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About the Cover
The Woodson County Courthouse was built from 1899 to 1900. The brick courthouse sits on a limestone base and has a Late Victorian design. The building is topped by four corner towers and a central cupola. The courthouse was added to the National Register of Historic Places on October 10, 1985.

The courthouse is located at:
105 W. Rutledge
Yates Center, KS 66783

Photo by John D. Morrison, Prairie Vistas Photography

This magazine is dedicated to professional prosecutors across the state of Kansas for public information. The KCDAA and the members of the Editorial Board assume no responsibility for any opinion or statement of fact in the substantive legal articles published in The Kansas Prosecutor. We welcome your comments, suggestions, questions, information, etc. From time to time, The Kansas Prosecutor will publish articles dealing with controversial issues. The views expressed in The Kansas Prosecutor are those of the authors and may not reflect the official policy of the KCDAA. Send correspondence to: The Kansas Prosecutor editor, 1200 S.W. Tenth Avenue, Topeka, Kansas 66604 or e-mail Nicole Van Velzen at nickiv@gmail.com.

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The current legislative session has proven again the importance of active involvement in the KCDAA. Members provided testimony both written and in person in support of bills backed by the association; provided valuable insight against bills contrary to the administration of criminal justice and finally worked with legislators and other interest groups to improve bills that, while well-intended, needed much improvement from their initial versions. For a detailed description of each bill of interest to the KCDAA and its relative progress through the session, I will defer to the article herein written by Patrick Volgelsberg of Kearney and Associates. I will however, take a moment to recognize the effort put into SB 367. Personal meetings between KCDAA board members and leaders from both the House and the Senate to discuss 367 preceded the session; personal trips were made for further discussion once the session began; and opposition testimony was offered in committees in both chambers by KCDAA members. Suffice to say, the KCDAA continues to be concerned with both the unintended consequences and the adequacy of funding for SB 367, the final version submitted to the Governor is decidedly better than the initial proposal. The KCDAA remains committed to identifying areas of improvement next session.

On a related subject, we also expect proponents to be back next year pushing for reform of the adult criminal justice system. Expanded availability of diversion, reducing sentences for “non-violent” offenders and expanded use of community–based alternatives to incarceration seem to be the primary goals of this effort. While the KCDAA supports legitimate efforts to improve the system of justice in our state, we will remain vigilant in the coming year to ensure that any measure is adequately funded, well thought through and will do nothing to diminish the public safety of the communities our membership represents.

One specific area that advocates for reform increasingly point to is the expanded use of body cameras. While these cameras provide many opportunities for enhancing trust and transparency, there are many issues to be ironed out. The cost and manpower associated with prosecutor’s discovery obligations alone are significant. How to collect, track, edit (when necessary) and disseminate all those video clips to defense counsel without crashing your county’s server, or overwhelming your staff while still finding time to watch all those clips—are all issues of great importance to our membership.

I was recently asked to provide the counter-point to an article written by Mark McCormick, Executive Director of the Kansas African American Museum in Wichita, regarding the propriety of public access to police-worn body cameras. The discussion was written in anticipation of the completed deployment of nearly 430 body worn cameras by officers with the Wichita Police Department. The discussion below was my contribution to this topic and appeared in The Journal, published by the Kansas Leadership Center, Volume 8, Issue 1, Winter 2016 (full article can be found at http://klcjournal.com):

“The ability of body cameras to objectively memorialize interactions between police and citizens promises to provide many enhancements to the justice system. Public policy discussions regarding access to the video recordings must balance issues of cost, privacy and one’s right to a fair trial.

Maintaining hours of video will be expensive,
though as more departments add cameras, vendor competition should reduce cost. Cost analysis must also account for staff hours spent redacting video to protect privacy interests of children, sexual assault victims and others. Given the 400 + Kansas law enforcement departments statewide—from 2-3 man offices to the 400 + certified police working for the WPD—a one-size-fits-all, unfunded mandate will be difficult.

Similarly, while privacy concerns should not derail camera use, if the goal of this effort is to memorialize encounters which are later contested in some fashion, we should weigh the consequences of giving open records-type access to videos of all police/citizen encounters. Police see people at their worst: intoxicated, depressed, suicidal, unconscious, disheveled, or beaten. Do we enhance or demean our communities by allowing unfettered/open records access to all situations simply because law enforcement responded to a scene?

Rising above all concerns though, is the absolute right of an accused to receive a fair trial. Supreme Court Rule 3.6 unequivocally states that a lawyer “shall not” disseminate information that “will have a substantial likelihood of materially prejudicing an adjudicative proceeding.” Rule 3.8, Special Responsibilities of a Prosecutor, states that “except for statements that are necessary to inform the public of the nature and extent of the prosecutor’s action and that serve a legitimate law enforcement purpose, [shall] refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and [shall] exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extra-judicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this rule.”

A video, like a DNA report, is evidence. Public trials are where an accused, with counsel, confronts and challenges evidence—including video—he or she has previously been provided in discovery per Brady v. Maryland, 373 U.S. 83 (1963) and K.S.A. 22-3212.

If a carefully restrained release of a still photo or short video clip can ease community tension and add transparency without impacting the right to a fair trial, then “a legitimate law enforcement purpose” may be served (Rule 3.8). When appropriate, this approach can balance legitimate calls for transparency against the litany of Constitutional due process rights uniquely granted to criminal defendants: right to silence, double jeopardy, right to counsel, speedy trial, the presumption of innocence, et cetera.

As policy makers wrestle with how to set access, law enforcement professionals must continue to follow the ethical rules and constraints long present in our law. Appellate courts will ultimately judge whether transparency can be achieved without sacrifice to fairness.”

As the use of body cameras expands statewide, the inevitable discussion regarding the use of and access to these cameras will increasingly require our membership to speak to this important topic. I would encourage prosecutors around the state to familiarize themselves with the issues surrounding their use and the propriety of their release. When a controversial encounter between a law enforcement officer and a citizen is recorded, we must be prepared to carefully and ethically respond to calls from all sides of the issue.
Legislative Update

by Patrick Vogelsberg, Associate

There is difficulty in writing a legislative article in the midst any legislative session because there is largely no finality until after the Veto Session (a.k.a. Wrap-up Session) concludes. Furthermore, legislative sessions are always fluid, more so as the Legislature heads into the segment where conference committees are meeting to reconcile differences between House and Senate versions of bills. It is commonplace for the bills in conference to be amended, combined with other subject-related bills, or completely gutted and replaced with other, unrelated pieces of legislation. Such is par for the course in the period leading up to the First Adjournment and during the Veto Session.

As I write, the Legislature has just adjourned for a five-week recess before they return for the Veto Session on April 27th. Perhaps appropriate at this point is start this article with the KCDAA legislative agenda during the 2016 Session and then follow-up with other notable bills that are of interest to prosecutors.

In my last article, I indicated that the KCDAA Board was still determining what the 2016 legislative agenda would be for the association. In early December, the Board met and decided to move forward with six initiatives.

1. Amend the laws dealing with the Kansas Criminal Justice Information System (KCJIS) regarding electronically stored information; authentication of such records by the KBI; and allow these records to be used in court by incorporating into the hearsay evidence exception for the content of official records or absence of records. This initiative was brought forth in SB 362 and had hearings and advanced in the House and Senate. SB 362 passed the legislature and was presented to the Governor on March 28, 2016 for his signature.

2. Amend the laws regarding who can access the official file and social file for CINC cases to specifically include any county or district attorney from another jurisdiction with pending CINC case regarding the same parties or interested parties. SB 325 had hearings and advanced in the Senate and House. The House Corrections and Juvenile Justice committee made amendments to update references to the Secretary of Corrections and added files regarding any “interested parties” also involved in the pending CINC matter. SB 325 ultimately passed the House, but since it was in the House, the Senate sent this bill to conference committee. The final version of this legislation has been agreed to, but the House and Senate Corrections conference committee left this bill open with the possibility of adding other legislation during the Veto Session.

3. Amend the laws regarding the mandatory disposition of detainers act. Specifically, clarify that an inmate’s request for final disposition of outstanding detainers is to be delivered to the Secretary of Corrections. These changes were sought in response to State v. Burnett, 297 Kan. 447 (2013). SB 392 had hearings and advanced in both the Senate and House and was presented to the Governor on March 28, 2016 for his signature.

4. HB 2002 was a carry-over bill from the 2015 session. It would have amended the crime of sexual exploitation of a child in two major ways. First, by making the intent of the crime consistent throughout the statute by specifying that the crime is committed with the intent to arouse or satisfy the sexual desires or appeal to the prurient interest of the offender or any other person. Second, it would have amended the definition of “sexually explicit conduct” by specifying that “appearance in the nude” could occur with or without the knowledge of the child. HB 2002 had a hearing in 2015 in House Judiciary committee and a follow-up briefing early in the 2016 session. However, the bill did not advance out of committee.

5. Amend the law to allow hearsay at preliminary hearings. Currently, hearsay is only allowed at preliminary hearing when the victim of a felony is less than 13 years of age. SB 327 would have removed the restrictions and, therefore, allowed all hearsay at preliminary hearings. SB 327 had
a hearing in Senate Judiciary, but was tabled when the committee brought the bill up to be worked. The KCDAA may consider pursuing further in the next legislative session.

6. Limit the successive filing of frivolous civil motions, i.e. 60-1501 and 60-1507 motions, by indigent inmates after the motion has been dismissed or denied on the grounds that it is successive, time-barred, frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the inmate is under imminent danger of serious physical injury. The KCDAA offered this change as an amendment to another bill in the House and Senate Judiciary committees, but it was not adopted. The KCDAA may consider pursuing further in the next legislative session.

Of the six legislative initiatives the KCDAA is pursuing during the 2016 session, three have advanced and are likely to become law. However, what has taken up most of the KCDAA’s legislative attention has been the sweeping juvenile justice reform efforts contained in SB 367.

SB 367 was the work product of the Kansas Juvenile Justice Workgroup, which was charged with reviewing the juvenile justice system and making recommendations for its improvement. This workgroup consisted of seventeen, handpicked “stakeholders” with various levels of experience in the juvenile justice system. The Pew Charitable Trusts provided technical assistance and lobbyists to advance the bill in the 2016 session.

To go through this 100+ page bill in this article would take up most of the Spring issue. Therefore, I will focus on the KCDAA’s response and the amendments sought to mitigate the KCDAA Board’s concerns. Hearings were held in less than a week after the bill was made publicly available. The KCDAA formally opposed SB 367 in the House and Senate Corrections and Juvenile Justice Committees and joined with other prosecutor offices in testifying in opposition to the bill. The Senate committee adopted favorable amendments to the bill that:

- Removed overall case length limits for certain felonies that the original bill provided.
- Restored current law on violent offenders I and II that would have been removed or amended by the bill as introduced.
- Removed cumulative detention limits on high severity levels that would have been capped by the bill as introduced.

Furthermore, on the Senate floor, an amendment was adopted to restore extended jurisdiction juvenile prosecution (EJJP), which would have been eliminated entirely by the bill as introduced. However, there are remaining modifications to the eligibility, burden of proof, and procedure of EJJP.

Regardless of these amendments, KCDAA concerns remained and testified in opposition in the House Corrections and Juvenile Justice committee. The House committee adopted several amendments attempting to accommodate concerns raised by the KCDAA and others. These amendments in part included:

- Changed the appointing authority for the Juvenile Justice Oversight Committee prosecutor representative from the Governor to the Attorney General.
- Struck speedy trial and preliminary hearing rights for juveniles that were added by the Senate committee.
- Retained a maximum of 50 youth residential facility beds. The original bill would have eliminated all group homes.
- Allowed probation to be extended for good cause in addition to being extended for
completion of a program.

- Extended the cumulative detention limit for certain offenders from 30 days to 45 days.

- Extended the time frame for detention review hearings from every 7 days to every 14 days and exempted high-severity-level offenses from the requirement.

- Specified that county and district attorneys are not required to supervise immediate intervention programs.

In reconciling the differences between the House and Senate versions of SB 367 the six-member conference committee ultimately agreed to reduce the length that probation could be extended to 1 month for low risk (instead of 2 months); 3 months (instead of 4 months) for moderate risk, leaving high risk at 6 months. In addition to the probation limitations, the conference committee agreed to have the supervising agency collect data on the number of times that “good cause” is used to extend probation.

The conference committee report detailing the final version of SB 367 was adopted by the House and Senate on March 24, 2016, and is expected to be approved by the Governor in the near future.

Regardless of the amendments adopted that attempted to address opponent testimony, the KCDAA remains concerned. The funding necessary to support community-based alternative intervention programs remains to be identified and provided for in any reliable or sustainable way. Furthermore, the bill limits the courts’ discretion to hold offenders accountable and protect the public. Lastly, the KCDAA continues to question the likelihood that any savings from limiting out of home placement of juvenile offenders will actually be reinvested to an adequate level in the years to come. However, with many provisions of this bill having delayed implementation dates, opportunities exist for the KCDAA to offer corrective legislation in the coming legislative sessions.

In addition to KCDAA’s legislative agenda and SB 367, there are still a number of bills of possible interest to prosecutors that we continue to monitor. Those include, in part, the following pieces of legislation that continue to be viable at this point:

- SB 428 relating to eyewitness identification. Originally would have mandated certain procedures to be followed by law enforcement. KCDAA opposed and offered an amendment to require law enforcement agencies to have a policy on eyewitness identification, which was adopted by the Senate Judiciary committee. Related was HB 2593 regarding mandatory recording of interrogations. KCDAA opposed and offered amendment to require a policy to be adopted, but not mandate recording. The bill was ultimately tabled in House Corrections and Juvenile Justice committee.

- Sub for SB 2289 relating to DUI test refusal or failure and the subsequent administrative hearing procedure.

- Sub for SB 18 regulating access to certain law enforcement audio and video recordings and adding an exception to disclosure under the open records act.

- HB 2151 regarding citizen grand juries; allowing petitioner to witness instructions given to the grand jury.

- SB 453 creates a program for early release from incarceration for parents in certain cases.

- HB 2502 amends court procedures regarding time limitations and findings of manifest injustice for motions attacking sentence.

- HB 2049 would lower penalties for first and second-time possession of marijuana. The House version also includes provisions...
regarding use of hemp oil and agricultural hemp production. Senate version includes increasing penalties for residential burglary (provisions from SB 20) without reference to hemp oil or agricultural hemp. HB 2049 is in conference committee where the differences between the House and Senate versions are yet to be reconciled.

- HB 2462 increases limits for felony theft.
- HB 2545 regarding the release of information in support of arrest warrants and search warrants.
- SB 391 creates the crime of unlawful transmission of a visual depiction of a child and unlawful possession of a visual depiction of a child. Euphemistically referred to at the teenage “sexting” bill.
- HB 2018 was previously many different things, but currently is the annual update to the drug schedule.
- HB 2464 would allow a prison sanction to be imposed for absconders without the offender first having served a county jail sanction under the graduated sanction laws.
- SB 375 changes the definition of “significantly subaverage general intellectual functioning” related to intellectual disability.

Many of these bills are awaiting final work on in conference committees, which will resume their work at the end of April when legislators return for the Veto Session. A reminder at this point in the session is that a bill only has had to pass one chamber for it to be put into a conference committee report of a subject-related bill. Therefore, it is not necessary for a bill (actual bill number) to pass both chambers if its contents are put into the conference committee report of another bill in “Conference” and passes both chambers as long as all provisions in the report are of a single subject.

The 2016 Session has been busy and like any legislative session, it has its own unique attributes to navigate. As the session comes to conclusion we will continue to monitor with the KCDAA Board and intervene where possible. I appreciate the opportunity to work with the KCDAA board at the Statehouse.

Job Posting

The Seward County Attorney’s Office has an immediate opening for an assistant county attorney with 0-3 years of experience. Must be licensed to practice law in Kansas. The position may include the prosecution of juvenile, felony, misdemeanor, and/or traffic cases. Compensation depends on experience.

Please send a letter of application, resume and references to Russell Hasenbank, Seward County Attorney, 415 N. Washington, and Ste. 106-107, Liberal, KS 67901 or by email at rhasenbank@sewardcountyks.org
Babies

Assistant District Attorney in Wichita, Matt Dwyer, wife Ashley and big brother Max welcomed Charles Michael Dwyer, aka Charlie, on January 29, 2016. Charlie weighed 7 lbs. 9.6 oz. and was 19 inches long.

Assistant County Attorney Joan Lowdon and her husband Christopher welcomed their second child, Emery Agnes Lowdon. She was born April 25 weighing 8 lbs. 3 oz.

Torrance Parkins, McPherson County Attorney, and his wife Ann Parkins, a partner with Wise & Reber, L.C., welcomed their first child Benjamin Tyler Parkins on October 13, 2015. Benjamin was 8 lbs. 11 oz. and 21.5 inches at birth and is growing up happy and healthy.

Leavenworth Assistant County Attorney Christopher Scott and his wife Jennifer delivered their first child on February 20. Her name is Sophia Margaret Scott. 7 lbs. 4 oz.

Assistant District Attorney Tyler Roush and wife Ashley welcomed Bennett James Roush on November 29, 2015. Bennett weighed in at 7 pounds even and 19 inches.

Assistant District Attorney Matt Erb, wife Tiffany and their three children, Amelia, Henry and Evangeline, welcomed Clara Elise Erb into the family on September 24, 2015. Clara was 7 lbs., 13.5 oz. and 20 inches long.

Marriage

Leavenworth County Attorney Todd Thompson married Dr. Rabiya Suleman November 14. Dr. Suleman is an OB/GYN with Specialist in Women’s Care. She works out of Overland Park Regional Hospital.

Andrea Patrick, Dickinson County Assistant County Attorney, married John Purvis on December 11, 2015. The ceremony and reception were held at the Abilene Civic Center. John Purvis is an attorney in private practice in Abilene, Kansas.

Office Changes

Susan Alig has the left the Wyandotte County District Attorney’s Office and is now serving as Assistant Counsel for the Legal Department within the Unified Government of Wyandotte/KCK. Susan was as Assistant District Attorney for 4 years.

Kathryn Devlin, from Oskaloosa, Kansas, switched offices from Wyandotte County to Leavenworth County Attorney’s Office. Mrs. Devlin is a University of Kansas Law graduate. She currently handles domestic violence and sexual abuse cases.
Megan Williams, from Olathe, Kansas, switched offices from Shawnee County to Leavenworth County Attorney’s Office. Ms. Williams is a Washburn Law graduate. She currently handles juvenile and domestic violence cases.

Torrance Parkins took office as the McPherson County Attorney in July of 2015. He filled the vacancy left by David Page who took a position as an Administrative Federal Judge in Wichita, KS.

Brian Koch became a Deputy County Attorney for McPherson County on October 1, 2015. Brian formerly worked as an Assistant County Attorney in Labette County, Kansas.

New Faces

Shawn Boyd, was hired by the Leavenworth County Attorney’s Office. Shawn previously worked for Wyandotte County as an Assistant District Attorney for seven years. He is a Washburn Law graduate.

Michelle Fuchs joined the Wyandotte County District Attorney’s Office. Michelle is from Leawood, Kansas and graduated from Shawnee Mission East High School. She received her Bachelor’s degree in English and Psychology from the University of Kansas in 2012. Michelle went straight to the University of Kansas School of Law after graduating from college, and graduated from law school in May of 2015. She interned for the Wyandotte County District Attorney’s Office while in law school. Michelle will be prosecuting juvenile offender cases in the District Attorney’s office.

Congratulations

Norbert Marek, former Wabaunsee County Attorney, was appointed District Judge of the Second Judicial District by Governor Sam Brownback. He took the oath of office on January 4, 2016.

Jessica Domme, Kansas Attorney General’s Office, was named an honoree of the annual Topeka’s Top 20 Under 40 Award from the Jayhawk Area Council.

We want to share your news!

We would like to publish baby announcements, new attorneys, anniversaries, retirements, awards, office moves, if you have been published, or anything else you would like to share!

If you have something you’d like to share with the KCDAA membership, keep us informed!

Please send your announcement and photos to Nicole Van Velzen at nickiv@gmail.com.

Next deadline: July 13
In 2014, the Kansas Prosecutor Foundation gave out its first ever annual Community Service Award.

The award recognizes a Kansas prosecutor who has rendered outstanding service to his or her community in addition to the performance of the duties required by the prosecutor.

Make a nomination today!
Deadline: May 2
Visit www.kcdaa.org/community-service-award for more information.
KPF PROSECUTOR
COMMUNITY SERVICE AWARD
NOMINATION FORM

The Kansas Prosecutors Foundation has announced the creation of an annual award intended to recognize a Kansas prosecutor who has rendered outstanding service to his or her community in addition to the performance of the duties required by the position of a prosecutor. Nominations for the award should include a biography of the nominee, as well as a description of the community service for which the prosecutor is being nominated. Final selection for the award will be made by the Board of Directors of the KPF, and the award will be presented at the KCDA Spring Conference in June 2016.

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

Biographical Information:

Community Service:

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

Please return this form with any additional pages by mail, fax or e-mail to:
Kansas Prosecutors Foundation
Attn: Kari Presley • 1200 S.W. 10th Ave • Topeka, Kansas 66604
FAX: (785) 234-2433 • EMAIL: kari@kearneyandassociates.com
ATTENTION: DEADLINE MAY 2, 2016 at 5 P.M.
THE KANSAS PROSECUTORS FOUNDATION SCHOLARSHIPS

Applications due
April 30, 2016

Endowing the Kansas County & District Attorneys Association
Enhancing Public Safety Through Professional Criminal Prosecutions

KCDAA Spring Conference

June 9–10, 2016
Hilton Garden Inn, Manhattan, KS

• Network
• Learn Best Practices
• Earn Continuing Legal Education Credits
• Discuss Legislative Issues
• And More!

Save the Date!
SCHOLARSHIP QUALIFICATIONS

Recipients of KPF scholarships shall meet the following criteria:

1. a Kansas resident;
2. a 2L or 3L enrolled in a law school in Kansas;
3. demonstrate a desire to become a prosecutor;
4. exhibit previous or ongoing activities of public service;
5. either be pursuing a career in prosecution or the administration of justice; and
6. may not be a member within the first degree of relationship to either a member of the scholarship committee or the KPF board.

SCHOLARSHIP AWARD PROCESS

1. Scholarship application forms shall be reviewed and approved by the KPF board of trustees.
2. Scholarship application forms are due by April 30 of the year in which the scholarship is sought.
3. The review period of the submitted scholarship applications shall be between May 1 and June 1.
4. The scholarship committee will review only fully completed scholarship applications which comply to the directions of the scholarship application form. Application packets which fail to conform to the scholarship application form requirements by the due date will be considered incomplete and not considered.
5. Final decision on scholarship recipients will take during the KPF Board Meeting each May unless otherwise authorized by the KPF Board.
6. All applicants will receive decision notification, in writing, within ten (10) business days of the KPF Board decision.
7. Scholarships shall be presented to selected recipients at the KCDAA conference in June. Scholarship recipients are required to accept the scholarship at the KCDAA Spring conference, unless waived, for good cause, by the KPF Board. A modest travel stipend is given to the winner for travel expenses.

HOW TO APPLY

Send the application form with all required materials (essay, proof of enrollment, bio and photo) by April 30 to:
Kansas Prosecutors Foundation, 1200 SW 10th Ave., Topeka, KS 66604
or e-mail materials to: kari@kearneyandassociates.com.

Questions? Call 785-232-5822

THE KANSAS PROSECUTORS FOUNDATION WILL AWARD
UP TO TWO SCHOLARSHIPS EACH YEAR - one to a student of each regent law school
(unless otherwise determined by the KPF Board.) Each selected recipient will receive a $1,500 check from the Kansas Prosecutors Foundation.
SCHOLARSHIP APPLICATION

APPLICANT INFORMATION

Name: ________________________________________________________________________
Address: ______________________________________________________________________
City _____________________________ Kansas Zip ___________________________
Age ________  Phone_____________  Email _____________________________________
G.P.A. ___________  (on a 4.0 scale)

Have you received a past scholarship from this organization?___________________________
(Yes with year listed or No )

In addition to this application, you are required to submit:

1. A 500 word essay containing the following:
   • Interests in a career in public service - particularly in prosecution
   • Career Goals
   • Indicate any past or current public service activities

2. Provide proof of enrollment at the University of Kansas Law School or Washburn University School of Law with a transcript from the institution.

3. A 250 word (or less) biography stating information about your previous and/or current school experience, a brief account of activities you are involved in, how you got interested in public service, and goals for the future. This biography, along with your photo, will be published in the Kansas Prosecutor magazine and will not be used in the selection process.

4. Please send in a current high quality photo. It can either be a hard copy if you are mailing materials or a digital copy if you are e-mailing materials. (A photo printed on a photo printer will not reproduce well.)
DUI Criminal Refusal Law
What you should know about Ryce and Nece
by Greg Benefiel, Assistant Attorney General

The Kansas Supreme Court held the DUI criminal refusal statute\(^1\) to be unconstitutional in *State v. Ryce*\(^2\) and three companion cases\(^3\) on February 26, 2016. In *State v. Nece*, one of the three companion cases, the Court also held the Kansas implied consent advisory to be coercive as it provided false information making any consent obtained involuntary. While *Ryce* impacts only individuals charged or convicted of DUI criminal refusal pursuant to K.S.A. 8-1025, *Nece* could potentially impact every DUI prosecution with an evidentiary test obtained pursuant to Kansas implied consent required notices since July 1, 2012, when the criminal refusal statute became law.

**State v. Ryce**

The Court ultimately held that K.S.A. 8-1025 violates the substantive due process rights of anyone choosing to exercise a constitutional right to withdraw consent to a warrantless search because the DUI criminal refusal statute is not narrowly tailored to meet the State’s goal of reducing impaired drivers. Before reaching this conclusion, however, the Court considered the State’s argument that a driver does not have a right to withdraw consent after driving, and also considered the underpinnings of decisions by the North Dakota Supreme Court and Minnesota Supreme Court in similar cases.

The Court rejected the State’s argument that a driver who has accepted the privilege of driving has waived the right to withdraw consent implied under K.S.A. 8-1001. Following its previous holding in *State v. Edgar*,\(^4\) in which the Court examined the right to withdraw consent to a preliminary breath test and held “(1) any consent to a search is valid until it is withdrawn and (2) the right to withdraw consent is a constitutional right,”\(^5\) the Court rejected the suggestion that implied consent is irrevocable. The *Ryce* Court applied *Edgar* to an evidentiary test conducted pursuant to implied consent and found that “the driver has a right grounded in the Fourth Amendment to refuse to submit.”\(^6\)

While no Fourth Amendment search occurred, Ryce’s “claim rests on rights flowing from the Fourth Amendment.”\(^7\) The Court found the DUI criminal refusal statute implicates a defendant’s liberty interests and analyzed Ryce’s claim for a violation of substantive due process. The Court held that strict scrutiny applied as the revocation of implied consent implicates a fundamental Fourth Amendment Right.\(^8\) The Court found the State has a compelling interest to combat impaired drivers, but “given the availability of a warrant,” questioned if the statute is narrowly tailored to meet the State’s interests.

The Court found that a warrant is the constitutionally approved tool “capable of achieving the same goals as those targeted by the test refusal statute.”\(^9\) If the State obtained a warrant, the State could have served all its criminal justice purposes without punishing Ryce’s exercise of a constitutional right. It could have (1) held Ryce accountable for driving while intoxicated, (2) deterred his refusals by legitimately threatening a warrant search, (3) reduced costs of prosecution by obtaining a warrant, searching, and finding evidence, and (4) if Ryce failed to comply with the warrant,

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1. K.S.A. 8-1025.
8. *Ryce*, slip op. at 63.
the State could charge him with interference with law enforcement under K.S.A. 2014 Supp. 21–5904(a)(3). Simply put, the legislature did not narrowly and precisely draw 8–1025 when it chose to criminally punish an individual for exercising his or her Fourth Amendment rights.10

The Court did acknowledge that the State could have criminalized the refusal to submit to testing after obtaining a warrant or when exigent circumstances prevent obtaining a warrant. But the Court ultimately found that the State failed to narrowly tailor the criminal refusal statute as it is impermissibly broad because it allows the State to criminally punish those who refuse a search that is not grounded in the Fourth Amendment. Because the State can achieve the same ends through constitutional means, the State's objective in cases like Ryce's can only be “to chill the assertion of constitutional rights by penalizing those who choose to exercise them.”11

Simply stated, DUI criminal refusal is unconstitutional because itriminalizes the exercise of a fundamental constitutional right when the State has other means, namely search warrants, to achieve the same results.

**State v. Nece**

While the holding in *Nece* flows from the Court’s decision in *Ryce*, the cases are factually different. Salina Police stopped Gregory Nece for an equipment violation in June 2013, which ultimately lead to his arrest for DUI. The officer provided Nece with the required notices pursuant to Kansas’s implied consent law,12 and Nece agreed to complete a test. Nece’s test results indicated a breath alcohol of .162, and Nece filed a motion to suppress those results alleging that his consent to the test was not freely and voluntarily given because of the language warning him of the criminal penalties of refusing to submit to a test. The district court agreed and suppressed the results of the breath test.

The Court began its analysis acknowledging that consent is one of the “established and well-delineated exceptions to the warrant requirement.”13 Consent, however, must be by freely and voluntarily given, which requires that it “not be coerced, by explicit or implicit means, by implied threat or covert force.”14 The Court acknowledged the Court of Appeals’ observation that DUI caselaw seems to present an exception to the requirement that consent be free of coercion, but the Court explained that “consent does not become involuntary merely because someone is advised of legal ramifications of their choice, even if those consequences are serious and negative.”15

It is not providing a driver with accurate information that could cause that driver to complain of being coerced, but failing to provide accurate information could cause consent to be involuntary.

Accurately informing a driver of the lawful consequences that flow from his or her decision to refuse to submit to blood-alcohol testing “ensures” that the driver “makes an informed choice whether to engage in that behavior or not.” (“[T]he failure to disclose accurate information regarding the potential legal consequences of certain behavior would seem to be a more logical basis for a defendant to assert that his or her decision to engage in that behavior was coerced and involuntary.”).16

Consequently, it is that the officer inaccurately informed Nece that he could be charged with a

10. *Ryce*, slip op. at 73.
11. *Ryce*, slip op. at 76.
12. K.S.A. 8-1001(k).
14. *Nece*, slip op. at 7 (quoting *Schneckloth v. Bostamonte*, 412 U.S. 218, 228 (1973)).
crime for refusing to submit to an evidentiary test that transformed Nece’s consent into coerced, involuntary consent.

*Nece* leaves undecided the question of whether the good-faith exception might apply. Judge Malone, concurring in the Court of Appeals decision, would have found that good-faith applied, but because the State declined to brief the issue or ask the Court to consider good-faith, it did not.

**Cases before the U.S. Supreme Court**

The Attorney General’s Office has filed motions in *Ryce*, *Nece*, and the companion cases to stay all further proceedings in the cases, including the deadline for the time to file motions for modification or rehearing and the issuing of the mandates. This unusual step is prompted by the pending hearing before the United States Supreme Court of three cases with the same or similar constitutional questions answered by our Court concerning DUI criminal refusals. The U.S. Supreme Court is scheduled to hear *Birchfield v. North Dakota*, *Bernard v. Minnesota*, and *Beylund v. North Dakota*\(^\text{17}\) in April. The two questions before the Court are similar to the questions answered in *Ryce* and *Nece*: 1) "Whether, in the absence of a warrant, a State may make it a crime for a person to refuse to take a chemical test to detect the presence of alcohol in the person's blood," and 2) "Whether consent to search is valid for Fourth Amendment purposes when the State obtains consent by informing the person subject to the search that failure to submit will result in criminal prosecution."

The Kansas Supreme Court discussed the rationale adopted by the respective state courts in *Birchfield v. North Dakota* and *Bernard v. Minnesota*, and rejected those courts’ rationale for upholding DUI criminal refusal. The U.S. Supreme Court’s decision should potentially provide some finality to the *Ryce* and *Nece* decisions without the need to petition for writ of certiorari.

**Current Implications of *Ryce* and *Nece***

If the U.S. Supreme Court’s decision supports *Ryce* and *Nece*, the rapid review of the same constitutional issues will provide a strong basis to review and modify Kansas’s implied consent law and consider whether to modify our DUI criminal refusal law to comport with *Ryce*. The immediate impact of *Nece* will be litigation of the question of whether the good-faith exception applies in cases where a driver completed an evidentiary test. Another question to be litigated is if *Nece* has any impact on drivers charged with a DUI first-offense. As first offenders could not be charged with DUI criminal refusal, the fact that those drivers were advised of part of the implied consent advisory inapplicable to them may make *Nece* inapplicable.

Also of note, although *Ryce* seemed to acknowledge the ability to obtain search warrants following a refusal, that issue should be squarely answered by our state Supreme Court in *Hoeffner v. Kansas Dept. of Revenue* and *City of Dodge City v. Webb*. Both of those cases were argued in December, and we are awaiting decisions.

The best advice for now? Stay tuned and look for updates later in the summer because the evolution of *Ryce* and *Nece* is just beginning to reveal itself.


KCDAA Member Survey Results *

In your free time, you participate in:

74% Service organizations
39% Recreational Sports
16% Music
13% Theater
10% Book Club
Other answers included: church activities, riding motorcycles, camping, gardening, fishing, coaching youth sports and other outdoor activities.

You're active in your communities because...

"Work-life balance is important, so most of my outside activities are for me or my family and have nothing to do with the job, which already consumes much of my time."

"I need a balance between work case loads and home responsibilities, and an outside activity helps give perspective of the "people" and "society" I represent in the courtroom."

"It is my way of giving back. I had wonderful mentors and only hope that I can be the same to someone else; to help give them an opportunity to achieve their goals."

"Work-life balance is important, so most of my outside activities are for me or my family and have nothing to do with the job, which already consumes much of my time."

*40 Responses
KCDAA Member Survey Results *

20% participated in college athletics

Sports:
- Basketball
- Cross Country
- Football
- Tennis
- Track
- Rowing
- Rugby

Athletic experiences have benefited you professionally in the following ways (to name a few):

"I learned that to get better, you have to keep working."

"I cannot stress enough how important these experiences were. The coaching and training I received took place during a formative time in my life and contributed greatly to the person I am today."

"It reinforced that hard work and discipline is important in anything you do. Additionally, it helped with my self-confidence and social skills."

"The ability to work as a team."

"Hard work and sacrifice."
Kansas Prosecutors Foundation Golf Tournament
June 8, 2016

We invite you to register for our golf tournament on Wednesday, June 8, 2016 with a 12:00 p.m. shotgun start. Come out and support a great cause!

**Location:**
Colbert Hills
5200 Colbert Hills Dr., Manhattan, KS  66503
www.colberthills.com

**Cost:**
$100.00 per player/$400.00 per team
includes 18 holes, cart, box lunch, and 2 drink tickets

Register a whole team or register as an individual, and we’ll put you on a team! Payments can be made online, mailed or brought to the tournament. Payments are due the day of the tournament and should be made out to the Kansas Prosecutor Foundation (KPF) and mailed to 1200 SW 10th Ave., Topeka, KS  66604.

**SPONSORSHIPS ARE ALSO AVAILABLE!**
**Gold:** $1,000.00 – hole sign, half page ad in conference program, full page ad in Kansas Prosecutor magazine, and a 4-person team

**Silver:** $750.00 – hole sign, quarter page ad in our conference program, half page ad in Kansas Prosecutor magazine, and a 4-person team

**Bronze:** $500.00 – hole sign, quarter page ad in our conference program, quarter page ad in Kansas Prosecutor magazine, and two golf registrations

**GOLF REGISTRATION DEADLINE IS May 20, 2016**

Proceeds from the tournament will go to the Kansas Prosecutors Foundation. Join us for a great afternoon of fun, networking, and supporting a good cause.

Register online at www.kcdaa.org/golf.

Questions? Contact KPF/KCDAA at 785-232-5822 or kari@kearneyandassociates.com
Send payments to: KPF, 1200 SW 10th Ave., Topeka, KS 66604
Changes Within the Highway Patrol

by Col. Mark Bruce, Kansas Highway Patrol

In April of 2015, I officially took command of the Kansas Highway Patrol as the new superintendent. At approximately the same time, Tammie Lord was promoted to the position of Records Custodian. In July we hired a new staff attorney, Sarah Washburn, to deal with issues related to and resulting from criminal investigations. With this new administration I decided we needed to review several of our policies to make sure that they were in line with statute and were the best practices for a transparent and accountable law enforcement agency. To that end, the Patrol is seeking certification from The Commission on Accreditation of Law Enforcement Agencies (CALEA).

Part of this certification is a comprehensive review of all policies, including evidence retention, disposition and destruction as well as records production.

In the past, the Patrol has sent out copies of Troopers’ in-car camera footage upon request of prosecutors. Those discs carried the warning that the footage was the property of the Kansas Highway Patrol and could not be duplicated. This put prosecutors in the unenviable position of violating the advisory of the Patrol or failing to honor their obligations under the law to provide discovery. While the discs that the Patrol sends out still carry this warning, it is not intended, nor should it preempt the independent obligations a prosecutor has to a defendant in a criminal case. To that end, I would encourage prosecutors to allow inspection, viewing or copying of these discs for that purpose pursuant to statute. As we fully anticipate prosecutors will comply with their discovery obligations, we will no longer be providing the defense with copies of these discs or documents which are subject of a pending criminal investigation absent a properly issued subpoena or a lawful KORA request.

In addition to the above change in how we handle records requests, many prosecutors across the state may have noticed an increase in requests for destruction or disposal orders for evidence in the custody of the Patrol. As part of the process of earning a CALEA certification, we are working to clear out the backlog of property and evidence that is no longer necessary to the prosecution or investigation of a crime. With the KBI moving into their new lab, they have been sending back samples that they have never tested and we are finding that we have evidence from fatalities and other investigations in our evidence storage facilities that is simply taking up room that could be utilized for new and pending criminal matters. Based upon the language of the property disposition statute and the case law citing it, we are trying to work with each judicial district to develop or comply with a process that is lawful and makes sense. As one of the only law enforcement agencies in Kansas with statewide jurisdiction, we want to respect the processes of each judicial district while maintaining the integrity of the evidence which we are charged with safekeeping.

I look forward to continuing our relationship with each county and district attorney’s office. Should you have questions or concerns about the evidence custody or records provisions policies, please do not hesitate to speak with our legal department. Ms. Tammie Lord is our records custodian and handles the civil side of the house and Ms. Sarah Washburn handles all criminal or criminal case related issues. They can be reached by calling General Headquarters at 785-296-6800.

Sincerely,

Col. Mark Bruce
On February 4, 2016, the Prosecutors’ Center for Excellence (PCE) led senior prosecutors from 22 states in a National Meeting of Statewide Best Practices Committees in Washington, D.C. Seven Kansas prosecutors were in attendance.

Best Practices Committees are non-partisan bodies of prosecutors that include elected and senior prosecutors from urban, suburban, and rural districts throughout a state. The committees serve as think tanks that gather, disseminate, and examine information on the latest developments in criminal justice and community safety.

The National Meeting created a forum for prosecutors from California, Colorado, Delaware, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New York, North Carolina, Pennsylvania, South Carolina, South Dakota, Tennessee, and Virginia to share their progress and to provide one another with advice on how to organize and run Best Practices Committees. Also in attendance were representatives from the National District Attorneys Association (NDAA), The Department of Justice, the Bureau of Justice Assistance (BJA), and the National Juvenile Justice Prosecution Center at Georgetown University. The NDAA generously provided a space for the gathering, which took place immediately following its 2016 Capitol Conference.

To date, senior prosecutors from 32 states have participated in regional and national best practices summits throughout the U.S.
Kansas delegation meets with U.S. Representative Mike Pompeo.

Kansas delegation meets with U.S. Representative Kevin Yoder.

Amy Hanley and Kim Parker participated in the First Annual NDAA Women Prosecutors Section Delegation on the Hill discussing women in leadership, domestic violence, and human trafficking with female members of Congress.

Kansas delegation meets with U.S. Senator Pat Roberts
Do you have an article idea you would like to know more about? We can try to find a writer for your idea. Or would you like to submit an article?

Send your idea and/or submissions to Editor Nicole Van Velzen at nickiv@gmail.com.
With your help, we can conquer mountains and enhance public safety for the future. 

Support our scholarships today!

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Learn more at www.kpfonline.org