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About the Cover

The original Gray County Courthouse was located in downtown Cimarron, Kansas and was established in January 1888. The building is still there and was nominated to the National Register of Historic Places due to its importance in the Gray County Seat War between Cimarron and Ingalls.

The present courthouse dates back to 1927 and is located two blocks south of the first courthouse at 300 S. Main St. in Cimarron.

Photo by John D. Morrison, Prairie Vistas Photography
President’s Column

by Mark Frame, KCDAA President
Edwards County Attorney

Busy Time of Year

As a board member of the KCDAA and now as President, I know that this time of year when the legislature is in session, is a very busy and important part of the year for prosecutors. The legislature always has its share of criminal procedure issues and criminal law legislation that needs to be closely looked at by prosecutors to make sure that Kansas has the laws that protect our citizens and laws that seek justice. This year is no different.

The KCDAA has been very active in the Kansas Legislature this session. The KCDAA legislative committee and the Board targeted several legislative fixes and new legislation for submission. Things change every day, but here are some updates as of writing this in March. Watch for current legislative updates and bill tracking reports in your e-mail or in the members only section at www.kcdaa.org.

The first addition to the criminal law slate was to have reckless aggravated battery include DUI. This proposed legislation was well received and just recently passed out of the Senate 40-0.

Another high priority bill introduced was the illegal possession of a firearm in the commission of a felony, or more simply put, “Don’t bring your guns to a drug deal.” This legislation passed out of Senate Corrections Committee and is now waiting for floor action in the House.

Other legislation being monitored by the KCDAA is HB 2252, which eliminates the statute of limitations for rape. The KCDAA provided testimony that aggravated criminal sodomy should be added as well. This legislation passed the Senate 40-0 and is waiting on the Governor’s signature.

The KCDAA board has telephone conference calls weekly during the legislative session. HB 2170, the justice reinvestment bill was of great concern to the board in its original form. Due to the cooperation of the legislature and various organizations and individuals, an amended bill was had. In said amendment, the current law that provides for consecutive sentences when new crime is committed while the defendant is on probation, etc., will remain the same. Still further, the graduated sanctions portion of the bill is limited to being only used once. Many thanks go out to all who worked so hard on this legislation.

Another bill of concern is Senate Bill 63: Voter Fraud, because it gives the Kansas Secretary of State the independent authority to prosecute. The KCDAA testified in opposition to this portion of the bill. The main concern is the unique position of allowing crimes in Kansas to be prosecuted by someone other than the Attorney General, a county or district attorney. Prosecution of crimes should be left to prosecutors. As an elected official in a county or district, we as prosecutors have sworn a duty to see that justice is served in our jurisdiction, and if someone violates the law, whether that be theft of a bicycle or that of intentionally trying to vote twice, that crime should be prosecuted by the prosecutor elected to do just that in their jurisdiction.

In other words, the duty instilled upon me by my electorate is to see that justice is served. To that end, I seek convictions if a crime has been committed in my county. If someone commits the crime of voter fraud, murder, or stealing a bicycle, the voters elected me to prosecute those crimes. If I need help or assistance in my prosecution, I seek out the help of the Attorney General’s office or another prosecutor.

I have gotten many communications from prosecutors over the last few months expressing concern about certain proposed legislation. It is my true belief that the best asset of the KCDAA is the members doing their job, day to day. I am never surprised by the level of diligence and commitment of the prosecutors around the state, and I urge you to keep communicating with the Board.
The patient is crashing! Code Blue!
At the Fall KCDAA Board meeting the scenario was something like this: “I can’t get a pulse.” “Get a crash cart.” “Someone charge the paddles!” “Charging” “Clear!” “Still no pulse.” “Recharging!” “Clear!”

One of the Board members did not have a heart attack or seizure, but apparently the membership thinks the Kansas Prosecutors Foundation is dead or dying, if you even know it exists. The survey we had just conducted was showing that as far as most of our membership was concerned, the Kansas Prosecutors Foundation was a relative unknown. We had posed the question about members’ willingness to serve on the Kansas Prosecutors Foundation Board of Trustees. Answers were the equivalent of “I thought that it was dead” or my personal favorite, “What Foundation?”

Had the patient died and no one told us? Had we been starring in a Weekend at Bernie’s sequel and didn’t know it? What happened from the time of formation of the Foundation? Didn’t anyone remember in 2007 when the Board took action to form a charitable arm of the KCDAA to provide scholarships for those entering the legal profession, or even someday endow a Chair at one or both of the law schools in Kansas?

You had not started law school yet you say? Hmmm… Having a firm grasp of the obvious, we sprang into action! It was determined that it was time to reacquaint the membership with the KPF and report on progress and relevance.

The timing of the survey and its accompanying revelation had coincided with the KPF making some noteworthy progress toward one of its most basic goals of providing scholarships to law students. The shock from the crash cart and the life the KPF is now breathing is through the generosity of several members in the form of donations sufficient to get the scholarship program underway.

So here is the crash course (pun intended) on the KPF. The KPF was formed as a separate corporation by the KCDAA 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.”

It is a 501 (C) (3) so all donations are charitable in nature. It is in good standing with the IRS and the State of Kansas as an exempt organization. The KPF was started at a time when all charities were having trouble fundraising due to the economy, particularly startup professionally narrow charities like the KPF. The KPF was kept on life support throughout the intervening years with the plan that as the economy turned around it would be able to begin its stated good works through the kindness of others.

That time is now! The KPF has developed and refined an application process for law school scholarships and as of this writing is actively receiving and taking applicants. The KPF scholarship committee will review them and make a decision on the recipients in May. The scholarships, one for each of the Kansas law schools in the amount of $1,000 will be presented in person to the successful candidates at the June conference.

The KPF is still actively looking for members to serve on the Board and on the committees. Perhaps now you will not wonder what it is and will know that the KPF is alive and well. Please contact me for more information if you are interested in taking part. We are not ready to run a marathon, but we are walking with assistance at long last and are getting stronger by the minute. Join us!

Learn more about the foundation at www.kpfonline.org.
Legislator’s Column

by Senator Jeff King, Vice-President of the Kansas Senate

Legislative Overview

By the time this article reaches you, the regular session of the 2013 Kansas Legislature should have concluded. I am writing this article, however, with a few weeks of legislative action remaining. As such, much of the legislation important to Kansas prosecutors remains mired in the legislative process. Fortunately, we have succeeded in moving many prosecutor-friendly bills through enough of the legislative process that their passage seems likely.

HB 2252 has passed the Kansas Senate and House of Representatives and awaits the Governor’s almost certain signature. As of July 1, 2013, it will abolish the statute of limitations for the crimes of rape and aggravated criminal sodomy. HB 2252 will also extend the statute of limitations for other forms of sexual assault from 5 to 10 years. For non-rape sexual assaults on an underage victim, the statute of limitations will extend in all cases until the date when the victim turns 28. Many Kansas prosecutors have requested this long overdue legislation. I am thrilled that it passed unanimously through the Kansas Legislature and will soon become law.

HB 2218 will provide an important fix to Kansas DUI law. As many of you are aware, the Kansas Supreme Court ruled last year a driver can only be cited for refusing an alcohol or drug test if that driver was arrested for an alcohol or drug-related driving incident. This policy is absurd. Many, if not most, traffic stops that lead to DUI or test-refusal arrests arise from non-alcohol or drug-related violations. Depriving law enforcement of the ability to arrest drivers for test refusals in those instances makes no sense. Once HB 2218 becomes law, law enforcement can once again rely on a reasonable suspicion of a DUI developed after a traffic stop as the basis for requesting an alcohol or drug test.

SB 228 clarifies the long-term policy that the Kansas Attorney General has the exclusive power to represent the State of Kansas on appeal in federal and state courts. Passage of this bill would in no way alter the longstanding system under which local prosecutors author appellate briefs in their criminal cases for review and approval by the Attorney General’s office. It merely ensures that final approval for these appeals, as well as the exclusive power to petition the United States Supreme Court for a writ of certiorari, rests with the Kansas Attorney General.

HB 2044 will create two new crimes – distribution of a controlled substance causing great bodily harm and distribution of a controlled substance causing death. The former will be a level 5, person felony and the latter will be a level 1, person felony. Many other states treat such crimes under their felony murder law (or analogous statutes covering drug-induced bodily harm). The Kansas Supreme Court, however, has rejected such application of our felony murder law. I strongly support the creation of both new crimes and believe they will provide prosecutors with valuable tools in the fight against illegal drugs.

If enacted by the Kansas House of Representatives, SB 16 would establish the Kansas RICO Act. This legislation, which the Kansas Legislature has considered for a number of years, would make it a crime for drug dealers, gang members, or human traffickers to engage through racketeering in numerous acts that would be felonies if done directly or individually. Essentially, for these class of persons, SB 16 would incorporate the federal RICO laws into Kansas for use by Kansas prosecutors and courts.

SB 61 will strengthen the state’s human trafficking laws with the specific focus on protecting children from commercial sexual exploitation. It will establish a Human Trafficking Victim Assistance Fund to help provide assistance to victims of human trafficking and other sex related crimes. The bill will also establish special child in need of care procedures for children who have been subjected to human trafficking and will expedite
expungement procedures for those convicted of selling sexual relations if coercion is involved. SB 61 will also create a new crime of commercial sexual exploitation of a child, which will increase the penalties of patronizing a minor prostitute and promoting prostitution of a minor.

SB 41 will amend the special sentencing rule that requires an extra six-month sentence for anyone who carries a firearm to commit a drug felony. Current law allows the extra sentence only for those who “carried a firearm to commit a drug felony, or in furtherance of, a drug felony…. ” Kansas courts interpreted that language to prevent its application for drug felons who kept a firearm nearby, but not on their person. The revised language of SB 41 will remedy that deficiency, placing the additional six-month sentence on anyone who “possessed a firearm and such firearm was readily accessible during the commission of, or in furtherance of, a drug felony…. ” This new language should ensure that criminals who possess firearms when committing drug crimes get the extra prison sentence they deserve.

I would be remiss if I did not take the time to thank you for all of the hard work you do to protect the people of Kansas and bring to justice those who would do them harm. As the husband of a longtime Kansas prosecutor, I know all you do to protect Kansans, especially the youngest and most vulnerable among us. For that, you have my gratitude and that of the entire Kansas Legislature.

In that vein, I would like to focus on the next year of the Senate Judiciary Committee, of which I serve as Chair, and work with you to identify ways we can provide you with the necessary tools to ensure your continued success. If there are aspects of Kansas law we can revise to help you better serve Kansas, please let me know. Your communications are vital to the work we do in the Kansas Legislature. I look forward to hearing more of your thoughts and suggestions in the upcoming year.

Jeff King is the Vice-President of the Kansas Senate and Chair of the Senate Judiciary Committee. He represents the 15th Senate District, which includes Neosho County and most of Montgomery and Labette counties in southeast Kansas. He is a private practice attorney in Independence.
From large counties to small counties, to attorneys with no prosecution experience to attorneys with years of prosecution experience, Kansas saw many new and varied county and district attorneys elected across the state in 2012. In two of those counties – Sedgwick and Cherokee – citizens welcomed two energetic and motivated elected officials at the beginning of this year. Marc Bennett became Sedgwick County District Attorney, and Nathan Coleman became Cherokee County Attorney after each won contested races. Both officials returned to the areas in which they grew up to run for, and win, the elections.

After 18 years of prosecution experience – 16 of them in Sedgwick County – Marc Bennett knew what to expect when he ran for District Attorney. However, after running the Sex Crimes Unit and after a tiring campaign, Bennett’s first few days in office were the “longest time [he] had sat at a desk for about a year.” Instead of running all over like he was used to doing when supervising 10 attorneys, people came to him for questions. Bennett is still as busy as ever, but with different matters. Instead of running to court, being called out in the middle of the night for a homicide, or getting ready for trial, Bennett now spends time dealing with the logistical and administrative side, and interacting with the district court to ensure the criminal justice process runs smoothly.

And although running an office of 50 prosecutors hasn’t held many surprises for Bennett yet, he did not always know he even wanted to be a prosecutor. Bennett began interning at the Geary County Attorney’s Office under Chris Biggs while he was attending K-State. Through law school, Bennett and Biggs stayed in touch, and Bennett wrote a couple of briefs during the time he attended Washburn Law School. When Bennett began searching for a job, he asked Biggs if he could use Biggs as a reference. “The next day, Biggs called and said an assistant had quit. He asked if I wanted a job,” Bennett recalled. Bennett had always pictured himself as researching and writing as he didn’t think he would be a courtroom lawyer. But after accepting the job as Assistant Geary County Attorney, he never looked back. He found prosecuting criminals more rewarding than he ever thought it could be, and he knew that prosecution was what he wanted to do for as long as he could.

Seventeen years later, Bennett found himself in the middle of a personal struggle – whether or not to run for Sedgwick County District Attorney. “I had convinced myself to run, and then I convinced myself not to,” Bennett said. But when he was driving back to the office from officiating his uncle’s funeral he thought, “Life is short. I’m going to go for it.” When he got back, he walked across the street and filed to run for Sedgwick County District Attorney.

His goals as D.A. include slimming down the size of the trial divisions to have smaller trial teams. Bennett also plans to manage the docket size more effectively in order to get cases moving more effectively, in the meantime cutting down the number of settings for each case prior to sentencing.

Although Bennett has little free time, he finds time for his three daughters, ages 5, 9, and 13. Additionally, he serves on the Board of Directors for numerous organizations, including KCDAA. Bennett has made many long-lasting friendships through KCDAA over the years, and found many of the relationships he made through KCDAA to be beneficial in the transition from Deputy District Attorney to District Attorney. Bennett finds prosecution to be a very rewarding career, and a “great profession to be in.”
Nathan Coleman, Cherokee County Attorney, is quickly finding that out as well. While Coleman so far only has a couple of months of prosecution experience, he has enjoyed jumping right in. In fact, on his first day as County Attorney, he had cases that were set and he was ready to cover.

Even though prosecution may be new to Coleman, he has a diverse legal background. After graduating from Washburn Law School, he went to work at Wallace Saunders practicing insurance defense for about a year. Coleman then worked for about three years practicing corporate litigation. After his wife was offered an in-house job in Missouri, the Colemans moved back to Cherokee County, where Coleman grew up. He opened a solo practice in 2006, and did everything from criminal defense, to civil litigation, to personal injury, and domestic law. Coleman liked the diversity of general practice and enjoyed being a business owner.

But after watching his children’s classmates getting yanked out of the home while their parents sat in jail for manufacturing meth, and watching young kids in school being exposed to the county’s serious drug problem, Coleman decided he wanted to make a positive difference. The county was “trying to make a push to get cleaned up and earn a better reputation, and I wanted to be a part of that,” Coleman said. And although Coleman whole-heartedly believes in the balance in the system created by good defense work, Coleman felt led to be a part of the other side – on the team to try to clean up Cherokee County.

Although the first couple of weeks had one hiccup – they thought they would have to dig out the dusty typewriters to compose complaints because neither Coleman nor his staff could log onto their computers – Coleman has been looking forward to accomplishing his goals as County Attorney. His broad goal is to change the citizens’ perception of the work being completed at the County Attorney’s Office. Through purposeful action and exhibiting good values, Coleman wants to restore the public’s confidence in the County Attorney’s Office. Coleman’s second primary goal is driving the drugs out of the county. Because of the close proximity of Missouri and Oklahoma, he wants to decrease the number of people coming into Cherokee County to manufacture meth.

These goals, in part, will be attained through the good relationship Coleman has been building with law enforcement. Coleman is encouraged by the team atmosphere between his office and the Sheriff’s Office and other law enforcement agencies, and is optimistic of progress to come for the county.

Coleman is looking forward to serving his county and building relationships with other prosecutors from across the state. If he’s not getting bombarded by questions from law enforcement, or being called to the scene of a crime, Coleman makes time for his wife and children, ages 8, 10, and 12.

While Marc Bennett and Nathan Coleman come to their new positions from very different backgrounds, they share the goal of serving the citizens of Kansas and both look forward to pursuing their goals to improve their communities. We congratulate them and wish them well in their new positions.
Awards

*Leavenworth County Attorney*  
**Todd Thompson**, Leavenworth County Attorney, was selected by Ingram’s Magazine, a KC business magazine, for their 40 under 40 class this year.

Babies

*Leavenworth County Attorney*  
**Adam Zentner** and his wife Emily had their first child, Coleman York Zentner.

*Saline County Attorney*  
**Charles Ault-Duell**, Assistant Saline County Attorney, and his wife DeMay Grunden had their first child, Charles Solomon Ault-Duell. He was born Feb. 28, 2013 at Salina Regional Health Center. He weighed 7 lbs. 7 oz.

*Wyandotte County District Attorney*  

New Faces

*Crawford County Attorney*  
**Randel L. Messner** was sworn in as Assistant Crawford County Attorney in December 2012. He graduated from the University of Kansas School of Law and began practicing in 1984, both as a private practitioner and a staff attorney for the State of Kansas Department of Children and Families. He is active with Boy Scouts of America and the SE Kansas Recycling Center.

*Kansas Attorney General*  
**Greg Benefiel** began working in the Criminal Litigation Division of the Attorney General’s Office in January. Greg came from the Douglas County District Attorney’s Office.

**Jessica Domme** joined the Criminal Litigation Division of the Attorney General’s Office in January. She previously worked in the Shawnee County District Attorney’s Office.

**Dennis Jones**, former Kearney County Attorney, joined the Criminal Litigation Division of the Attorney General’s Office in January. Dennis is handling the Southwest Kansas drug crimes caseload.

*Ellis County Attorney*  
**Ryan Finnegan**, started as an Assistant County Attorney in Ellis County on January 14, 2013.

*Leavenworth County Attorney*  
Christopher Scott transferred from Shawnee County to Leavenworth County to handle drug cases and person felonies.

*Miami County Attorney’s Office*  
**Amory Lovin** joined the office as an Assistant County Attorney Feb. 19, 2013. She has previously prosecuted in Wyandotte and Johnson Counties. She will be handling the traffic and juvenile offender dockets.

Office Moves

**Jennifer Myers**, Senior Assistant District Attorney is no longer with the Wyandotte County District Attorney’s Office. She has taken a position as assistant legal counsel with the Unified Government/Wyandotte County/KCK as legal advisor for the Kansas City Kansas Police Dept.

NDAA Involvement

**Amy Hanley**, Assistant Attorney General, will serve as an Associate Director on the National District Attorneys Association (NDAA) Board of Directors. As a member of the Board, Hanley will contribute to NDAA’s mission to improve and to facilitate the administration of justice in the United States through continuing legal education, professional development, and technological training. Hanley has served in the Kansas AG’s criminal litigation division since 2009.

We want to share your news!

Send your info. to Mary Napier, Editor at mary@napiercommunications.com  
Upcoming deadlines - Summer 2013: June 28, Fall 2013: October 25
The Kansas Attorney General’s Criminal Litigation Division has four prosecution focus areas: child sex crimes with specific targeting of off-grid crimes, homicides, illegal manufacturing and distribution of drugs with specific targeting of methamphetamine manufacturers, and felony crimes involving public officials. The Criminal Litigation Division’s intent is to ensure that justice is served by developing prosecution leaders in these areas through a combination of education, training, and experience. Within this context, the Division contemplated a way to bring together prosecution leaders from each region of Kansas who specialize in these focus areas to discuss issues outside of a formal CLE setting. Out of that discussion emerged the 2011 Focus Four Forums, which have become an annual event. The Forums are a series of meetings that are structured to facilitate informal sharing of observations, insights, and lessons learned. These meetings have become one of the Criminal Litigation Division’s key avenues for building positive relationships with county and district attorneys, achieving the leadership development goal, and raising the bar of excellence within the Kansas prosecutor community.

The 2012 Forums were held at James P. Davis Hall at the Wyandotte County Lake and hosted jointly by the Kansas Attorney General’s Office and the Wyandotte County District Attorney’s Office. The Forums kicked off on November 13, 2012, with a meeting of capital litigators from across the state. This event was coordinated and planned by Assistant Attorney General Amy Hanley. Twenty prosecutors attended, including representatives from the Attorney General’s Office and all of the following counties: Cowley, Douglas, Johnson, Riley, Sedgwick, Shawnee, and Wyandotte.

Wyandotte District Attorney Jerome Gorman welcomed the group, gave introductory remarks, and presented a brief overview of Wyandotte County and the District Attorney’s Office. The group reviewed the recent Kansas Supreme Court decision issued in State v. Scott Cheever and Deputy Attorney General Kris Ailslieger discussed the Attorney General’s decision to seek certiorari in this case. The group, led by Assistant Attorney General Kristiane Bryant, also contemplated use of the new PIK 4th in jury trials.

Assistant Attorney General Nicole Romine shared thoughts on handling experts and discovery of expert materials. Johnson County District Attorney Steve Howe discussed case law on alternative means in the context of aiding and abetting. Sedgwick County Chief Appellate Attorney David Lowden reviewed common errors in capital jury instructions. Wyandotte District Attorney Jerome Gorman, Shawnee County Chief Deputy District Attorney Jacqie Spradling, and Riley County Attorney Barry Wilkerson all led case reviews of recent capital cases.

The second day of the forum focused on child sex crimes. The forum on child sex crimes was coordinated by Christine Ladner and was led by Steve Karrer and Nicole Romine, all Assistant Attorneys General. The focus was to spotlight a few interesting cases from less populated places, and to discuss current trends in child sex prosecutions. Washington County Attorney Elizabeth Hiltgen presented a case review on a complex child sex/child pornography case. Haskell County Attorney Lynn Koehn presented a case involving a pregnant 10-year-old. Assistant Lyon County Attorney Amy Aranda led an interesting discussion on rape shield. The appellate attorneys were key contributors to the conversation on charging, trying, and appellate treatment of alternative means theories in sex cases. Twenty-seven prosecutors attended the forum on child sex crimes, including representatives from the AG’s office, the United States Attorney’s Office, and the following counties: Wyandotte, Johnson, Sedgwick, Finney, Shawnee, Douglas, Cowley, Leavenworth, Lyon, Haskell, and Washington.

The drug prosecutor’s forum was held on the third day, November 15, 2012. This event was coordinated and planned by Assistant Attorney General Steve Wilhoft. Eighteen prosecutors attended, including representatives from the Attorney General’s Office, the United States Attorney’s Office and the following counties: Crawford, Finney, Geary, Reno, Riley, Saline, Seward, Shawnee, Sherman, and Wyandotte.

The group reviewed the decision of the United States Supreme Court in United States v. Jones and Assistant Attorney General Steve Wilhoft led a discussion regarding the effect of Jones on the use of GPS devices in Kansas. Melinda Spangler
from the Johnson County Sheriff’s Office Crime Lab gave a presentation on K-2 and bath salts, and prosecutors shared their experiences in dealing with cases involving these controlled substances. DEA Task Force/KBI Senior Special Agent Kerry Hommertzheim gave an informative presentation regarding the operation of Mexican methamphetamine distribution networks. Special Assistant United States Attorney Robin Summer discussed asset forfeiture and provided tools that prosecutors can use to obtain money and property from those who are involved in the distribution of illegal drugs in Kansas. Reno County Deputy District Attorney Tom Stanton presented an overview in regard to the impact of the new drug statutes and sentencing guidelines, and facilitated the discussion of those issues.

The 2013 Focus Four Forums will be hosted by District Attorney Marc Bennett in Sedgwick County.

# The Prosecutor’s Role in Resolving Claimed Violations of the Kansas Open Meetings Act

by Stephen M. Howe, Johnson County District Attorney & Steven J. Obermeier, Senior Deputy District Attorney, Johnson County

To most prosecutors, complaints that a city council or a county commission violated the open meetings act are deemed civil matters. But they are civil matters that squarely fall within the bailiwick of the prosecutor’s office. This article provides an overview of the Kansas Open Meetings Act and suggestions on handling alleged violations.

## A. An Overview of KOMA.

The Kansas Legislature passed the Kansas Open Meetings Act (KOMA), K.S.A. 75–4317 et seq., to ensure public confidence in government by increasing the access of the public to government and its decision-making processes. KOMA declares that it is the policy of Kansas “that meetings for the conduct of governmental affairs and the transaction of governmental business be open to the public.”

The rationale for this is that a representative government is dependent upon an informed electorate. The beauty of open government is that it should be within the “aye” of the beholder.

All meetings for the conduct of the affairs of and the transaction of business by government shall be open to the public. Further, no binding action by such bodies shall be by secret ballot. The scope of government agencies subject to KOMA is very broad. If there is ever a question concerning this issue, State ex rel. Murray v. Palmgren, 231 Kan. 524, 646 P.2d 1091 (1982), is worth consulting.

KOMA requires that notice of the date, time and place of any regular or special meeting of a public body shall be furnished to any person requesting such notice. It shall be the duty of the presiding officer of the body to give such notice and to keep an accurate record of the same.  

### Footnotes

1. Any person may bring an action alleging a KOMA violation. K.S.A. 75-4320(a) (The district court shall have jurisdiction to enforce KOMA by injunction, mandamus or other appropriate order on the application of any person.).
3. K.S.A. 75-4317(a).
4. Id.
6. It includes all legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof, including boards, commissions, authorities, councils, committees, subcommittees and other subordinate groups thereof, receiving or expending and supported in whole or in part by public funds. K.S.A. 2012 Supp. 75-4318(a).
7. (1) The group of people meeting together must be a “body or agency” within the meaning of KOMA; (2) The group must have legislative or administrative powers or at least be legislative or administrative in its method of conduct; (3) The body must be part of a governmental entity at the state or local level, whether it is the governing body or some subordinate group; (4) It must receive or expend public funds or be a subordinate group of a body subject to the Act; and (5) It must be supported in whole or in part by public funds or be a subordinate group of a body which is so financed. State ex rel. Murray v. Palmgren, 231 Kan. at 535.
A “meeting” under KOMA has three requirements. A meeting is defined as:

1. any gathering or assembly (in person, by telephone, or through the use of any medium for interactive communication);
2. by a majority of the membership of a body or agency;
3. for the purpose of discussing the business or affair of the body or agency.

The most common disqualifier of a KOMA violation is the requirement that there be a majority of the membership involved. Many boards have at least four members. For a four- or five-person board, this would require three members discussing business before KOMA is triggered and notice of the meeting must be given.

But even if there is a majority, the members must discuss the business or affairs of the body or agency to trigger KOMA. Mere attendance as observers by a majority of a city council at a meeting of a city administrative board does not trigger a KOMA violation as long as the council members do not actually engage in discussion of city business.

For example, a prayer gathering attended by a majority of city council members at which they pray for guidance and wisdom in the performance of their elected duties but do not discuss the specific business of the body, does not constitute a “meeting” for KOMA purposes.

The most troublesome element of the meeting requirement is the first one: the gathering or assembly. A series of phone calls or e-mails can constitute a meeting. A serial gathering or assembly can occur “through the use of any medium for interactive communication.”

K.S.A. 2012 Supp. 75-4318(f) states that interactive communications in a series shall be open if they collectively involve a majority of the membership of the body or agency, share a common topic of discussion concerning the business or affairs of the body or agency, and are intended by any or all of the participants to reach agreement on a matter that would require binding action to be taken by the body or agency.

Interactive communication, for the purposes of KOMA, requires a mutual or reciprocal exchange between or among members of a body or agency subject to KOMA. Whether a series of communications constitutes a violation of KOMA is very fact specific, and each situation must be decided on its facts. Attorney General Opinion 2009-22 contains a good discussion of when interactive communications constitute a meeting.

Other KOMA violations have arisen in the context of executive session. An executive session typically involves meeting in private to discuss sensitive topics such as personnel matters of non-elected personnel, preliminary discussions relating to the acquisition of realty, and privileged communications with the attorney for the body or agency.

All bodies subject to KOMA may recess, but not adjourn, an open meeting for a closed or executive meeting. Any such motion to recess shall include a statement of: (1) the justification for closing the meeting; (2) the subjects to be discussed during the closed or executive meeting; and (3) the time and place at which the open meeting shall resume.

12. Majority means the next whole number greater than half the total number of members. Attorney General Opinions No. 87-45, 86-110, 83-174.
17. The Kansas Attorney General’s web site contains helpful materials to navigate KOMA cases. This includes training slides, a citizen’s guide and FAQs. This information is accessible at http://ag.ks.gov/legal-services/open-govt.
18. K.S.A. 2012 Supp. 75-4319(b). There are currently 16 reasons for convening a closed meeting in this statute.
19. K.S.A. 2012 Supp. 75-4319(a) (Such motion, including the required statement, shall be recorded in the minutes of the meeting and shall be maintained as a part of the permanent records of the body or agency).
Some organizations go into an executive session for a valid reason, but are pulled into a related subject that is beyond the announced reason for the executive session and outside one of the statutory exceptions for convening an executive session. This violates KOMA. But when a public body faces discussions of topics, some of which are exempt and some of which may not be exempt under KOMA, if segregation of the materials into open and closed sessions would make a coherent discussion pragmatically impossible, it is reasonable to close the entire meeting.20

B. Suggestions on Handling and Investigating Alleged KOMA Violations.

More than just a telephone call to the district attorney’s office should be required in order to initiate a KOMA complaint. Before a KOMA investigation is commenced, we require a letter that sets forth the factual allegations. When we receive such a written KOMA complaint, our office conducts an initial evaluation to determine if the complaint creates reasonable suspicion that a KOMA violation has occurred. If such reasonable suspicion is found, an investigation is conducted. The investigation includes interviews with the members who were involved and any other witnesses who may have knowledge of the facts. It is important to promptly conduct this investigation before the witnesses’ memories fade.

It has been our experience that elected officials who face allegations of KOMA violations are cooperative.21 But in the event they are not, KOMA provides prosecutors who are investigating alleged KOMA violations with inquisition-type tools. This includes the issuance of subpoenas, examining relevant documentary material, taking testimony under oath, and serving interrogatories.22

C. Dispositions Following the KOMA Investigation.

When the investigation is completed, the district attorney confers with the investigator to determine whether KOMA was violated. If there was not a KOMA violation, a letter is sent to the complainant and the board or agency. If the district attorney determines, based on the results of the investigation, that a KOMA violation occurred, then appropriate action should be taken.

This appropriate action, in the face of a KOMA violation, can take different turns. The discretion exercised by the district attorney should depend upon the nature of the violation – was it a first-time technical violation or a willful subterfuge to prevent the public from observing? Has the body or agency ever had KOMA training?

The legislature has given district attorneys many remedies when it comes to KOMA violations. If a lawsuit is filed, the case is expedited. And unlike most civil suits, the burden of proof shall be on the public body or agency to sustain its action.23 Civil penalties of up to $500 for each KOMA violation may be pursued.24 Any binding action that is taken at a meeting that was in substantial noncompliance with KOMA shall be voidable. The district court is also given jurisdiction to issue injunctions or writs of mandamus to enforce the provisions of KOMA.25 The court may award court

21. According to the AG’s FY 2011 County KOMA-KORA Report, which is accessible at http://ag ks.gov/legal-services/open-govt, in one instance the Belleville City Council self-reported that it went into executive session during two meetings to discuss non-elected personnel matters in violation of KOMA. The City of Wellington self-reported that it possibly had violated KOMA when city council members came together at a public town hall meeting. However, no violation had occurred. Lastly, the Kansas State Board of Education self reported an e-mail chain between Board members and the Board attorney that violated KOMA after a Board member had made a technical violation of KOMA by hitting “reply all” when responding to an email by the Board’s attorney that was sent to the entire Board.
22. K.S.A. 75-4320b.
23. K.S.A. 75-4320a(b); K.S.A. 75-4320a(e). The general rule is that the burden of proof is upon the party asserting the affirmative of an issue. Wooderson v. Ortho Pharm. Corp., 235 Kan. 387, 412, 681 P.2d 1038 (1984) (citing cases).
24. K.S.A. 2012 Supp. 75-4320(a). The civil penalties recovered by a county or district attorney shall be paid into the county’s general fund. Id. An individual who brings a KOMA lawsuit cannot obtain a civil penalty.
25. K.S.A. 2012 Supp. 75-4320(a). The statute of limitations for seeking to void binding action is within 21 days of the meeting. Id.
KOMA violations often arise due to public officials’ ignorance of the law.

26. Other fees and expenses to be assessed as additional court costs shall be approved by the court, unless specifically fixed by statute. Other fees shall include, but not be limited to, witness fees, appraiser fees, fees for service of process, fees for depositions, alternative dispute resolution fees, transcripts and publication, attorney fees, court costs from other courts and any other fees and expenses required by statute. K.S.A. 60-2001(d).

27. K.S.A. 75-4320a(c). But if the plaintiff maintained the KOMA action frivolously, without a reasonable basis in fact or law, or not in good faith, then the court may award court costs to the defendant if the defendant is the prevailing party. K.S.A. 75-4320a(d).


30. See footnote 21, supra, for examples of dispositions.


33. K.S.A. 75-753. Complaints alleging violations of the open records act and dispositions must also be reported annually.

34. K.S.A. 75-753.
As an attorney in the Appellate Section of the Attorney General’s office, every brief written by either party in the criminal appellate system should make its way into our office. Kansas Supreme Court Rule 6.10 (2013 Kan. Ct. R. Annot. 562). As the primary attorney assigned to review and approve the briefs written on behalf of the State, I also try to read, or at least skim, the appellant briefs our office is served with to determine which issues are frequently raised.

The first part of this article is a snapshot of many of the common issues on appeal and the published case law that is shaping those issues. But this article does not seek to resolve any of these issues; instead it is merely an issue-spotting article. The second part of the article will highlight several recent published cases that do not involve common issues on appeal, but instead change the law, conflict with existing cases, or involve issues of first impression that may have significant impact in other cases.¹

**Part 1: Common Issues**

**Alternative Means**

Since almost every case that involves an element or related jury instruction with the word “or” in it is the subject of an alternative means issue, this area of law is constantly being addressed by the appellate courts. Recently the Kansas Supreme Court completely changed how alternative means are determined in State v. Brown, 295 Kan. 181, 284 P.3d 977 (2012), by introducing an “option within a means” analysis. Below are the crimes that have post-Brown cases discussing alternative means:

**Supreme Court Cases**

**Aggravated Battery**: The court first noted that the subdivisions of the statute meant there were at least five alternative means of committing aggravated battery. However, the court rejected defendant’s argument that “great bodily harm to another person or disfigurement of another person” created alternative means. The court also rejected the argument that the following circumstances state alternative means: 1) with a deadly weapon or 2) in any manner whereby great bodily harm, disfigurement, or death could occur. State v. Ultreras, ___ Kan. ___, ___ P.3d ___ (2013) (No. 103,527, decided March 1, 2013).

**Aggravated Indecent Liberties**: Each subsection in the statute creates alternative means, but the phrase “either the child or the offender, or both” does not. Brown, 295 Kan. at 200-02.


**Aggravated Intimidation of a witness**: The phrase “preventing or dissuading, or attempting to prevent or dissuade” does not constitute alternative means of that crime. Likewise, the definition of malice found in the intimidation of a witness statute does not constitute alternative means since definitions generally do not create alternative means. State v. Aguirre, ___ Kan. ___, 290 P.3d 612, 614 (2012).

**DUI**: The phrase “operate or attempt to operate” does not constitute alternative means of committing DUI. State v. Ahrens, 296 Kan. ___, 290 P.3d 629, 636 (2012).


**Kidnapping**: The phrase “taking or confining” constitute alternative means of kidnapping, but the terms “force, threat, or deception” are options within a means and do not create alternative means. Also, each subsection in the kidnapping statutes constitutes an alternative means, but the phrase, “to facilitate flight or the commission of any crime” does not contain alternative means. State v. Haberlein, ___ Kan. ___, 290 P.3d 640, 649 (2012).

**Sodomy**: The phrase “oral contact or oral penetration of the female genitalia or oral contact of the male genitalia” does not constitute alternative means. But the complete definition of sodomy contains three alternative means: (1) oral contact of genitalia, (2) anal penetration, and (3) sexual intercourse with an animal. State v. Stafford, 290 P.3d 562, 583 (2012). The phrase “by any body part or object” does not constitute alternative means. State v.


Court of Appeals Cases


Theft: The phrase “obtaining or exerting control” does not create alternative means. Snover, 287 P.3d at 949.

Constitutionality of Jessica’s Law


Harmless Error

The single most common suggestion I now make to the briefs I review is to consider adding a harmless error argument in every issue for which it is feasible. This suggestion stems from recent cases pointing out that the State waives harmless error if it is not adequately briefed. E.g. State v. Torres, 294 Kan. 135, 144, 273 P.3d 729 (2012). Additionally, it is the State’s burden to prove the erroneous admission of evidence is harmless. E.g. State v. McCullough, 293 Kan. 970, 983, 270 P.3d 1142 (2012).

Ineffective Assistance of Counsel/Conflict of Counsel

There are quite a few cases challenging whether counsel was constitutionally effective. Here are the ones that break new ground:

State v. Cheatham, ___ Kan. ___, 292 P.3d 318, 329-30 (2013): Although the Kansas Supreme Court reversed Cheatham’s convictions due to his counsel’s deficient and prejudicial admission of prior crimes and his conflict of interest, the following rulings should be helpful in other ineffective assistance of counsel (IAC) cases: 1) The failure to comply with ABA standards does not equal deficient performance; and 2) an IAC claim must be tied to a specific trial error; merely alleging insufficient preparation or insufficient experience is not a specific trial error.

State v. Edgar, 294 Kan. 828, 844-45, 283 P.3d 152 (2012): The argument that the deficient performance “may” have affected the result of a trial is not the equivalent of the requisite burden and standard requiring the defendant to establish a reasonable probability that a “not guilty” verdict would have resulted.

State v. Galaviz, ___ Kan. ___, 291 P.3d 62 (2012): In a case involving a defense attorney who had been the guardian ad litem for the victim, the court first determined that a defendant has the right to effective and conflict-free counsel at probation revocation proceedings. The court then overruled State v. Jenkins, 257 Kan. at 1079–80, 898 P.2d 1121 (1995), and held, when there is no objection to the conflict, the defendant must demonstrate a conflict of interest adversely affected the adequacy of the attorney’s representation. The case was then remanded in light of the insufficient record to make that determination on appeal.
Jury Instructions: Challenges to the District Court’s Failure to Read a Response to the Jury’s Question Directly to the Jury

Here, the defense bar challenges the district court’s submission of a written response to a jury question by arguing that the written response violates the defendant’s rights: 1) to be present, 2) to a public trial, and 3) to an impartial presiding judge. The Kansas Supreme Court recently rejected the first part of the challenge in State v. Wells, ___ Kan. ___, 290 P.3d 590, 608-09 (2012). The court has not reached the other two challenges, but the Court of Appeals has rejected those challenges as constituting harmless error in Womelsdorf, 47 Kan. App.2d at 319-26.

Jury Instructions: Eyewitness Identification Instruction

The Kansas Supreme Court held it is error to include a factor allowing the jury to consider the degree of certainty of the witness in the eyewitness identification instruction. State v. Mitchell, 294 Kan. 469, 275 P.3d 905 (2012).

Jury Instructions: Using the Former PIK on Reasonable Doubt

This issue has become the single most popular issue on appeal. In it, the defense bar contends that the PIK instruction, which was regularly given for well over a decade until the PIK was modified in 2005, unconstitutionally dilutes the State’s reasonable doubt burden. The challenge centers on the following statement, which uses the word any instead of each: “if you have no reasonable doubt as to the truth of any of the claims required to be proved by the State, you should find the defendant guilty.” Numerous Court of Appeals cases (mostly unpublished) have rejected this argument, and the Kansas Supreme Court just issued an opinion dealing with this issue. The published cases rejecting this argument include: State v. Herbel, ___ Kan. ___, ___ P.3d ___ (2013) (No. 103,558 filed April 5, 2013); State v. Beck, 32 Kan. App.2d 784, 88 P.3d 1233, rev. denied 278 Kan. 847 (2004), and State v. Womelsdorf, 47 Kan. App.2d 307, 334, 274 P.3d 662 (2012), petition for rev. filed May 10, 2012.

Jury Verdicts: The Failure to Comply With K.S.A. 22-3421

This issue continues to appear regularly based on the Court of Appeals’ decision in State v. Gray, 45 Kan. App. 2d 522, 249 P.3d 465, rev. denied 292 Kan. 967 (2011), which held the failure to comply with the statute constituted reversible error. It typically arises when the district court fails to ask the jury as a whole if the verdict is the verdict of the jury after the verdict is announced. The Kansas Supreme Court has not decided the issue in the wake of Gray, but two Court of Appeals cases have found the issue is waived if the defendant declines the district court’s offer to poll the juries. State v. Dunlap, 46 Kan. App. 2d 924, Syl. ¶ 5, 266 P.3d 1242 (2011), petition for rev. filed December 30, 2011, and Womelsdorf, 47 Kan. App. 2d at 334.

Preservation for Appeal

The Kansas Supreme Court’s current trend, in cases involving jury trials, has been to refuse to address issues that have not been preserved for appeal. Thus, when an issue is raised for the first time on appeal, and no explanation is attempted on why an exception should be applied, the court has declined to reach the issue. E.g. State v. Haberlein, ___ Kan. ___, 290 P.3d 640, 651 (2012); see also Kansas Supreme Court Rule 6.02(a)(5) (requiring a pinpoint citation to where the issue was ruled on below or an explanation of why the issue is properly before the court). But it remains unclear whether the opposing party must point out the procedural reasons the issue should not be reached in order for the court to decline to reach the merits. Further, if the trial is a bench trial on stipulated facts, the court is likely to review the issue if it was made in a pre-trial motion. E.g. State v. Kelly, 295 Kan. 587, 285 P.3d 1026 (2012).

Prosecutorial Misconduct

Prosecutorial misconduct remains a frequently raised issue on appeal. While the facts of these numerous claims vary too much to concisely summarize, one case stands out as it overrules previous cases saying a provoked response cannot be prejudicial. That previous holding has been replaced with the rule that “[t]he extemporaneous, rebuttal nature of a prosecutor’s argument is merely a factor to be considered by an appellate court.” State v. Marshall, 294 Kan. 850, 861, 281 P.3d 1112 (2012).


This issue is extremely likely to come up in every

**Restitution**

Challenges to restitution are becoming more prevalent. One more common dispute is whether the retail price of stolen goods can be used to calculate restitution. Some cases hold it can, while others require the wholesale price to be used. *E.g. State v. Davis*, __ Kan. App. ___, 294 P.3d 353 (2013) (retail cost is permissible when it is not disputed); *State v. Behrendt*, 47 Kan. App. 2d 396, 402-03, 274 P.3d 704 (2012), *petition for rev. filed* May 10, 2012 (only the wholesale price can be awarded). The Kansas Supreme Court heard oral arguments in this issue in the March docket, and hopefully its opinion in *State v. Hall*, No. 102,297, will clarify this issue.

**Search and Seizure**

Search and seizure challenges are regularly made on appeal, and challenges to consent seem to be especially popular and relatively successful. Although most of the cases reaching the issue are unpublished, here are the published cases finding the consent was invalid:

*State v. Spagnola*, ___ Kan. ___, 289 P.3d 68 (2012): The request to search a defendant’s pockets instead of performing a pat-down frisk was held to violate the Fourth Amendment. The defendant’s consent to search his pockets was held to be involuntary because his hands were interlaced behind his back when the consent was requested and because more than one officer was present.

*State v. Wendler*, 47 Kan. App. 2d 182, 274 P.3d 30 (2012): The consent to search the RV was not sufficiently attenuated to purge the taint of the illegal detention due to the lack of reasonable suspicion to extend the stop and the fact that the consent occurred very shortly after a barrage of questions that were part of the illegal detention. There was only a two second break between the officer ending the illegal detention and the request for consent.

Additionally, here are recent cases addressing issues other than consent:

**Arrest**

“K.S.A. 22–2401(d) allows a law enforcement officer to arrest a person when a crime ‘has been or is being committed by the person in the officer’s view.’ The plain language of the statute does not require that the arrest occur at any particular time.” *State v. King*, 293 Kan. 1057, 1061, 274 P.3d 599 (2012). Due to this interpretation, an arrest 15 days after the officer witnessed the crime was upheld. 293 Kan. at 1058, 1061.

**Search of a Cigarette Pack**

During a *Terry* frisk, the seizure of a cigarette pack after the defendant disregarded an order to not reach for it, and the officer articulated officer safety concerns, was reasonable, but the search of the pack was unconstitutional. *State v. Johnson*, 293 Kan. 959, 967-69, 270 P.3d 1135 (2012).

**Search of a Mobile Vehicle**

In *State v. Sanchez-Loredo*, 294 Kan. 50, 51, 272 P.3d 34 (2012), the Kansas Supreme Court held, for Fourth Amendment purposes, the mobility of a vehicle fulfills the requirement of exigent circumstances. Thus, a warrantless vehicle search is permitted based solely on probable cause.

**Search of Text Messages in a Search Incident to Arrest**

As a matter of first impression, and relying heavily on the facts of the case, the Kansas Court of Appeals held the cell phone on the defendant, who was arrested for possessing a substantial quantity of marijuana, was comparable to a container, and the search of the text messages was a valid search of a container incident to arrest since it was a valid search of evidence probative of criminal conduct. *State v. James*, ___ Kan. ___, 288 P.3d 504 (2012), *petition for rev. filed* December 10, 2012. In its decision, the court recognized that other jurisdictions have found searches of cell phones incident to arrest to be illegal. 288 P.3d at 513.

**Standards of Review**

Since Kansas Supreme Court Rules 6.02(a)(5) and 6.02(a)(4) require the parties to start each issue with the relevant standard of review, knowing the current standard of review is crucial to appellate practice. While the standards of review are too long to quote
in their entirety, here are the recent cases modifying a number of standards of review:

State v. Backus, ___ Kan. ___, 287 P.3d 894, 904 (2012), held the abuse of discretion standard applies when deciding if the district court correctly determined whether there was a sufficient reason to support a defendant’s claim of mental retardation.

State v. Plummer, 295 Kan. 156, Syl. ¶ 1, 283 P.3d 202 (2012), sets out the new framework for determining if the failure to give a requested instruction is erroneous.

State v. Rodriguez, ___ Kan. ___, 289 P.3d 85, 91-92 (2012), summarizes State v. Williams, 295 Kan. 506, 286 P.3d 195 (2012), which lays out the new framework for determining if the jury instruction, or the failure to give the jury instruction, is erroneous when there is no objection and notes that “clearly erroneous” is not actually a standard of review.


State v. Warrior, 294 Kan. 484, 510, 277 P.3d 1111, 1129 (2012), revised the standard of review on determining if Brady was violated and sets out the proper framework for reviewing a Brady allegation.

Question Reserved

After setting out the requirements for a State’s question reserved to even be considered, the Kansas Supreme Court clarified that an answer to a question reserved has no effect on the criminal defendant in the underlying cases and overruled any case holding otherwise. State v. Berreth, 294 Kan. 98, 124-25, 273 P.3d 752 (2012). The court also held that if the State elects a particular statutory basis for an appeal in its notice of appeal (which is not required in an appeal to the Court of Appeals) and docketing statement, the State cannot change that basis without notification or formal amendment. 294 Kan. at 112, 144.

Part 2: New Ground

Admission of Police Harassment

In King, the Kansas Supreme Court reversed the defendant’s convictions because the district court ruled the evidence regarding the officer’s motive to plant the cocaine and his alleged harassment by the officer, including alleged stalking and harassment, was irrelevant. The court noted: “Evidence of bias, interest, or improper motives of a witness is always relevant in order to place the witness’ testimony in proper perspective. A party should have wide latitude in establishing partiality, bias, motive, or interest of a witness.” 293 Kan. 1057, 1064-65, 274 P.3d 599 (2012).

Conflicting Law on Aggravated Robbery

The Court of Appeals panels are no longer in conformity on whether a robbery requires the intent to permanently deprive the victim of the property. In State v. Edwards, ___ Kan. App. ___, 290 P.3d 661, 671-74 (2012), the panel disagreed with another panel’s conclusion in State v. Montgomery, 26 Kan. App. 2d 346, 988 P.2d 258 (1999), and held that the plain language of the statute, and Kansas Supreme Court precedent, did not require an intent to permanently deprive the victim of the property.

Constitutional Speedy Trial: Computation When Charges Are Re-filed

In State v. Gill, 48 Kan. App. 2d 102, 113-14, 283 P.3d 236 (2012), petition for rev. filed September 27, 2012, as an issue of first impression, the Court of Appeals decided:

“when the State dismisses a charge and files another one, the constitutional speedy trial clock will start anew in the second case if the State dismissed the first case because of necessity or the charge in the second case is not identical to the charge that was previously dismissed. If, however, the first case was not dismissed because of necessity and the charge in the second case is identical to the charge previously dismissed, then the dismissal of the first case will be construed as merely tolling the constitutional speedy trial clock.”

Death Penalty

As relevant to other pending death penalty cases, in State v. Cheever, 295 Kan. 229, 284 P.3d 1007 (2012), petition for cert. granted February 25, 2013, the Kansas Supreme Court held K.S.A.
21-4627(b) requires the court to address any issue raised by the defendant regardless of whether the issue was preserved. 295 Kan. at 241. The court also determined that whether the defendant is at least 18 is a fact that must be determined by the jury in order to impose a death sentence. 295 Kan. at 265.

As relevant to all capital murder cases, the court decided felony murder is a lesser included offense of capital murder. 295 Kan. at 259.

**Expert Witness Qualifications**

In *Gaona*, the Kansas Supreme Court thoroughly covered Kansas case law discussing expert witnesses in sex crimes cases. It then held the Finding Words Executive Director, Kelly Robbins, was an investigator and was not properly qualified to testify regarding the difficulty and rarity of coaching children to make false allegations or common characteristics of child abuse victims, including delayed disclosure and piecemeal disclosure. 293 Kan. 930, 947-948, 270 P.3d 1165 (2012).

**Expungement**

Because there is no language indicating retroactivity, the court must use the expungement statute in effect at the time the crime occurred to determine whether expungement is permitted. *State v. Jaben*, 294 Kan. 607, 613, 277 P.3d 417 (2012). However, the Kansas Supreme Court specifically limited its decision to K.S.A. 21-4619 and warned that its decision should not be read as interpreting or applying the current statute or any future amended version of the statute. 295 Kan. at 610.

**Factual Basis of a Plea**

In *State v. Ebaben*, 294 Kan. 807, 281 P.3d 129 (2012), the Kansas Supreme Court held that the mere recitation of the bare-boned elements of the offense of sexual battery without any facts or evidence to support the elements was insufficient to establish a factual basis for the plea. Hence, the defendant was allowed to withdraw his plea.

**Immunity Based on Self-defense**

This claim has not come up often on appeal, but the latest case issued by the Kansas Supreme Court is important because the district court has lacked guidance on the practical application of the immunity statute. In *State v. Ultereras*, ___ Kan. ___, ___ P.3d ___ (2013) (No. 103,527, decided March 1, 2013), the court held the prosecution must negate a claim of immunity by satisfying the probable cause standard in proving the force used by the defendant was not justified. Additionally, the court held that using an improper standard could be reviewed for harmless error, and any error was harmless when the jury found the defendant guilty beyond a reasonable doubt. However, the court did not reach the issue of the procedures that should be used to present or resolve the issue in the district court.

**Jail Credit: Residential Drug Abuse Treatment Facility**

As an issue of first impression, the Kansas Supreme Court held that the defendant was entitled to receive jail time credit in her attempted robbery case for the time she spent in a residential treatment facility even though the treatment was required in a separate SB 123 case and not ordered in her robbery case. *State v. Hopkins*, 295 Kan. 579, 586, 285 P.3d 1021 (2012).

**Legal Impossibility**

“It is a legal impossibility to both attempt the commission of a crime and complete the commission of the same crime, because the failure to complete commission of the crime is an element of attempt.” *State v. Hernandez*, 294 Kan. 200, 204, 273 P.3d 774 (2012). If a jury returns a verdict convicting the defendant of both, the district court must order the jury to reconsider and correct its verdicts. 294 Kan. at 205. In *Hernandez*, the failure of the judge to take remedial action led to a mistrial being declared on appeal.

**Mandatory 48 hours in Domestic Violence Cases**

In *State v. Skillern*, ___ Kan. App. ___, 288 P.3d 147, 151 (2012), the Court of Appeals interpreted K.S.A. 2011 Supp. 21-5414(b)(1) and concluded that the statute does not require a defendant to serve a minimum of 48 hours in custody before being granted probation.

**Multiplicity: Aggravated Indecent Liberties**

In *State v. Sprung*, 294 Kan. 300, 310, 277 P.3d 1100 (2012), the Kansas Supreme Court held that
subsection (A) of the aggravated indecent liberties creates only a single unit of prosecution. Thus, the
digital penetration of the child’s anus and vagina,
immediately followed by placing the child’s hand on
the defendant’s penis, were all part of the single unit
of prosecution.

**Offender Registration**

In *State v. Nambo*, 295 Kan. 1, 7, 281 P.3d 525
(2012), the Kansas Supreme Court held the definition
of offender requires an unarmed accomplice to
register as an offender.

**Redefining Lewd**

In *State v. Ta*, ___ Kan. ___, 290 P.3d 652
(2012), the Kansas Supreme Court reworked an
earlier definition and held that whether a touching is
lewd cannot be determined by a defendant’s mental
state, but rather by an objective determination of
whether the touching tends to undermine the morals
of the child and would outrage the moral senses of a
reasonable person.

**Right to Counsel**

P.3d ___ (2013) (No. 106, 937, filed February 8,
2013), the Court of Appeals held that under K.S.A.
22-4506(c) an indigent inmate has a statutory right to
the appointment of appellate counsel upon the filing
of a notice of appeal of the district court’s ruling on a
petition for a writ of habeas corpus filed pursuant to
K.S.A. 60-1501.

**Sentencing**

*Prior Rape Conviction: Aggravated Habitual Sex Offender v. Persistent Sex Offender*

When a defendant is convicted of rape and has
at least one prior rape conviction, the aggravated
habitual sex offender statute and the persistent sex
offender statute both apply equally, and neither is
more specific. Thus, the defendant is required to be
sentenced under the more lenient statute. *State v.

*Doubling a Jessica’s Law Sentence*

The persistent sex offender statute cannot apply
to double the mandatory minimum of 25 years’
imprisonment for an off-grid Jessica’s Law offense.

*State v. Wilson*, 294 Kan. 818, 820, 280 P.3d 784
(2012).

**State’s Breach of a Plea Agreement**

The Kansas Supreme Court recently released
two cases finding that the State had breached its plea
agreement and remanded the cases for resentencing in
front of a different judge. In *Peterson*, ___ Kan. ___,
293 P.3d 730 (2103), which involved an agreement by
the prosecutor to stand silent at sentencing, the court
found that the prosecutor’s actions in cross-examining
the defendant to correct misrepresentations were
appropriate, but came close to crossing the line of
disguised argument. The court further found the
prosecutor did cross the line and breached the plea
agreement when, in her closing comments, she
referenced recidivism and argued that the defendant’s
dishonesty meant he was not likely to address his
desire to look at child pornography.

In *State v. Urista*, ___ Kan. ___, 293 P.3d
738 (2013), the prosecutor agreed to make a
sentencing recommendation and actually made that
recommendation to the court three times. But in the
course of making her recommendation, the prosecutor
also made numerous and extensive negative
comments regarding the defendant. The court held
the plea agreement was breached by the unprovoked
comments, which went beyond the facts of the case
and a summary of the victim’s statements to constitute
an example of a prosecutor giving her personal
opinion of the defendant and effectively argued
against the recommended sentence.

**Taint Hearing**

While not deciding if the trial court is required to
conduct a taint hearing to determine the reliability of
a child’s statement before permitting the admission
of the statement, the Kansas Supreme Court has
ruled that a separate hearing, solely for the purpose
of determining whether the victim’s statements was
519, 547-49, 276 P.3d 165 (2012).

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1. This article only encompasses published Court of Ap-
peals and Kansas Supreme Court cases from March 1,
2012, until March 1, 2013, and does not attempt to summa-
rize every case that was issued during that timeframe.
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