelated work product addressing those very concerns. Over the course of three days, with adjournment looming due to COVID 19, Senate Bill 102 was able to move through the process from the House floor debate and action on Monday, March 16, to the Senate concurring with the house amendments on March 17, and the measure being presented and signed into law by the Governor on Thursday, March 19.

That effort from start to finish was one for the record books. The cooperative and non-partisan efforts guaranteed that the Kansas system of justice was able to adapt to this new challenge we are facing. The passage of SB 102 was a real testament to all the policymakers and stakeholders involved. Sometimes you can just do the right thing because it is the right thing.

Epilogue – In the intervening time since SB 102 and then HB 2016 (Special Session) were passed by the legislature vesting the power in the State Finance Council to extend the State of Disaster Emergency related to COVID-19, the Court has used those provisions to enter Orders of its own regarding deadlines and continuing to toll statutory speedy trial deadlines. The Court has been acting following each extension by the Finance Council of the State of Disaster Emergency related to COVID-19 issuing an Order Continuing Administrative Orders Suspending Statutes of Limitation, Statutory Time Standards,

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Deadlines, and Time Limitations. The latest State Finance Council Extension is through December 15, 2020 as the extensions come in 30 Day intervals.

The necessity of continuing the Order as it pertains to deadlines, particularly as it applies to statutory speed trial cannot be overstated. We encourage the continued extension of State of Disaster Emergency related to COVID-19 to enable the Court to continue to issue its Orders until the legislature can act. The total inflexibility of Kansas statutory speedy trial has reared its head in this pandemic as a true public safety threat. Without the extraordinary acts on the part of the Legislature, the Governor, and the Courts even those accused of capital murder, Jessica's Law violations and others

charged with violent offenses against their fellow Kansans would walk free and never be held to account for their acts.

Remember that statutory speedy trial is just that, a creation of the legislature by codifying what is a constitutional right in Kansas, Kan. Const. Bill of Rights, § 10 ".....a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." The US Constitution also governs the right of an accused to a speedy trial in the 6<sup>th</sup> amendment "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed...." (U.S. Const. amend. VI).



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## Legislative Update

By Kim Parker  
KCDAA Prosecutor Coordinator

# 2020 Legislative Session

It is refreshing to know I represent one of the strongest and most resilient groups of individuals, the prosecutors of this state. Recently, I delivered a two-hour CLE training to a small group of prosecutors representing Douglas, Miami, and Leavenworth counties. The training event was hosted by Douglas County District Attorney Charles Branson and organized by Senior Assistant District Attorney Deborah Moody. During my presentation, I was once again reminded of the incredible commitment of Kansas prosecutors to fairness, justice, and public safety despite ongoing challenges to that pursuit.

The 2020 Kansas Legislative session was one for the record books with the pandemic taking over. This year through SB355, we sought to correct

the archaic, biased and discriminatory practice of sending victims of sexual assault for psychiatric/psychological examination to determine their veracity. SB355 sailed through the Senate with overwhelming support and caught some media attention in the process. The bill then moved to House Judiciary committee where I again provided proponent testimony accompanied by Todd Thompson, Leavenworth County Attorney and President of the KCDAA. Three days later the House Judiciary committee chaired by Representative Fred Patton passed the measure from the committee on to the whole house. Unfortunately with the interruption from the pandemic, this bill did not cross the finish line in 2020. Also, our effort to bring greater clarity and proportionality to abuse of

a child stalled out in the House of Representatives never moving above the line for consideration and vote.

Unexpectedly, 2020 brought a growing global health issue and the containment of COVID-19. Marc Bennett Sedgwick County District Attorney, KCDA Board of Directors of KCDA and other members of the association, recognized the urgent need to pass legislation to alleviate statutory speedy trial issues that coincide with the containment of this virus in the criminal justice system. Steve Kearney Executive Director of KCDA worked with lightning speed, bringing together the Chief Justice of the Supreme Court, Representative Fred Patton, Representative Brad Ralph, and the Revisor to add a new provision to K.S.A. 22-3402. The new section would give the Chief Justice sufficient authority when faced with similar circumstances to suspend statutory speedy trial deadlines. See more about this issue in Steve’s Executive Director report.

On a different note, each year KCDA organizes an opportunity for the Board of Directors to meet over dinner with a small group of legislators to discuss our legislative agenda. This important event allows our board members to get to know the opinions, experiences, and plans of the legislators who are instrumental in attending to our legislative measures. It also allows legislators to obtain a better understanding of the concerns that our prosecutors

face in the varying jurisdictions across Kansas.

One of the highlights of my work at the Capitol includes the opportunity to meet Kansas prosecutors who come to the Statehouse to testify, watch the work of the legislature, and tour the amazing building. One such individual I met was Laura Mizer, Assistant County Attorney, Lyon County.



*Laura Mizer, Assistant County Attorney, Lyon County, with the Brown v. Board mural in the capitol.*

Please check our website for information on key issues, job postings, and upcoming events. Also follow us on twitter and facebook. Keep up the good work and stay well. If you need to contact me, email me at [kteresep@gmail.com](mailto:kteresep@gmail.com).



*Photos from the 2020 legislative dinner... Above: County Attorneys Darrin Devinney, Tabitha Owen, and Sherri Schuck Right top: Representatives Shannon Francis, John Wheeler, Fred Patton and wife Kim, and Leonard Mastroni Right bottom: Brandon Jones, Franklin CA with Representatives John Wheeler and Leonard Mastorni.*



*Prosecutors Chris McMullin and Ron Paschal*



## Legislator's Column

By Senator Dinah Sykes  
District 21 - Lenexa, KS

# Public Service Requires Proximity

When we are close to those we represent, we have an opportunity to learn the real problems facing our communities. Before the 2019 legislative session, I was touched when I met survivors of domestic violence who described their difficulties with housing. My heart broke as they described the problems caused when the place they lived was no longer a safe place for them to live. They described the difficulty finding and paying for a new place to live when they were still obligated to honor a lease. I admired the resiliency of these amazing people and their courage to leave abusive situations and seek safety for themselves and their children.

I knew that many good landlords would likely allow people to leave and seek safety, but I heard stories of people who would force victims to continue paying for a place where they felt they could no longer live. As we crafted the legislation, I also spent time listening to landlords who described their concerns. I heard from police officers and prosecutors who described the real danger the status quo created for people in this situation.

Prosecutors likely know better than most the messy business of finding justice. Even though that work is messy, Kansans value the work of upholding laws that protect the vulnerable, ensure fairness, and allow us to pursue happiness. Our shared pursuit of justice also includes decisions for lawmakers about the tools we provide to prosecutors and law enforcement.

Pursuing justice in the legislature is messy too. Legislators need to listen to many voices and stories as we try to find how to solve problems and make policy. Done well, this work involves listening more than speaking. Done well, this work requires setting aside the need for recognition or credit. Done well, this work, like yours, requires a responsibility to respect the process, have hard discussions and find compromises that reflect our best collective understanding of justice. Without constant input

from our constituents, legislators lose touch with the people they were elected to represent.

In our polarized world, finding common ground is often difficult. I'm proud of the legislation that ended up in SB 78. The legislation allowed victims of sexual assault, stalking, domestic violence, or human trafficking to break leases in order to find safe housing while protecting landlords from false claims. This legislation enjoyed support from law enforcement and victims' rights groups. The Associated Landlords of Kansas offered their support as well reflecting their belief that the legislation respected both landlords and tenants.

There are many days in the lives of public servants when we question why we entered into this difficult calling. My hope is that as you do the difficult work of upholding our law and seeking justice that you find days where your work leaves the world a better place than it was when the day started. May we never tire of pursuing justice and serving our neighbors. 🌟

**2021 Kansas Legislative  
Session**

**begins**

**January 11, 2021**

**Watch your email for  
legislative updates  
throughout the session.**

# KCDAA Member Highlight: Barry Disney

By Kate Butler, Assistant District Attorney, Douglas County

Barry Disney is a born Kansan. He grew up in Wichita, attending Wichita State University and, later, the University of Kansas School of Law. He did not, however, always plan on being a prosecutor. “I started out in southeast Kansas, Crawford County,” he said. But while working in general practice, an opportunity arose for Disney to run for county attorney. He already had an interest in criminal cases, and, he explained, “I wanted to be in the courtroom more.”

His election in 1991 was the start of his career as a prosecutor. Disney remained in Crawford County until 1997, when he moved to the Sedgwick County District Attorney’s Office. After about a decade, he transitioned to the criminal division of the Attorney General’s Office. He moved to Riley County in 2011, where he remained until recently. In all these roles, he said, he prosecuted a general criminal docket “with an emphasis on person crimes.”

Disney’s proudest accomplishment is the relationships he has built with attorneys and law enforcement throughout his career. “I can list cases,” he said, “but the relationships stand out more.” He also spoke warmly about his time as a travelling prosecutor with the Attorney General’s Office. In that role, he found himself “going across the state and practicing at different courthouses,” some of which had been built at the turn of the

century. This job presented him with the unique opportunity to come into rural communities and meet the people there. “That [experience] really impressed upon me how great a state Kansas is,” he said.

This January, Disney transitioned into a new role: prosecuting death-penalty cases with the Department of Justice’s capital case section in Washington, D.C. The biggest factor in this move was the chance to be closer to his daughters, who live on the east coast. “We’re all in this for our families,” he said. Still, Disney does not plan on forgetting his experiences in Kansas any time soon. For one, he is working to “take what I’ve learned in Kansas and apply it” at the Department of Justice. He also intends to maintain the relationships and friendships he’s built with people throughout this state. And, of course, he is going to keep up with KU Basketball.

In closing, Disney observed that prosecutors are able to directly impact the community around them. Many lawyers help people, he said, but not everyone has “people come back 20 years later to thank you, show you their kids.” His advice to young attorneys, then, is simple: “Think less about money and more about what you want to look back on and say you’ve accomplished.” 📌

## Speedy Trial and COVID-19

By Marc Bennett, Sedgwick County District Attorney

When it became clear last March that COVID was poised to cause shutdowns and limitations on public gatherings, the KCDAA and the courts reached out to the legislature as previously mentioned in this issue. SB 102 was passed shortly thereafter giving the Chief Justice of the Kansas Supreme Court the power to suspend deadlines in the justice system:

*(j) The chief justice of the Kansas supreme court may issue an order to extend or suspend any deadlines or time limitations established in this*

*section pursuant to section 1, and amendments thereto. When an [emergency] order issued pursuant to section 1, and amendments thereto, is terminated, any trial scheduled to occur during the time such order was in effect shall be placed back on the court schedule within 150 days.*

In May, HB 2016 was passed which directed that the Governor’s emergency orders would sunset on September 15, 2020 and would be extended thereafter by approval by the State Finance Council.

In the lead up to September 15, we expressed our concern to members of the Finance Council that if they did not extend the emergency deadline, there would be no way to process all of the criminal cases that had gathered during the shutdown. Indeed, only a handful of jury trials have been held across the state since March while thousands of cases await resolution. Highly summarized, our concerns were as follows:

First, §(c) of SB 102 says that any order issued as a result of the emergency declaration “may remain in effect for up to 150 days” thereafter. While there was no reason to doubt the Supreme Court would extend their orders, there was also no guarantee either.

Second, what does *schedule* mean? Scheduled and actually tried within 150 days? Or, that the calendaring of the case just had to occur within 150 days, while the actual date for trial could be months away?

Third, does “suspension” mean wiped clean, or simply tolled? For instance, if a guy had 120 days of speedy trial at the time his jury trial was set last April--SB 102 would clearly protect the state as long as we got him tried during the first 150 days after the order lifted. If case was not tried before the suspension of deadlines was lifted, that defendant would argue the original speedy trial time he had coming to him in April should be re-applied, giving us 30 days if he was in custody. I know there is a strong belief that the legislative intent behind SB 102 was that any speedy trial time already accrued prior to the passage of SB 102 would be wiped clean, and we would start over. Our concern was that we won’t know how courts (district or appellate) will interpret this issue for some time.

Fourth, even if the Supreme Court were to take an affirmative step to unequivocally extend the order 150 days, it would have only applied to cases that were *set for trial* during the emergency order.

*(j) “The chief justice of the Kansas supreme court may issue an order to extend or suspend any deadlines or time limitations established in this section pursuant to section 1, and amendments thereto. When an order issued pursuant to section 1, and amendments thereto, is terminated, any trial scheduled to occur*

*during the time such order was in effect shall be placed back on the court schedule within 150 days.*

So, cases that had not yet been set for trial before March or that have been filed since March would arguably not fall under SB 102 protections. Had the finance council not extended the emergency declaration, the argument would have been made that any case that has not been set for trial during the emergency order would be on a straight 150 day speedy trial clock. This could have put judges in the unenviable position of deciding who goes first – the newer cases with 150 day speedy trial or the older cases that were set for trial when SB 102 was passed?

Fifth, the reality is that we still don’t have access to enough jurors to resolve the backlog of cases. In Sedgwick County alone, we would need 5K-6K jurors to come through our doors just to handle the off-grids offenses on file.

In closing, know that the KCDA will make every effort to ensure that the 2021 legislature takes the steps necessary to ensure the courts of this state are afforded adequate time to resolve the backlog created by the COVID crisis. 🙏

**This is your association  
magazine.**

**Let us know what you want  
to see in the magazine or  
offer to write an article.**

**Email ideas to:  
[mary@napiercommunications.com](mailto:mary@napiercommunications.com)**

**Next deadline: March 1, 2021**

# Benefits of a Grand Jury

By Michael Kagay, Shawnee County District Attorney

Every felony case requires a court finding of probable cause. Kansas, unlike the federal government and the system employed by many other states, has traditionally used preliminary hearings as the vehicle for probable cause. In Shawnee County, we utilize both preliminary hearings and the grand jury. KSA 22-3001(b) provides: “The district or county attorney in such attorney’s county may petition the chief judge or the chief judge’s designee in such district court to order a grand jury to be summoned in the designated county in the district to consider any alleged felony law violation, including any alleged misdemeanor law violation which arises out of the same criminal conduct or investigation...”

By utilizing the grand jury process, the Shawnee County District Attorney’s Office has been successful in saving time and expense associated with the traditional use of preliminary hearings. The list of witnesses for a preliminary hearing varies from case to case. The State, the Court, and the defendant are first required to find a time in which the hearing can be conducted. The State is then required to generate subpoenas and serve each individual. Each witness, including victims, would then be required to miss work and travel to the courthouse where they would sit until it was their turn to testify. These logistics are compounded when you consider that the hearing may be rescheduled a number of times. By utilizing the grand jury system, the State is able to schedule up to 30 cases per session and all 30 cases can be presented through a single witness, with no need to continue the hearing to accommodate additional witnesses, the Court, or the parties.

The total benefit realized from the grand jury system is incalculable. One can calculate cost savings: the cost of issuing and serving subpoenas, overtime wages for law enforcement, court personnel time, attorney time, witness fees and transportation costs, corrections staff time, inmate transportation costs, and transcription costs. The grand jury process saves those dollars so they may be used elsewhere. However, the process also saves things that are more difficult to calculate, such as the affect of civilian and law enforcement witnesses missing work. One can imagine the impact to the

community of removing police officers and private citizens from their daily responsibilities and placing them in a courtroom for preliminary hearings that will most likely never occur. Finally, there is no way to calculate the emotional benefits of the grand jury from the perspective of a victim, who may be spared the trauma of having to testify at a preliminary hearing.

During my time as the Shawnee County District Attorney, I have seen firsthand the positive impact of utilizing the grand jury process. Aside from cost savings and efficiency advantages, the grand jury process also provides a collateral benefit. It allows the citizens of my community to perform another integral part of the criminal justice system—to decide whether or not the State has sufficient evidence against someone in order to make them stand trial—and in that capacity, to function as a collective representation of community conscience. As prosecutors, we are well positioned to make charging decisions. I find value however, in hearing what a grand jury panel thinks about the cases that are presented to them. In some ways, a grand jury can provide a preview of the reaction you will receive from a petit jury.

If you have an interest in learning more about our grand jury use, please contact me. I will be happy to share our system and answer any questions you have. For the sake of clarity, I will provide here some of the grand jury “rules” that we employ, in keeping with our statutory and ethical duties.

Rule 1: Do **not** use the grand jury because you can’t get a bind over at prelim. This would constitute an abuse of the system, and you would pay the price at trial, if not before.

Rule 2: Use preliminary hearings for person felonies. Preliminary hearing remains the best tool for evaluating witnesses before a trial setting, and provides testimony that can be introduced at trial if the witness becomes unavailable. We use the grand jury for non-person crimes, including drug offenses, which still constitute the majority of case filings.

Rule 3: Use a designated witness from your law enforcement agency. A designated witness can also present multiple cases, saving multiple fact witnesses from appearing. A supervisor in this

role can also provide feedback to officers on any deficiencies in report writing.

Rule 4: Only present evidence you have a reasonable belief will be admissible at a trial and always include any potentially exculpatory evidence that would also be admissible.

Rule 5: Do not convene a grand jury to hear a single complex case. Our grand juries serve 6 months at a time, two days a month. The first few sessions we keep the cases simple and allow extra time for questions from the jurors.

Rule 6: Work with your local stakeholders. By convincing the county commission of the value of the grand jury, we were able to secure additional

funding for a court reporter, and we have been able to secure facilities within the Courthouse to hold our grand jury proceedings.

Rule 7: Be prepared. Have your witnesses and any exhibits ready to go, as there will be no other parties to blame for delays. Also be prepared to interact with the grand jury and know your ethical boundaries in doing so. Know what questions can be answered, what evidence can be presented, and what legal advice you can give to the jurors.

Rule 8: Be appreciative of your grand jurors. While the system amounts to a huge time and cost savings to everyone else involved, for the jurors it is a significant time commitment. 🙏

*We want to share your news!*



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

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

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

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**Next Deadline:**  
**Spring 2021: March 1**

# Prosecutors and the Pandemic

By Kristine Hamann and Sarah Solano Geisler

## Necessity Is the Mother of Invention

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The impact of the pandemic has hit every aspect of the criminal justice system. It forced all members of the system to adjust on the fly and adopt methods that would have seemed inconceivable just a few months ago. Adversity spurs innovation, and inevitably a new normal will emerge that includes the lessons learned from the pandemic.

This article outlines a few of the many innovations adopted by prosecutors that have helped them to continue their work and serve their communities during these difficult times. Many of these initiatives have been done in collaboration with other criminal justice stakeholders. The topics, from offices of all sizes and different parts of the country, include virtual court proceedings, outreach to the community, services for victims and witnesses, reduction of the jail population, going paperless, and reopening of a prosecutor's office.

### **Remote Preliminary Hearings San Diego County District Attorney's Office, California (324 Prosecutors)**

In response to the coronavirus, the District Attorney, Public Defender, and Sheriff's Department collaborated to find ways to reduce the jail population for inmates who were low risk, nonviolent, or medically fragile. The stakeholders, along with the court, then formed a Technology Committee to develop remote courtroom proceedings. The Technology Committee decided on Microsoft Teams for the remote proceedings as it allows the court to "host" the meetings using almost any device such as cell phone, computer, or tablet. "Invitation links" were set up for all operating "virtual courtrooms" countywide.

Remote courtroom hearings for criminal cases began on April 6, 2020, starting with matters that did not involve witnesses or the taking of

testimony. The judge, along with a court clerk and court reporter, is located in a courtroom, socially distanced and with personal protective equipment. The defense attorney and prosecutor are located in their respective offices. The accused is located in a room at the detention facility equipped with protective equipment, a computer, as well as a confidential phone line where the defense attorney and his/her client can privately talk while not being heard by anyone else present during the remote Microsoft Teams meeting. A sheriff's deputy equipped with personal protective equipment coordinates the use of the technology inside the room where the accused sits. If the case requires an interpreter, the interpreter is also "invited" to the meeting, and then translates what he or she hears via a separate phone connection to the accused.

Remote preliminary hearings required significant additional coordination for witnesses. Because California allows hearsay testimony at preliminary hearings, the virtual hearings have initially called only law enforcement as opposed to civilian or other witnesses. To conduct the hearings, each law enforcement agency set up a "tech room" equipped with a computer outfitted with Microsoft Teams and any additional required audio equipment, such as headsets. During the hearing, when it is time for the prosecutor to call the officer-witness, the prosecutor "invites" the testifying officer to the Teams meeting where the judge, defense attorney, prosecutor, and interpreter are already present. Evidence such as photographs, videos, or other documents may be presented through a screen-sharing function in Microsoft Teams. The parties coordinate with the court clerk regarding how to get the exhibits lodged with the court, which typically occurs through email.

Legal authority for remote hearings came from the combination of statewide emergency executive

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orders and judicial council orders authorizing the use of technology for this purpose, along with current precedent authorizing remote or video proceedings as long as they are the functional equivalent of an in-person or traditional hearing. At the heart of each executive/court order and San Diego County's remote hearing policy, are the health and safety of every member of the criminal justice system.

(For the Office's videoconferencing guide and YouTube training video, as well as a short video with Chief Deputy District Attorney Tracy Prior, visit <https://bit.ly/3iVWDqT>.)

### **Virtual Mental Health Court and Addiction Intervention Court Yolo County District Attorney's Office, California (42 Prosecutors)**

The Yolo County District Attorney's Office made it a priority to continue their Mental Health Court (MHC) and Addiction Intervention Court (AIC) from the early stages of the coronavirus pandemic. MHC and AIC are a minimum 18-month, court-based treatment and monitoring system for adult offenders with a serious mental illness (MHC) or substance use disorders (AIC). These programs are designed to increase the treatment and engagement of the participants while reducing arrests, hospitalizations, and jail time both during and after the program. The programs are a collaborative effort between the Yolo County Superior Court, Probation, Health and Human Services Agency, the Public Defender, and the District Attorney.

Though Yolo County Superior Court had been handling only essential matters that did not include MHC/ AIC, the DA's Office and its MHC/AIC partners quickly developed a process for video proceedings with a judge via Zoom. The virtual MHC and AIC are informal as no bailiff, clerk, or court reporter is present. If formal action is needed, for example, if there is a violation of conditions, then the case is calendared in traditional court where the participant is required to appear in person.

Once all agreed to go forward, the Health and Human Services Agency (HHS) clinicians immediately provided guidance for MHC and AIC participants on how to use Zoom, some from their own homes, and some from group homes. All the while, the team continued meeting and discussing cases while HHS clinicians provided participants

with other virtual services. By Thursday, April 9, 2020, the team held its first live, informal court hearing with 11 MHC participants, who all joined from separate locations. The following week, AIC followed suit. Judge David Rosenberg opened up "court" from his home wearing his judicial robe, greeted participants, and provided words of encouragement. Participants then shared how they were managing during the coronavirus.

An important part of MHC and AIC is the graduation that occurs when a participant successfully completes his or her program. The AIC team held a virtual graduation via Zoom. Because they typically serve pizza at the in-person graduation, they instead sent a pizza to the graduate's residence. They also invited participants via Zoom who normally attend in person, including the Woodland Police Department Deputy Chief, AIC team members, and the graduate's family members. In one case, the graduate's sister and daughter made uplifting and tearful remarks, and the Deputy Chief and AIC team members praised the graduate for his efforts.

(For additional materials and a short video with Deputy Chief Jonathan Raven about the virtual court, see <https://bit.ly/2CCSAQC>.)

### **Paperless File System Wayne County Prosecutor's Office (Detroit), Michigan (210 Prosecutors)**

Within the Wayne County Prosecutor's Office (WCPO), the Special Prosecutions Division (SPD) is comprised of approximately 53 attorneys, clerical specialists, and victim advocates. In response to the coronavirus pandemic, the SPD successfully implemented a paperless file system that did not previously exist and leveraged multiple technologies to accomplish remotely police file intake, file review, redaction by prosecutor office staff, and discovery. Besides a continued need for warrant typists in the intake section, cases can now be processed completely remotely when necessary.

Development of the paperless file system and technical competencies began several years prior to the pandemic in anticipation of a significant increase in video evidence. The WCPO began using [Evidence.com](https://www.evidence.com) - a case management tool that can house videos, photos, documents, and other evidence

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in a single location—for digital file transfer via the cloud. They also obtained licenses to Camtasia in order for staff to perform reliable video capture and redaction on laptops. Attorneys were provided with technical training that included classes on virtual trials from Michigan’s Visual Trial school as well as other IT-related competencies.

Within days of the coronavirus stay-at-home order, the SPD (with the help of the WCPO’s IT department) successfully rolled out the paperless file system technologies and processes in their entirety. An initial challenge faced in the rollout was that most staff did not have remote access to office servers. As such, they could not obtain the digital materials that had not yet been transferred to [Evidence.com](#) or other materials needed to perform their jobs. Fortunately, all staff had existing, remote access to email via Office 365, and some staff had additional access to OneDrive and SharePoint, used for storing and editing files. The few staff members who could successfully access office servers were able to obtain and share all relevant materials for the SPD using OneDrive, thus creating broader access to office files.

OneDrive is now used to create various documents and spreadsheets and provide work assignments. Managers and staff members, based on permissions related to their job function, can access and edit relevant documents as needed. This has successfully allowed prosecutors to work from home and for their supervisors to monitor their work.

(For additional resources and a video interview with APA Patrick Muscat, visit <https://bit.ly/3iV9tWq>.)

### **Reopening the Grand Jury and Updating the Community by Video Shelby County District Attorney General’s Office (Memphis), Tennessee (Number of Prosecutors: 112)**

**Grand Jury:** In late May 2020, for the first time in its history, the Shelby County District Attorney General’s Office held a partially virtual grand jury. Grand juries are typically held multiple days per week, but due to the coronavirus, 25 sessions had been missed, creating a large backlog. Working together, the District Attorney’s Office, the judges, and the grand jury commissioner developed a

protocol for the grand jurors to convene socially distanced in a large room at the courthouse, with all witnesses appearing remotely on a screen in the grand jury room. In Tennessee, prosecutors are not allowed in the grand jury room and the witnesses are typically a police officer. The hope was to create three grand juries, but at first there were only enough volunteers for one grand jury. The cases prioritized for presentation to the grand jury represented the most serious offenses, primarily homicides, and involved offenders who had been in custody the longest. After a few weeks, three grand juries were seated, and witnesses continued to appear virtually.

**Community Outreach:** The Office has also focused on keeping citizens informed during the coronavirus pandemic. In March 2020, soon after the stay-at-home orders were imposed, District Attorney General Amy Weirich reached out to her community through a six-minute YouTube video in which she discussed victim/witness court procedures in light of the new order, the importance of continuing to report crime, how to address price gouging, an explanation of dismissed cases, and the Office’s commitment to lowering the jail population. (Visit <https://bit.ly/2FBO9Xu>.)

### **Release of Those in Custody, Outreach to Victims/Witnesses, and the New Normal White Paper East Baton Rouge District Attorney’s Office, Louisiana (Number of Prosecutors: 54)**

**Reducing Jail Population:** In response to the pandemic, the East Baton Rouge District Attorney’s Office worked quickly to address a key issue—the high jail population. (Note: In Baton Rouge the local jail is referred to as the “prison.”) On a daily basis, the District Attorney’s Office met with the public defender to address this issue. Keeping public safety in mind, they made the necessary reductions for inmate safety that reduced the jail population to the lowest levels the jurisdiction has seen in 50 years.

**Victims and Witnesses:** Keeping victims and witnesses safe also required a new and rapid response. Preparing for the stay-at-home orders, victim assistance counselors reached out to victims individually and via social media to provide a variety of hotlines they could call in cases of domestic violence or other crimes. The Office

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continues to post updates on social media, has created short videos with information for victims, and stays in remote contact with victims regarding the status of their case.

**White Paper on the New Normal:** Recognizing the importance of capturing lessons learned during the many changes that continue to arise as a result of the coronavirus, District Attorney Hillar Moore sought input from all staff members to draft a paper to explore the “new normal” for prosecuting cases in Baton Rouge parish. The paper collects practical suggestions and legal authorities to assist the prosecutor’s office as it works with criminal justice stakeholders both during the pandemic and into the future. The document will evolve over time as innovations emerge and evolve.

### **Outreach to Community Members and Victims of Crime Nassau County District Attorney’s Office, New York (Number of Prosecutors: 225)**

**Community Meetings:** The Nassau County District Attorney’s Office has a robust community outreach division. Among its many initiatives, it has formed Advisory Councils for business, faith leaders, students, African Americans, Hispanic Americans, South Asian Americans, and Asian Americans. See <https://bit.ly/3h8Hjqj>. Prior to the pandemic, the meetings with each council were held in person on a monthly basis. Meetings have since been moved to a virtual format, and for some groups, they now occur weekly instead of monthly with even greater communication than before the virus. These meetings give each council a centralized and consistent way to discuss the issues they are facing. Meeting topics vary and now include issues such as virus testing, healthcare accessibility, and food insecurity, along with topics involving criminal justice reform. Council partners regularly seek information from the DA’s Office on food banks and other critical items needed in their respective communities. Following the death of George Floyd, the importance of these long-standing relationships is even more urgent.

**Victim/Witness and Reentry Outreach:** In addition to the council meetings, the Office has improved its connection with victims and witnesses as well as the general community. Crime victim

advocates conduct proactive outreach calls on all open cases to check in on the safety and welfare of victims and witnesses. The District Attorney’s Community Partnership Program staff members—some of whom are individuals with previous justice system involvement—continue to connect with newly released individuals reentering society. The Office also conducts outreach calls to elders in the community who may feel isolated. On an ongoing basis, the Office reviews new case files and connects relevant individuals with providers and services they may need.

(To view a video of Executive ADA Joyce Smith discussing these issues, visit the PCE website.)

### **Reopening a Prosecutor’s Office—Floor Captains Jacksonville State Attorney’s Office, Florida (Number of Prosecutors: 109)**

As their building space gradually reopened starting at 25 percent capacity, the Jacksonville State Attorney’s Office implemented “Floor Captains” for each of the office’s five floors, consisting of a supervisor and a staff member. The Floor Captains are responsible for working with each unit on their assigned floor to create the staggered work schedules consistent with occupancy regulations and helping to assess the safety precautions employed. They are also the liaisons between management and the staff, so that communication is effectively shared by all.

The Floor Captains assist the administration to manage the necessary isolation and contact tracing required for employee health and safety upon return to the office. Isolation involves the staggering of employee schedules so that only certain groups of individuals are in the building during a given week. This enables better contact tracing should an employee fall ill, and it will make it easier to quickly identify and inform others who may have been exposed. The reduced staff also allows for easier social distancing.

(To view a video of First Assistant Steve Siegle discussing these issues and additional materials regarding the reopening of a prosecutor’s office, visit <https://bit.ly/2Q11oCY>.)

Necessity is the mother of invention. All involved in the criminal justice system are adapting rapidly and learning valuable lessons from living

with the coronavirus. Particularly in the area of technology, great strides have been made toward developing new forms of court proceedings, remote work, outreach to the community, victim assistance, treatment, and alternative sentencing. Hopefully one positive outcome of the dreadful pandemic is the blossoming of new ideas that will improve the criminal justice system far into the future. 🌱

#### ABOUT THE AUTHORS

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## Appellate Advocacy on Behalf of Kansas

By Kansas Attorney General Derek Schmidt

### Recent Cases in the U.S. Supreme Court

Over the past decade, the Attorney General's Office has gained authority and built capacity for appellate advocacy on behalf of Kansas. The Legislature provided for us to contract with county or district attorneys to handle criminal appeals (we currently contract with 38 counties), K.S.A. 22-3612, and to receive notice and opportunity to intervene in any case in which a statute's validity is at issue, K.S.A. 75-764. It also clarified our authority to appear for the state and control all of the state's appeals (civil or criminal) in the Kansas Supreme Court and in "any federal court," K.S.A. 75-702.

These authorities have enabled us to build a more-robust appellate capacity. When I began serving as attorney general in January 2011, the office had only two attorneys dedicated to appellate work. We now have 10 appellate attorneys in a fully supported Solicitors Division.

Without this expanded capacity, I question whether we could have successfully argued three U.S. Supreme Court cases in four short weeks last fall – while maintaining the state's many other appellate obligations. We are unaware of any previous time in Kansas history when the attorney general's office argued three cases in a single U.S. Supreme Court term, much less all in the span of 28 days. In fact, while our research is admittedly not



*(L to R): Kate Duncan Butler, Charles Branson, Deputy Mehrer, Andrew Bauch, Derek Schmidt, Toby Crouse, Jodi Litfin, Kurtis Wiard, and Brant Laue*

exhaustive, we have yet to discover precedent for *any* state having done so.

Critical to this accomplishment were our close working relationships with county and district attorneys – not only in the individual cases on appeal at the Supreme Court but also more broadly to build and maintain the state’s capacity for appellate advocacy. This article shares the successful U.S. Supreme Court experience our partnerships enabled.

### One, two, three grants

Kansas filed two petitions for writs of certiorari asking the U.S. Supreme Court to review rulings made by the Kansas Supreme Court. In December 2017, we filed a petition for certiorari in *Kansas v. Garcia*, No. 17-834, a Johnson County case in which a majority of the Kansas court held that federal immigration law expressly preempted the State’s identity theft and related prosecutions of individuals who used stolen identities in documents related to employment applications.<sup>1</sup> In October 2018, we petitioned for certiorari in *Kansas v. Glover*, No. 18-556, arising from a Douglas County prosecution, in which the Kansas Supreme Court unanimously held an investigative traffic stop unreasonable under the Fourth Amendment if based solely on a law enforcement officer’s assumption that a vehicle was being driven by its registered owner.

In June 2018, the defendant in *Kahler v. Kansas*, No. 18-6135, had filed a certiorari petition challenging the Kansas Supreme Court’s affirmance of his capital murder conviction (and death sentence). He argued that the Kansas mental disease or defect statute, K.S.A. 22-3220, and lack of an affirmative defense of insanity in Kansas law violated the 14<sup>th</sup> Amendment (and perhaps the Eighth Amendment).

Each of these three cases separately made its way through the sometimes-lengthy process of the U.S. Supreme Court deciding whether to grant review. Then, in rather quick succession, we received the results. We were pleased on March 18,



(L to R): Jacob Gontesky, Toby Crouse, Natalie Chalmers, Kris Ailslieger, Steve Howe, Derek Schmidt, Justin Russell, Alex Scott, Steve Edwards, Doug Matthews, and Steve Obermeier

2019, when the Court granted review in *Garcia*, grew concerned on the same date when it granted *Kahler*, and were left a bit breathless two weeks later when it granted *Glover*. We had much work to do.

We immediately engaged with the district and county attorneys whose offices handled the cases below – Steve Howe and his team for *Garcia*, Charles Branson and his team for *Glover*, and Brandon Jones for *Kahler*. In coordination with these local prosecutors, and with opposing counsel in the Supreme Court cases, we set about building schedules for merits briefing. We had five Supreme Court briefs to produce – two each as the petitioner in *Garcia* and *Glover* and one as the respondent in *Kahler*. Because our resources, although robust, are not unlimited, it was essential that briefings for the three cases be coordinated so our team could move from one brief to another and not become bottlenecked. Of course, the many other cases handled by our solicitors in state and federal court also continued with their own briefing and argument demands.

We were grateful that, in each of our cases, the U.S. Solicitor General agreed that our position was sound and filed an amicus brief in support of the Kansas position. The U.S. Solicitor General—who sometimes is called the Tenth Justice—performs a unique role in U.S. Supreme Court advocacy,

### Footnotes

1. The petition in *Garcia* also included two other Johnson County prosecutions that raised identical issues: *State v. Morales*, 306 Kan. 1100 (2017); and *State v. Ochoa-Lara*, 306 Kan. 1107 (2017).

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and support from that office is coveted. For each case, we traveled to the U.S. Department of Justice in Washington, D.C., to present our case for the Solicitor General’s support.

We filed our final brief in *Kahler* on August 2, in *Garcia* on September 5, and in *Glover* on September 30. The U.S. Supreme Court, which was sensitive to the significant load three oral arguments in quick succession placed on our capacity, coordinated with us and with opposing counsel to set oral argument in *Kahler* on October 7, *Garcia* on October 16, and *Glover* on November 4. So we had seven days between the end of briefing and our first oral argument.

### Many moots

Taking into account many factors, particularly unrelated time and schedule obligations, I assigned Kansas Solicitor General Toby Crouse—who leads our appellate team—oral argument in *Kahler* and *Glover* and assigned *Garcia* to myself. Each of us second chaired the other, so each of us prepared fully for each of the three arguments to be able to step in should lead counsel become unable to participate at oral argument.

As I knew from my prior arguments in *Kansas v. Cheever*, 571 U.S. 87 (2013), and *Kansas v. Carr*, 577 U.S. 108 (2016), preparation for a U.S. Supreme Court argument differs from other oral argument preparation. We scheduled six moot courts for each argument – a total of 18 moots. Our moot court panelists were varied, ranging from our internal staff, to law school faculty (we are grateful to both the University of Kansas School of Law and Georgetown University Law Center for assisting us with each of these cases), to firms and practitioners specializing in U.S. Supreme Court advocacy (we are grateful to the Heritage Foundation, Baker Botts L.L.P., Consovoy McCarthy PLLC, and Gibson, Dunn & Crutcher LLP), to the National Association of Attorneys General.

During the final weeks of argument preparation, we typically had two moots per week, together with hours of study and preparation in between. Most of these final moots were in Washington, D.C., with Supreme Court practitioners, so Toby Crouse and I effectively moved to Washington for weeks during this stretch. The National Association of Attorneys

General provided us office space to set up East Coast operations.

We invited counsel from the county and district attorneys who handled the cases below to join us for as many or as few moots as they wished. Their participation was invaluable – particularly because they knew the case records, as well as nuances in the legal positions below, better than anybody else.

In addition to our own moots, the U.S. Solicitor General invited us to attend and observe their internal moots. Suffice it to say they are exceptional appellate advocates and the experience of prepping with them was unparalleled.

When successive moots produce no new questions but generate advice or answers in conflict with prior moots, the advocate knows he or she is nearly ready.

### Oral argument

U.S. Supreme Court oral arguments often are as much an exchange among Justices as between a Justice and arguing counsel. Because of that, advocates typically anticipate a “hot bench” posing questions with little opportunity to express prepared remarks. So when we learned only four days before our first argument that the Supreme Court would change its practice and allow principal counsel two minutes for uninterrupted opening comments before questioning begins, the news was welcome—but also disconcerting.

As a colleague in another state is fond of saying, it takes a certain courage to “break the silence of a room with the sound of your voice.” Breaking that silence in the U.S. Supreme Court chamber for 120 uninterrupted seconds was particularly daunting.

In preparation for oral argument, we helped arrange attendance for interested parties. The Johnson County District Attorney, Douglas County District Attorney, and former Osage County Attorney and their respective teams attended to observe their cases being argued. So too with law enforcement who worked on the cases. We also ordinarily work with victims and their families to arrange their attendance if they so wish, although none did for these three cases.

After argument, weather permitting, it is customary to gather outside the Supreme Court building on its marble apron. This is the scene often



(L to R): Bryan Clark, Dwight Carswell, Derek Schmidt, Toby Crouse, Steve McAllister, Brandon Jones, Kris Ailslieger

presented in news coverage of arguments since cameras are not allowed inside the court building. Particularly memorable was the scene outside the Supreme Court after our argument in *Glover*, the traffic stop case. The defendant, the sheriff's deputy who made the stop, the trial-court prosecutor, and the trial-court judge each traveled to Washington to observe the argument. All were gathered together outside the court afterwards, smiling and visiting politely despite being on different sides in the dispute just argued before the nation's highest court. When Nina Totenberg, who covers the Supreme Court for National Public Radio, saw this, she seemed amazed and exclaimed to me, "You Kansans – you're just so ... nice!"

## Decisions

The State of Kansas went 3-0 in these cases. On March 3, 2020, the Supreme Court reversed the Kansas Supreme Court decision in *Garcia*. In a decision written by Justice Alito, all nine of the Justices rejected the Kansas Supreme Court's express preemption conclusion and five Justices further agreed that the prosecutions were not impliedly preempted. *See* 140 S. Ct. 791 (2020). On March 23, 2020, the U.S. Supreme Court affirmed the Kansas Supreme Court decision in *Kahler*, ruling 6-3 in a decision by Justice Kagan that the 14<sup>th</sup> Amendment does not oblige Kansas to maintain an affirmative defense of insanity so long as state law affords some mechanism for the jury to consider

evidence of the defendant's mental capacity. *See* 140 S. Ct. 1021 (2020). And on April 6, 2020, the U.S. Supreme Court, issued an 8-1 decision by Justice Thomas reversing the Kansas Supreme Court ruling in *Glover*, holding instead that the 14<sup>th</sup> Amendment does not forbid investigatory traffic stops based only on the officer's reasonable assumption that a vehicle's owner is likely to be its driver. *See* 140 S. Ct. 1183 (2020).

These three decisions added to our successful advocacy for Kansas in criminal cases before the U.S. Supreme Court over the past decade. In 2016, the U.S. Supreme Court had agreed with our request to reverse the Kansas Supreme Court on two questions of constitutional law in the consolidated case *Kansas v. Carr*, 577 U.S. 108 (2016),<sup>2</sup> and in 2013 the high court had similarly reversed the state court on a Fifth Amendment question in *Kansas v. Cheever*, 571 U.S. 87 (2013). In six criminal cases we have argued before the U.S. Supreme Court over the past decade, Kansas is 6-0, reversing the Kansas Supreme Court five times and affirming it once. Those outcomes, of course, result from the strength of the state's legal position in each case. But there is no doubt that our ongoing partnership with the county and district attorneys in Kansas, which has allowed us to build appellate capacity that benefits all of us in performing our duties, provided the ability to handle these cases properly and effectively.<sup>3</sup>

For that, I am truly grateful to each of you. 🙏

2. This consolidated case involved two full-length arguments: One a 14<sup>th</sup> Amendment question regarding separate trials, the other an Eighth Amendment question regarding jury instructions for weighing mitigation evidence during the sentencing phase of a death penalty case. In addition to the two *Carr* defendants from Sedgwick County, the Eighth Amendment question also involved defendant Sydney Gleason in a separate case arising from Barton County, see *Kansas v. Gleason*, No. 14-452.
3. I am particularly grateful to the attorneys in our Solicitors Division who worked on these cases. In addition to Solicitor General Toby Crouse, the lawyers who were responsible for briefing and preparing the arguments included Kris Ailslieger, Dwight Carswell, Bryan Clark, Natalie Chalmers, Brant Laue, Jodi Litfin, Steve Obermeier, and (now Judge) Rachel Pickering. Chief Deputy Attorney General Jeff Chanay also worked on the state's briefings.

# The PIK is Not Perfect

By Natalie Chalmers, Assistant Attorney General

Our criminal pattern jury instructions for Kansas (PIK) are undoubtedly an invaluable resource. The PIK is a fantastic starting point for instructions, and there is wisdom in using it. As the Kansas Supreme Court repeatedly notes,

The use of PIK instructions is not mandatory but is strongly recommended. The pattern instructions have been developed by a knowledgeable committee to bring accuracy, clarity, and uniformity to jury instructions. They should be the starting point in the preparation of any set of jury instructions. If the particular facts in a given case require modification of the applicable pattern instruction or the addition of some instruction not included in PIK, the district court should not hesitate to make such modification or addition. However, absent such need, PIK instructions and recommendations should be followed.<sup>1</sup>

But the PIK is not perfect. More attorneys and trial judges need to be willing to deviate from the PIK when necessary. No matter how invaluable it may be, the PIK is not binding law.

In fact, the preface to the PIK plainly sets forth the idea that the PIK instructions are not infallible:

The Committee also wishes to point out that these are patterns—that is to say—suggestions on language that can tell a juror what the law is. But one size does not fit all and judges and lawyers should feel free to modify these patterns as justice and the facts of each case require.

All pattern instructions are works in process. With every appellate case, every session of the legislature, the law is either clarified or changed. We have taken great pains

to keep this work error free. But we are realistic and seek your help and feedback. If an error is discovered, please advise the Council staff so corrections can be made in a future supplement.<sup>2</sup>

## The PIK Advisory Committee

For those of you unfamiliar with how the PIK is updated, the PIK committee members are part of a Kansas Judicial Council Advisory Committee.<sup>3</sup> As of this article, the committee is comprised of eight district court judges and a Washburn law professor.<sup>4</sup> These talented legal minds are not appellate practitioners, nor do they see every single trial court case in the State, and as such, they may not be fully aware of the potentially meritorious challenges raised by criminal defense attorneys until after an appellate decision is issued. Even then, the committee does not have the luxury of meeting every single time an opinion or legislative amendment affects a PIK instruction. Instead, the committee meets monthly during the second half of the year to work on criminal PIK instructions.

Thus, again, while the PIK is the best starting point for instructions, care must be taken to ensure the instructions need no further modification. Simply put, there are times when there will be a delay in the complete accuracy of the PIK. And, other times, errors have been inadvertently overlooked.

## Examples of potentially problematic instructions

At the moment, any PIK instruction dealing with an element of the crime that is broader than the charging document is flawed. This is because “[a] jury instruction on the elements of a crime that is broader than the complaint charging the crime is erroneous.”<sup>5</sup>

For example, in *State v. Snyder*,<sup>6</sup> the State

## Footnotes

1. *State v. Bernhardt*, 304 Kan. 460, 470, 372 P.3d 1161 (2016).
2. Preface to the 4<sup>th</sup> Edition of the Criminal PIK.
3. Unlike other Judicial Council Advisory Committees, the Judicial Council does not review the committee’s work.
4. The judges are the Honorable Mike E. Ward, the Honorable Kevin Berens, the Honorable Dan Creitz, the Hon-

- orable Amy Hanley, the Honorable David W. Kennedy, the Honorable Timothy Lahey, the Honorable Nancy E. Parrish, and the Honorable Robert J. Wonnell. The sole non-judge is Professor Jim Concannon, who teaches Appellate Practice, Civil Procedure, and Evidence.
5. *State v. Brown*, 306 Kan. 1145, 1165, 401 P.3d 611 (2017) (quoting *State v. Trautloff*, 289 Kan. 793, 802, 217 P.3d 15 [2009]).

charged the defendant with kidnapping with the intent to commit aggravated indecent liberties with a child. PIK 54.210 follows the statutory language and lists the element as “to facilitate flight or the commission of any crime.” The State followed the PIK, but then had to concede error because the jury instruction was broader than the complaint. While the error was ultimately not reversible, better practice would have been to tailor the PIK to conform to the charging document.

Another area where the PIK and the charging language may conflict is with the requisite mental states. There are a number of crimes that have no requisite mental state, such as sodomy. In such cases, PIK 52.300 says to inform the jury that the “State must prove the defendant *insert specific act committed by defendant* intentionally, knowingly, or recklessly.” This is a correct statement of law. Even in PIK 55.060, the PIK requires the element of “intentionally, knowingly, or recklessly.” But if the complaint specifies an intent, listing an intent lower than that intent (such as recklessly if the complaint says knowingly), will be error. Thus, this another example of the need to carefully tailor the instruction to match the charging document.

Additionally, the PIK does not always note the caselaw relevant to deciding whether an instruction is proper. For example, in PIK 55.020, nothing notes that giving the entire sodomy definition is unquestionably problematic. Yet it is. Sodomy is one of the crimes where the definition section provides for alternative means. And it is currently reversible error to include a portion of the definition that is unsupported by any evidence.<sup>7</sup>

Likewise, the PIK makes no mention of *State v. Fitzgerald*, 308 Kan. 659, 423 P.3d 497 (2018). In that case, the Kansas Supreme Court reversed an aggravated criminal sodomy conviction because the defendant was charged with “causing [the child] to engage in oral copulation with another person.” The court held that the wrong subsection was charged because the defendant could not be considered “another person.” Granted, *Fitzgerald* is a charging case, but for those prosecutors that use the PIK to

charge cases, its omission could have catastrophic consequences. After all, charging under the wrong subsection means insufficient evidence to uphold a conviction. And it appears prosecutors have mistakenly believed they could charge under the wrong subsection in order to mirror the “caused” language in the PIK when the victim, rather than the defendant, performs the act of sodomy.

### Fixing the PIK

The premise of this article is not to unjustly criticize the PIK, but instead to raise awareness of the need to modify the PIK in some circumstances. Those errors can also be corrected in future PIK updates.

In fact, when possible flaws are pointed out to the committee members, the committee has proven to be very responsive. In the last few years, I have reached out to the committee upon noticing a PIK error, and the committee considered and corrected the error.

For example, in an intentional second-degree murder case, the Appellate Defender’s Office correctly pointed out that the prosecutor erroneously relied on the PIK 54.180’s comment discussing a case to argue an instruction on reckless involuntary manslaughter was not warranted. The reliance was in error because the case was no longer good law.<sup>8</sup> After conceding that error, I emailed the PIK committee to alert them of the problem. The 2018 Supp. for PIK 54.180 is now correct.

As another example, I noticed a few cases where the reasonably foreseeable option for aiding and abetting in PIK 52.140 was given in specific-intent cases. I asked the PIK committee if *State v. Overstreet*, 288 Kan. 1, 200 P.3d 427 (2009), which holds that the defendant must have the same specific intent as the principal in specific-intent crimes, should be mentioned. It is now in the notes on use, along with an explanation of how to handle cases with both specific and general intent crimes. Hopefully that will prevent future mistakes.

Thus, if errors are found, please reach out to the PIK committee. They may be contacted at [judicial.council@ks.gov](mailto:judicial.council@ks.gov). 

6. *State v. Snyder*, No. 119,452, 2020 WL 741663, at \*12 (Kan. App. Feb. 14, 2020) (unpublished opinion).  
7. *State v. Dishner*, No. 120,422, 2020 WL 593907, at \*1 (Kan. App. Feb. 7, 2020).

8. *State v. Salem*, No. 118,351, 2019 WL 2237382, 441 P.3d 537 (Kan. App. 2019) (unpublished case) (this case also exemplifies the need for thorough on-the-record discussions of jury instructions).

## KCDAA Conferences

By Chris McMullin, CLE Committee Chair

When the 2020 CLE season began, it was with hope and anticipation of two “in-person” conferences. (Remember when we did not have to specify “in-person?” How quaint.)

When the season ended...KCDAA hosted its most-attended event *ever* in my 29 years. How did we get there?

In April, it began to dawn on the CLE Committee that the pandemic may not be over by June. Our friends at Kearney and Associates, who manage several organizations, were watching multiple events get cancelled.

KCDAA as an organization, and in particular the CLE committee, plans ahead. The Board approves our conference locations for at least a year into the future, and K&A staff book our event space at least a year into the future to secure the best room and food rates. Cancelling an event where 200 people and their dollars are going to be eating, drinking, sleeping, and learning all in one place is a serious decision. But events led the organization to pull the plug on our June conference in Manhattan. This involved contacting all of our speakers, and the conference center, which was a group effort. Fortunately, the Supreme Court extended the CLE deadline—although at the time we did not fathom having to cancel Wichita in October.

During the summer, the committee began meeting with a representative from the Kansas CLE Commission to discuss what would be required to present some sort of video CLE. At one point, I was on a zoom with someone who was *the only human being in the Kansas Judicial Center*—in the

middle of a work day. As the summer wore on, the committee realized that we would have to cancel the in-person fall conference.

We began to discuss the prospects of a zoom conference as Steve Kearney had successfully run one for another group he manages. The committee reached out to our spring speakers, and much to my relief, nearly all of them agreed to speak online in October.

We decided to keep our original date since that was the judicial conference and many courts would be in recess. We decided to have ethics on both days, in case people could not attend on one day or the other. We also wrangled some additional speakers, so that anyone who attended both days could earn all of their 2020-2021 CLE credit at one time. Then we practiced.

I will admit that I was exceptionally nervous on Monday morning...and then things went as planned! Over 260 people attended at one time or another. The screen did not freeze, the internet did not crash, and the Chief Justice was able to present without a problem. To say that I was relieved would be an understatement.

Thanks to the KCDAA Board, the CLE Committee, Kearney and Associates, and all of our awesome speakers.

Now, what about 2021? Will we be able to meet in person in June? Hope springs eternal. But, if I have learned anything, it is not to predict the future of a pandemic. In the meantime, keep your topic and speaker ideas coming! 🙏

**Watch your email and [kcdaa.org](http://kcdaa.org)  
for details on upcoming events in 2021.**

**We hope to see you in-person again soon!**

## KCDAA on Social Media

**By Todd Thompson, KCDAA Outgoing President**

Prosecutors may not be the type to immediately jump on a bandwagon. We are slow and cautious. We should be. We have the highest ethical responsibility of any licensed attorney. We wear that distinction as a badge of honor. When one of us fails to meet that standard, it hurts us all.

When social media came into existence, we did not jump in quickly. In fact, this organization has not jumped in at all. We are like the tortoise's older, slower grandfather. Prosecutors know that posting on social media can be dangerous for us. We can't brag about our convictions, nor should we. We aren't allowed to discuss our cases until after they have been resolved. If we even mention a case that is charged and not filed, we must say they are, "innocent until proven guilty." (Mind you, this an edict all of us firmly believe).

In this day and age, many members barely go to websites. Important issues we want to communicate are being lost in mass-emails. We know we need

other ways to reach out to our membership and to the general public about things that matter to us, which is why we as KCDAA have decided to enter our appearance in social media.

We don't plan to be political with our social media. However, we do want to let our membership know of legislation we find important. We want to share cases that come out. If an office has a job opening, we want to help further advertise it. We want to let people know of events and CLEs that are occurring. Also, we want to give county and district attorney's offices a chance to talk about their prosecutors so other members get a chance to know them better. We know the importance of good communication is being adaptable. We hope this will be yet another way to benefit our membership.

**Connect with us:**

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## KCDAA Goes to Washington, D.C.

**By Todd Thompson, KCDAA Outgoing President**

Prosecutors from across the state of Kansas visited Washington, D.C. in January to advocate for legislation that improved the justice system. Prosecutors advocated for better policies in using search warrants to get into technology like cell phones.

"Since the incidents of San Bernardino we have realized how important it is to have access to this data when the court allows us through a search warrant," Todd Thompson said.

Further, prosecutors asked for more funding to the John R. Justice grant. The John R. Justice (JRJ)

Grant Program provides loan repayment assistance for local, state, and federal public defenders, and local and state prosecutors who commit to continued employment as public defenders and prosecutors for at least 10 years.

Finally, prosecutors requested assistance in funding mental health and drug treatment facilities.

"This issue alone would help reduce the number of people incarcerated while helping deter crime," said Thompson.

See the next page for photos of the prosecutors during their visits in Washington.

# Association Updates



*In attendance in Washington were: Mike Kagay, Shawnee County DA; Brandon Jones, Franklin CA; Steve Howe, Johnson County DA; Marc Bennett, Sedgwick County DA; Charles Branson, Douglas County DA; Todd Thompson, Leavenworth CA; and Marc Dupree, Wyandotte DA.*

*(L to R): Steve Howe, Brandon Jones, US Representative Steve Watkins, Marc Bennett, and Todd Thompson.*



*(L to R): Marc Dupree, Charles Branson, Mike Kagay, Brandon Jones, US Representative Roger Marshall, Steve Howe, Todd Thompson, and Marc Bennett.*



*(L to R): Mike Kagay, Steve Howe, Todd Thompson, Brandon Jones, US Representative Ron Estes, Marc Dupree, Marc Bennett, and Charles Branson.*



*(L to R): Mike Kagay, Brandon Jones, Steve Howe, Marc Bennett, Charles Branson, Todd Thompson, and Marc Dupree outside the U.S. Supreme Court building.*





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