The Kansas Prosecutor

The official publication of the Kansas County and District Attorneys Association
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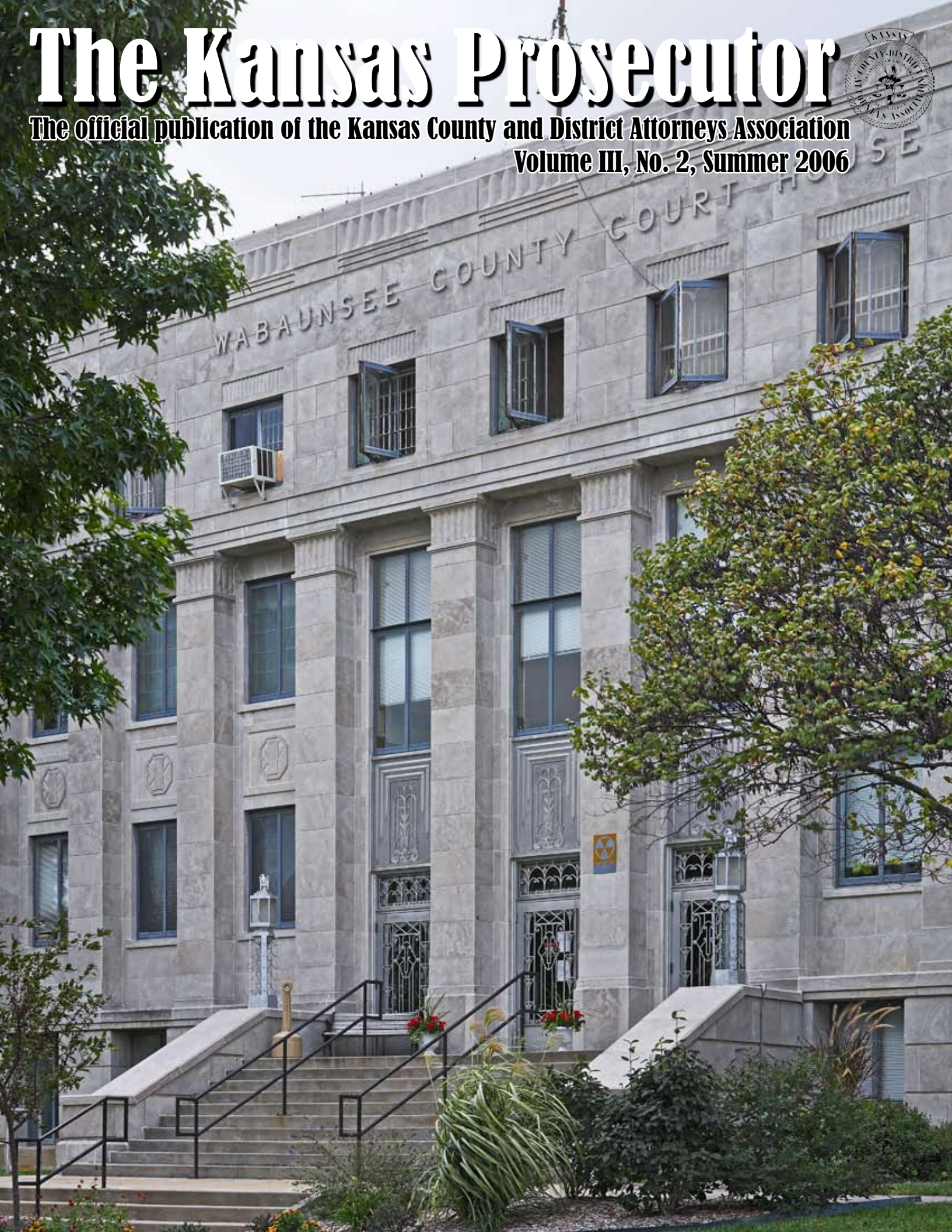

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Our mission:
The purpose of the KCDAA is to promote, improve and facilitate the administration of justice in the State of Kansas.

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About the Cover

The Wabaunsee County Courthouse was built in 1931 and is constructed of Carthage and native stone. The Carthage stone, used on the outside for facing, gives the appearance of a granite building. All outside walls are backed up with eight inches of native stone. The beauty of the marble on the second floor is enhanced by a map of Wabaunsee County carved in the terrazzo floor, naming all of the 13 townships in the county. There are several memorials and historical markers on the courthouse grounds.

Photo by John D. Morrison, Prairie Vistas Gallery

President's Page

by Doug Witteman, KCDAA President

As I write I note that my calendar has recently been turned to the month of April. As I look out my window I am able to observe that the trees are budding, the sky is blue and the breeze is warm. The weatherman has indicated that by this time tomorrow the buds may suffer from frost, the sky will be gray, and the breeze will be anything but warm. Spring brings dramatic change both on a seasonal and daily basis. Despite these changes, however, we can count on the constant fact that tomorrow the sun will rise in the east and set in the west, just as it did today. By now you are probably wondering what any of this has to do with being a Kansas prosecutor. Nothing really, other than to illustrate an essential point about being a prosecutor. Despite the changing nature of our workloads from season-to-season and from day-to-day, it is imperative that the principles that guide our work remain constant. Many of those principles can be encompassed under the heading of a single word: Integrity.

We all know that establishing and maintaining our personal and professional integrity is essential to providing justice in our communities. Hopefully, integrity is not a concept that we have to actively think about as we go about our daily work. It should be an attitude that pervades our lives and our work and that guides us without active thought. Most of the time integrity is easy. Integrity, however, is so important for a prosecutor to maintain that when a difficult matter comes before us, we should give the concept active thought to ensure that our decisions and actions reflect the highest levels of integrity.

When we go before a judge, it is important that we be perceived as knowledgeable and honest. If we ever give a judge a reason to think otherwise, we will spend a great deal of time regretting having left that impression. If we are unsure about a point of law, we must do our homework before we act as if we are sure. If under all of the facts and the law as it exists, we are convinced that opposing counsel is right on a point, we should not try to convince the judge otherwise. The judge does not want to be reversed any more than we want to try a case twice. The one thing we should want a judge to know when we are arguing a position is that we truly believe we are right, and we are not shooting from the hip. If the judge knows that they can trust our integrity in these things, they will know that they can trust our argument.

As important as integrity is in our relationship with a judge, it is equally as important in our relationships with opposing counsel. While we cannot control the integrity of any other lawyer, we can control our own integrity. In fact, no one can affect our own integrity other than ourselves. Although the criminal justice system is designed to be an adversarial process, this does not mean that our relationships with opposing counsel should be personally adversarial. In fact, we will be more effective in our work if we go out of our way to avoid personal animosity with opposing counsel and work to develop an atmosphere of professional collegiality. Defense counsel should never have any reason to question whether we can be trusted. Our word must be our bond. When we strike a deal on a case, the only reason that defense counsel should need to prepare a tender of plea is to protect their interests from their client's claims and to satisfy the court's requirements. Defense counsel should know that our verbal commitment is as reliable and strong as any words written on a piece of paper.

Another area that is vital to establishing our integrity is in our application of prosecution and office policies. By this, I mean to say that it is vitally important that we be consistent in applying the broad discretion the law puts in our hands. Although there are many ways to define fairness, one essential element of any definition is consistency. Like people in like circumstances should be dealt with in a like manner. This is not to say that small differences in the underlying facts or in a defendant's circumstances could not lead to appropriately different results in similar cases. It is to say that a friendly relationship with an attorney or a defendant should not lead us to treat that defendant differently than we would if that person or his or her attorney were a stranger. During our prosecutorial careers we will be faced with times that our personal acquaintances or

Editor's Page

by Mary Napier, Editor,
The Kansas Prosecutor

even friends will find themselves as defendants. It may be a serious matter, or more commonly, a minor matter such as a traffic ticket. If they understand we believe it is important to treat people equally and fairly, they will respect us and they will respect our decisions. Whether it is a defendant or an attorney, our integrity, in consistently applying our discretion, will result in respect for the criminal justice system itself.

Finally, I would like to comment on the importance of integrity when dealing with the public. The public consists of people who will be our jurors, our victims, and ultimately our supporters or critics. For reasons too numerous to list, it is imperative that we be viewed by the people of our communities as persons of the highest integrity. Many of us stand for election every four years and to a great extent our ability to continue to do our work and earn a livelihood depends on whether we are perceived as knowledgeable and honest by the public we serve. The only campaign promise we should ever make is that we will work hard and in everything we will use our best judgment. For those who do not run for office, I would suggest that this is the commitment your boss should expect from you. If we are in fact capable people who conduct our work with integrity, then that should be the only promise that a supervisor or citizen should expect or want from us. From personal and professional integrity flows respect. Respect for you and for your office will always be integral to providing justice to the community you serve.

Executive Director's Page

by Steve Kearney, KCDAA Executive Director

Service Above Self

The strength of any organization is only as good as the dedication and enthusiasm of its leadership. An association, like the Kansas County and District Attorney's Association, is initially formed to pursue the collective interests of the members, to protect the well being of a profession, and to provide a unified front for advocacy using the strength of a group not available to each member individually. To accomplish these goals however, there must be, from the membership, those willing to serve as leaders, as board members, as officers of the association, to shoulder the fiduciary responsibility to the organization and its members. Service in these roles is an additional commitment in what are surely already busy lives, undertaken on behalf of the rest of the membership willingly, but not without some personal sacrifice by those who step up. All this simply to raise the visibility of the needs of the ordinary Kansan that have been victimized, seek true justice as their redress, and be certain that the laws governing justice in Kansas first looks to the victims needs and the greater public good.

Throughout my tenure in this position, I have been repeatedly struck by the time spent not just at the board meetings given freely by these prosecutors, but also their involvement in guiding the KCDAA during the weeks between meetings. Their involvement in protecting the rights of their fellow Kansans during the intervening weeks between the board meetings, their ready availability to others in the profession or as resources for state policy makers, shows a level of commitment to their profession not often seen in our instant gratification, what about me society.

While the KCDAA has been blessed with willing leaders throughout its history, it is always critical to an organizations success to consistently identify leadership potential in its members and mentor those individuals who are willing to make the sacrifice of service to their profession. The board meetings are open to its members and if you have never been to a meeting as a member you should come. My observation has been that new attendees at the board meetings come away with an understanding of the depth of commitment this organization has for its members and the work involved in sustaining the well being of prosecutors and prosecution. In those attending for the first time, I see not just the understanding of purpose, but a growing willingness to take time from the other demands of their lives to serve.

Leading and serving as officers and directors of a professional association is no longer just a resumé builder in an elite club. The volume of work involved, the liability as fiduciaries and the increased pressure for maintaining best practices in the operation of a non-profit corporation requires a willingness to develop knowledge beyond that of the underlying specialization in prosecution. Thanks to the corporate corruption that gave us Enron and resulted in the Sarbanes/Oxley Act, more and more transparency is justifiably required for shareholders (in our case, our members) in the day-to-day operations of all businesses. Those choosing to serve today shoulder an even bigger responsibility on behalf of their profession than ever before.

With this rosy picture, I am certain many of you reading this are dialing the phone to let me know you want to be more active and serve in leadership roles with the KCDAA. No? Then think again. There has never been a time when involved visionary leadership could make more of a difference than now. The likelihood of being able to leave a legacy to your chosen profession has never been greater than for those willing to take the plunge today. You would not be in this profession if you were looking for an easy ride. As my dearly departed father liked to say, "If it was easy, everyone would do it." You already know the easy way is not for you. Step up. Continue the excellence of the profession and its organization. You know how because your everyday actions as prosecutors already show "Service above Self." Thanks for all you do for your profession, the victims of criminal conduct, and the greater good of Kansas!

Legislative Session Finished

by Stephen R. Morris, Kansas Senate President

Serving as President of the Kansas Senate has afforded me many opportunities. Most of these are memorable and positive by virtue of the people I meet, the places I visit, or the occasions in which I get to share. I consider the invitation by the KCDAA to submit an article for its magazine one of those positive experiences.

As a member of legislative leadership who does not have a law degree, I have tremendous respect for the men and women charged with interpreting and enforcing the laws passed by the state legislature – particularly in the area of criminal prosecution. The KCDAA members I've had the privilege to meet have impressed me with their level of commitment and the breadth of their knowledge.

In the same way, I am pleased to count your lobbyists among those I consider friends. Steve Kearney and Michael White are always willing to discuss issues openly and honestly, providing complete and accurate information when we need it. The KCDAA should be very pleased with its representation in the statehouse.

The 2006 Regular Legislative Session is now history, and with it, we saw several measures successfully passed and signed into law. The work now falls to you for enforcement through effective prosecution. I hope the legislature has been helpful in crafting sound laws that will enhance the safety and security of the people of Kansas, increasing protection for them, their families, and their property.

The following are but a few of the major bills passed this year, which may be of particular interest to you as Kansas prosecutors.

Jessica's Law

Perhaps the most significant measure passed is **"Jessica's Law,"** which increases the penalties for those convicted of sex offenses against children. As most of you are aware, the law is named for 9-year-old Jessica Lundsford of Florida who was kidnapped, raped and murdered by a convicted sex offender. The law mandates a minimum 25-year without parole (Hard 25) sentence for first time sex offenders in which the victim is a child; a minimum 40-year sentence (Hard 40) for second time offenders; and for third and subsequent sex offenders (aggravated habitual offenders), a life sentence without the possibility of parole. The bill provides for life-time supervision and life-time monitoring of sex offenders who are released by the Kansas Parole Board.

The mandatory sentences apply to sex offenders who are 18 years old or older, when the victim is 14 years old or younger for the following crimes: aggravated trafficking (slavery); rape; aggravated indecent liberties with a child; aggravated criminal sodomy; promoting prostitution; sexual exploitation of a child; and an attempt, conspiracy or criminal solicitation to commit those crimes.

Electronic Solicitation of a Child

The bill also creates **a new crime: electronic solicitation**. This is so defined to include communication by telephone, over the internet or through other electronic means, which involves enticing or soliciting ***someone the offender believes to be a child*** to commit or submit to unlawful sexual conduct. If the child is believed to be under the age of 14, the penalty is a Level 1 Person Felony; if the child is believed to be 14 or 15 years old, the penalty is a Level 3 Person Felony.

Under this new law, prosecutors must notify the victim or the victim's family of any proposed plea agreement, and the right to attend any hearing where a plea agreement is reviewed or accepted, and the right to make written arguments prior to the hearing.

Abuse, Neglect and Exploitation of Persons Unit

Also of note is the creation and funding of the new **Abuse, Neglect, and Exploitation of Persons Unit** within the Attorney General's office. This special unit was established primarily in response to the appalling abuses which took place in connection with the Kaufman case in Newton. Clearly, we needed to ensure that complaints of abuse in such group homes are completely investigated and the vulnerable citizens who live in those residential facilities are

safe from exploitation of any kind – sexual, financial, physical labor, etc.

This measure is designed to facilitate the ability of agencies to share information and to more effectively investigate allegations of abuse, particularly against persons with disabilities. The unit will have access to all reports, investigation results, and findings received or generated by the Department of Social and Rehabilitation Services, the Department on Aging, or the Department of Health and Environment, and will have the authority to contract with other agencies or organizations to provide services as needed for investigation or litigation.

Scruffy's Law

"Scruffy's Law," named for a Kansas City-area terrier that was tortured and burned several years ago, was passed this session. It is now an off-grid non-person felony to intentionally and maliciously kill, injure, maim, torture, burn, or mutilate any animal. The penalty is no fewer than 30 days or more than one year imprisonment, and a fine of not less than $500 nor more than $5,000. Persons convicted under this law must submit to a psychological evaluation and must complete an anger management program. Exceptions exist in the law for animals that pose a threat to people, their animals, or property; for accepted farming and veterinary practices and the sport of rodeo.

Exotic Animals

The **ownership of exotic animals** will now be closely regulated, following the death in August 2005 of Labette Co. High School senior Haley Hilderbrand, who was mauled by a tiger while having her senior picture taken. Persons who possess an animal covered by this law will have to notify local animal control authorities, register the animal in writing, maintain specific records, and purchase liability coverage or a bond of at least $250,000. The regulated animal would be prohibited from coming into physical contact with anyone other than the person possessing the animal, the registered designated handler, or a veterinarian. Regulated animals include lions, tigers, leopards, jaguars, cheetahs, mountain lions, bears, and non-native or poisonous snakes. Exemptions are built into the law for accredited zoos and registered wildlife sanctuaries.

Concealed/Carry

With the enactment of the Personal and Family Protection Act, Kansas joined the ranks of the majority of other states to permit certain licensed individuals to carry concealed handguns. Beginning in January 2007, the Attorney General will be authorized to issue four-year licenses to persons who are at least 21 years old, a U.S. citizen, and at least a six-month resident of Kansas. Applicants must live in the same county in which they apply for the license, and must provide proof of completion of an approved weapons safety and training course, for which that individual must pay.

This law contains an extensive list of places where firearms will not be permitted, including schools, churches, courthouses, and state buildings. Business and homeowners have the right to post "no guns" signs on their property. Penalties are built in for failure to carry one's permit at all times.

DNA Samples

Finally, HB 2554 amended current law regarding the disposition of DNA samples received from suspects and convicted criminals. With the advent and increasing sophistication of forensic science, the state's DNA database has become an ever-more critical tool in solving crimes, tracking and convicting offenders, and exonerating the wrongly accused. Among other things, the bill provides that:

- From Jan. 1, 2007 through June 30, 2008, any adult arrested or charged or any juvenile placed in custody for or charged with committing or attempting to commit any person felony or drug grid level 1 or 2 felony would be required to submit a specimen for DNA at the time of fingerprinting when being booked.

- On or after July 1, 2008, an arrested or charged adult or juvenile placed in custody for committing or attempting to commit any felony would be required to submit DNA samples as well as fingerprints;

- While the samples themselves may, under certain circumstances, be destroyed at some point, the database records will be retained;

- Upon conviction, any person required to provide a DNA sample will be charged $100, which will be placed in the KBI's DNA Database Fee Fund to help cover lab services and expenses.

A Personal Take on the Nomination of John Roberts

by U.S. Senator Sam Brownback

Most Americans know the basic facts about the confirmation of our newest Chief Justice of the Supreme Court. Last July, John Roberts was nominated by President Bush to be the next Associate Justice. However, when Chief Justice William Rehnquist passed away in August, Roberts was re-nominated for the vacant Chief Justice position. After going through Senate Judiciary Committee hearings and a full Senate floor vote, he was confirmed and took the oath of office on September 29.

But there was more to this process.

Many remember the pictures of Roberts' young son dancing in front of the cameras as President Bush announced his father's nomination in a formal White House ceremony. The public often misses these personal images of life in Washington, but such rare glimpses remind us that business in Washington does not exist entirely of scripted events and predictability.

The confirmation process begins with visits by the nominee to senators. I greatly value this part of the process because I can meet with the nominee in a relaxed setting and have an informal discussion about anything from their family life to judicial philosophy.

Roberts immediately struck me as a man with a humble demeanor but great intellect. We talked about our families-both of us have young children-and I asked him a number of questions about his professional background.

I also asked about his view of the Supreme Court's role in America. From his comments I believe that, in his own words, he favors "a more modest Court." His baseball analogy best encapsulates his view of the Court. He believes that a Supreme Court Justice, like a baseball umpire, should apply the rules but not create them.

Though we did not discuss our shared faith, I did suggest that he read the Book of Wisdom. This section of the Bible's Apocrypha is attributed to King Solomon and contains important lessons for individuals in positions of leadership.

After a thorough document review by senators and their staff, the next major phase of the confirmation process begins with the public hearing. Supreme Court hearings have changed greatly with the explosion of media coverage. While the extensive media coverage and instant analysis creates some problems, I do appreciate the public's interest in this process.

At the hearing, Roberts' wife and children were present, as were his parents, three sisters, an uncle, and a cousin. You could tell from their faces that it was a humbling and profound moment for his family.

Each senator is allowed to give a 10-minute opening statement. I focused my remarks on the role of the Court. Drawing on Roberts' own words, I emphasized the need for a "more modest Court." I laid out a few of the most obvious extensions of judicial power, such as the recent decisions redefining marriage, determining when a human life is worth protecting, and permitting the seizing of private property for public use.

After patiently sitting through statements from all 18 senators-and displaying a remarkable ability to appear raptly enthralled by each one-Roberts gave a brief but eloquent opening statement. He spoke without notes and impressed the Committee with the sincerity and earnestness of his remarks.

When Chairman Arlen Specter asked Roberts to stand and raise his right hand so he could be sworn in, the whirring sound from camera shutters was striking. Even those of us familiar with such events in Washington were impressed by the number of reporters and media outlets covering the hearing.

The second day of the hearing began with 30-minute rounds of questioning by each senator. In these rounds the public gets a better look at not only the nominee, but also at the senators. As we observed how senators tend to do more talking than asking, an amusing set of statistics began circulating that showed the ratio of time each senator spent talking versus the time they spent questioning. This made us all a bit more cognizant of our penchant for long-winded speeches.

The last day of the hearing was mostly devoted to panels of experts who testified about Roberts'

personal and professional life. The Committee heard from legal experts, former colleagues, and personal acquaintances. While this day was less widely covered by the press, I actually think it provided some of the best insights into who Roberts is and what his judicial philosophy might be.

One moment that particularly stood out came during the testimony of Henrietta Wright. Wright chairs the board of trustees at the Dallas Children's Advocacy Center and has known Roberts and his wife for almost 20 years. She noted that Roberts is a man of perseverance in the face of challenges and disappointments. She told us about the Roberts' struggle to adopt children, and how their first effort fell through just days before the adoption was to take place. She described their joy when they were eventually able to adopt not one, but two children.

Such personal anecdotes often go unreported by the media, but they provide a more complete picture of the new Chief Justice. He is a man devoted to his family, his country, and the rule of law.

It is an honor to serve on the Senate Judiciary Committee, particularly at this fascinating time in our nation's history. I look forward to seeing Chief Justice Roberts lead the U.S. Supreme Court.

KCDAA Lobbyists Battle the Legislature

by Michael White, VP of Association Operations, Kearney & Associates, Inc.

I have the dubious distinction in the following article to try and write about what the Kansas Legislature accomplished this year concerning criminal legislation without making every single reader fall asleep. Now this may seem easy to some, but I can honestly tell you that most legislation and the legislative process would make anyone want to go to sleep. That being said, I think this legislative session led to some of the most comprehensive changes in Kansas' criminal law in quite some time. The 2006 Kansas Legislature did some good work that will help prosecutors and law enforcement in their task of keeping the public safe.

I would like to thank those prosecutors who on short notice and with a desperate plea from me agreed to testify before a legislative committee. I know it is not always easy to fit this into already busy schedules, but it is the expertise of the KCDAA that legislators want to hear on important issues. Ron Paschal, Karen Wittman, Mike Jennings, Kevin O'Connor, Kim Parker, and Marc Bennett were just a few of the prosecutors who stepped up to help out. Thank you.

The 2006 legislative session started out in no short order with the introduction of House bill 2576. This bill commonly referred to as Jessica's Law was passed unanimously by the House and had an overwhelming majority in the Senate. The bill was sponsored by Rep. Patricia Kilpatrick and had broad support on both sides of the rotunda. HB 2576 establishes mandatory minimum sentences for first time sex offenders, makes a number of other changes regarding sex offenders, and limits diversions for the crime of domestic battery.

A mandatory minimum sentence of 25 years is created for first-time sex offenders. No good-time credits would apply. If the sentencing guidelines grid for non-drug crimes due to the defendant's prior criminal history would exceed 300 months (25 years) the mandatory minimum term would be the minimum sentence under the grid. A mandatory minimum sentence of 40 years would be created for second-time offenders who already have been convicted.

A sentencing judge would be able to depart downward from the 25-year minimum sentence if the judge finds substantial and compelling mitigating factors. The departure sentence in such cases would be the sentence pursuant to the Kansas Sentencing Guidelines Act.

A life sentence without the possibility of parole for aggravated habitual sex offenders was also created. A habitual sex offender is defined as a person who after July 1, 2006 has committed a sexually violent crime, and who has two prior convictions of any sexually violent offense. Sexually violent offenses include, among others: rape; indecent liberties with a child; aggravated indecent liberties with a child; criminal sodomy; aggravated criminal

sodomy; indecent solicitation of a child; aggravated indecent solicitation of a child; sexual exploitation of a child; aggravated sexual exploitation of a child; aggravated sexual battery; and aggravated incest.

The bill amends KSA 22-3436, dealing with victims rights in regard to person, sex, and family crimes, and prosecutor duties to require a prosecutor to notify the victim or victim's family of any proposed plea agreement, and the right to attend any hearing where a plea agreement is reviewed or accepted and the right to make written arguments prior to the hearing.

A registered sex offender would be required to report to the local sheriff's office annually during the offender's birth month and pay a $20 registration fee each year to the sheriff. At this time, the sheriff would take an updated photograph of the offender. The offender would then report for the next six months on days and times determined by the local sheriff's office.

The bill creates several new crimes including electronic solicitation defined to include communication conducted through the telephone, Internet, or by other electronic means, which involves enticing or soliciting a person whom the offender believes to be a child to commit or submit to an unlawful sexual act. If the child is believed to be under 14 years of age, the penalty would be a level 1 person felony. If the child is believed to be 14 or 15 years of age, the penalty would be a level 3 person felony. The bill also creates the new crime of unlawfully tampering with electronic monitoring equipment as a level 6 non-person felony.

HB 2576 also has new sanctions that are intended to make sure sex offenders register under the Kansas Offender Registration Act. It increases from a severity level 10 non-person felony to a severity level 5 person felony and a new violation would occur after 31 days have elapsed. The crime of aiding a felon would be amended to provide a more severe penalty, a level 5 person felony, for anyone who aids a person required to register under the Kansas Offender Registration Act.

HB 2576 also amended the crime of domestic battery to limit diversions to two during a five-year period. The bill will require mandatory treatment for a person convicted of three or subsequent domestic battery crimes, and require a person who does not enter into a treatment program to serve not less than 180 days or more than a year of imprisonment.

KCDAA Issues in the Legislature

The KCDAA sets out every year to pass some legislation that they believe to be important. This year the KCDAA was able to pass HB 2616 that allows the state to request a preliminary hearing in any felony case. Previously, only the individual being charged with a crime could request a preliminary hearing. The KCDAA also sought clarification of the law regarding protective orders with HB 2617. It added to the violation of a protective order to include "at any other time during a criminal case."

Every legislative session, there seems to be a bill that gets the dubious distinction of being labeled the omnibus crime bill. The conference committee usually will place about six or eight measures in one conference committee report. The 2006 omnibus crime bill was SB 431. The major victory for law enforcement in SB 431 was the fix to *State v. Anderson*. Finally, after several years of lobbying the legislature to change "the" crime to "a" crime in the search incident to arrest statute it was approved in SB 431.

SB 431 also included provisions that increased the severity levels for battery of a law enforcement officer and aggravated battery of a law enforcement officer. It also amended the crime of aggravated arson to cover arson, which results in the great bodily harm or disfigurement to a firefighter or law enforcement officer in the course of fighting or investigating a fire. The bill also amended KSA 8-1012 to clarify that an officer must have "reasonable suspicion" rather than "grounds" to believe a person has been operating a motor vehicle under the influence of alcohol or drugs before requiring a person to submit to a preliminary breath screening test.

SB 366 was another conference committee report that included multiple provisions that created new crimes. The 2006 legislature approved SB 366, the Criminal Street Gang Prevention Act. This bill will define a criminal street gang and street gang activities, membership, and association. The bill will further define recruiting criminal street gang membership as causing, encouraging, soliciting, or recruiting another person to join a criminal street gang. Recruiting members will be considered a severity level 6 person felony.

In addition, the bill will define criminal street gang intimidation as communicating, directly or indirectly with another; any threat of injury to another; or damage to property with the intent to deter a person from withdrawing from the gang or retaliation against an individual from having withdrawn from a criminal street gang. Criminal street gang intimidation will be a severity level 5 person felony. The bill also will clarify the

definition of criminal street gang now contained in the criminal common nuisance law.

Many of you might remember *State v. Frazier*. After many years of debating whether to fix this Supreme Court decision, the 2006 legislature passed the amended fix to make it a severity level 2 and to strike "products" from the definition in KSA 65-4510. The amendment addresses a court ruling in *State v. Frazier* 30 KA 2d 398 (2002), which lowered the drug severity level 1 crime to a drug severity 4 crime. The House followed the lead of the Senate who had passed this legislative fix for several years.

One area of concern that the KCDAA will take an extra measure of caution with is the provisions of SB 366, which authorizes a person who is not engaged in an unlawful activity and who is attacked in a place where the person has the right to be, to stand his or her ground and fight back with no duty to retreat. The KCDAA would have rather seen these provisions studied in an interim committee before passage. The bill amends the statutes on use of force in defense of a person, dwelling, or occupied vehicle by explicitly adding the authority for a person to use deadly force against another, if the person reasonably believes death or great bodily harm to the person or a third person is imminent. The bill contains statements that nothing in the bill should be construed to require that a person retreat if the person is using force to protect themselves, a third person, their dwelling, or an occupied vehicle.

The bill would immunize a person from criminal prosecution and civil action for the use of force. If, however, the force is used against a law enforcement officer, the person using the force would not be immune from criminal prosecution and civil action. The law enforcement officer would have to be in the act of performing his or her official duties, and the officer would have to identify himself or herself in accordance with the law, or the person using force knew or reasonably should have known the person was an officer.

A law enforcement agency would be permitted to use standard procedures to investigate the use of force. However, the agency would not be permitted to arrest a person for using force unless it determines there is probable cause to arrest. This legislation seems to be in response to the passage of the HB 2118, the conceal carry bill. It is very possible that the KCDAA will have to look at future legislation to improve this new law.

The 2006 Kansas Legislature passed HB 2554 which is legislation that requires any adult or juvenile arrested or charged of any person felony or drug severity level of 1 or 2 to be required to submit an oral or other biological sample at the same time such person is fingerprinted pursuant to the booking procedure. After July 1, 2008, the adult or juveniles required to submit such oral samples would broaden to anyone arrested or charged for any felony.

If charges against a person are dismissed, a conviction against a person is expunged or a verdict of acquittal with regard to the person is returned then, upon the person's request, the KBI shall destroy the specimen or sample but retain the record in the database. If a person has not been charged and the statute of limitations on the crime has expired then, upon the person's request, the KBI shall destroy the specimen or sample but retain the record in the database.

The legislature also extended the work of the Re-codification, Restoration, and Rehabilitation Committee. This is the committee that is better known as the 3R's committee. They have been reviewing for about the last two years suggestions on how and what to re-codify in the Kansas criminal statutes. Please watch for updates from the KCDAA on what the committee is proposing.

These are just a few of the amendments and new criminal laws that the 2006 Kansas Legislature passed for prosecutors to use in prosecuting criminals. The 2006 Legislature made it a priority to ensure that public safety was not compromised when it came to sex offenders. They also made it a priority to make sure any and all criminals are caught with the passage of HB 2554, the DNA sample bill. All of these measures will help prosecutors secure the type of sentences that ensure that our family, friends, and neighbors are safe.

County Courthouse Portraits

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Violence Against Prosecutors: Your Experiences Needed

by Patricia L. Fanflik, Deputy Director, Office of Research & Evaluation, American Prosecutors Research Institute

Violence encountered by local and state prosecutors and their staff is not surprising given the key role these professionals play in the criminal justice system. Simply being a prosecutor or a professional working in a prosecutor's office can entail risk. Yet, despite the risk, when examining the current state of the literature on workplace violence, research exploring aggression encountered by prosecutors is nearly entirely lacking. Unfortunately, without research, preventative solutions for workplace violence will not be accomplished.

Recognizing the need for research, the American Prosecutors Research Institute's Office of Research and Evaluation in conjunction with the Kansas County and District Attorneys Association recently conducted a survey to assess the incidence and prevalence of workplace aggression, level of threat, risk factors, changes in behaviors as a result of aggression encountered, and potential interventions that may deter violence for prosecutors and their staff in the future. Some of the key findings from the study are presented in this article.

Although only a small number of surveys were filled out and returned, the overall findings were quite alarming. Fortunately, no prosecutor responding to the survey had been physically assaulted, but most reported receiving work-related threats. A majority of threats made to prosecutors were in the form of face-to-face verbal threats, threatening letters, phone calls, followed by harassing e-mail. Although all prosecutors reported being threatened in one form or another, more than half indicated that they did not receive threats very often. Unfortunately, of the threats received, some had very lasting effects for prosecutors especially threats that had a higher level of lethality or seriousness. Threats such as being called disparaging names from across the courtroom were frequently dismissed while other threats were more dangerous and warranted serious attention. For example, one prosecutor reported being approached outside the courthouse and having an automatic weapon pulled. Other prosecutors reported being followed home, approached in parking lots, hallways, stairwells, restaurants, and stores by defendants, gang affiliates, or family members of a defendant. Most threats mentioned physical injury to the prosecutor. Even more disturbing were the number of threats directed at prosecutors' family members or other close individuals.

Interestingly, most prosecutors were not concerned for their personal safety but when asked if individuals close to them worried about their safety, almost all responded "yes." In addition, although most described feeling safe, a majority of prosecutors reported either a change in behavior (e.g., altering routes when driving home, purchasing and training family members on responsible gun ownership, screening phone calls at home, developing close relationships with law enforcement, or developing a safety plan for family members) or implementing security measures (e.g., security fence to protect home with gates padlocked, dog ownership, extra locks on doors and windows, or panic buttons stationed throughout the house) to guard against potential risk of harm.

Moreover, prosecutors also suggested several security measures that could be implemented to improve workplace safety. Some of the security measures mentioned included: electronic monitors or guards for parking lots close to office so that workers do not have to park on dark side streets, metal detectors, and armed deputies at the courthouse, more rigorous screening at the courthouse entrance, restrict access to workplace in the prosecutor's office, bulletproof glass and panic buttons in the prosecutor's office and courthouse, and better trained detention staff especially when bringing prisoners to the courthouse.

More research is needed to better understand the level of threat experienced by prosecutors, the risk factors that make the possibility of violence more likely, and the kinds of measures that have been implemented by prosecutors that might successfully ameliorate potential violence. If you are interested in participating in this important research, please visit http://www.surveymonkey.com/s.asp?u=698482021869 to complete a survey.

Editor's Note: A copy of the survey was sent out to KCDAA members via e-mail. If you need another copy, please contact the KCDAA office by calling them at (785) 232-5822, or visit the web site mentioned above. Please take the time to fill out this survey. It will help us determine ways to keep attorneys safe in the future.

Seeking Certiorari in the Supreme Court of the United States

by Jared Maag, Deputy Attorney General of the Criminal Litigation Division in the office of the Kansas Attorney General

I. Introduction

In prosecution, a common utterance by a defeated defendant is the pathetic cry that, "This isn't over...I'll appeal to the Supreme Court." This hackneyed plea draws about as much attention by prosecutors as the defendant's case-in-chief did by the jury. With less than a *de minimis* chance of the Supreme Court of the United States reviewing a defendant's case, such apathetic attention by prosecutors is well-founded.

Assume for the moment, however, that as a prosecutor *you* wish to have a case reviewed by the Court of Last Resort. As an advocate for the State of Kansas, what is to be done to let the Court know of the compelling reasons why it is paramount for it to review your case? How does a prosecutor draw the uncommon attention of this uncommon Court?

This article broadly brushes certain issues a prosecutor must consider in appealing a case to the Supreme Court of the United States.

II. Court's Benchmark

Jurisdictionally speaking, the oft-utilized means by which a state prosecutor takes a case to the Supreme Court is on petition for a writ of certiorari.[1] Although a frequent means to appeal a case to the Supreme Court, "certiorari" is anything but routine. More exactly, it is compelling.

According to the Supreme Court, "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons."[2] In ruling that certiorari is discretionary and granted only for compelling reasons, the Court provides more of a comparative benchmark than an exact one. Under this standard, the Court considers certain factors, which include but are not limited to, the following:

> (a) A United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeal has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.[3]

Yet under this benchmark, certain factors, unlike the ones above, are rarely included in the Court's calculus in determining whether to review a case. In an unembellished caveat, the Court explicitly warns *cert. seekers* that a "petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."[4]

What does the Court's benchmark mean for a prosecutor seeking certiorari? In essence, the Supreme Court, in most cases, will not sit to review matters of purely

Footnotes

1. *28 U.S.C. § 1257(a) provides the Supreme Court with jurisdiction to review decisions of a state's highest court.*
2. *Sup. Ct. R. 10.*
3. *Id.*
4. *Id.*

state law.[5] Nor will it generally grant review of a state case where the dispute involves questions of fact.[6] As a result, when all is said and done, the Supreme Court's gaze ordinarily falls on cases with issues that require judicial intervention to ameliorate wrongs of federal constitutional dimensions.[7]

III. A and I Doctrine

Thus for a prosecutor, it seems that in the final analysis of whether to seek certiorari, the decision will be greatly influenced by which federal constitutional issue is raised on appeal. To illustrate this point, let's look at a highly plausible situation that a prosecutor might face when considering certiorari.

Imagine a prosecutor's case contains questions of both federal and state law. Imagine further that the state court resolved the matter by deciding the case on state-law grounds, independent of any federal law. This likely posture, where the decision coalesces both federal and state issues, but is exclusively decided on state law, triggers what is commonly referred to in appellate practice as the doctrine of adequate and independent state grounds, or "A and I" for short.[8]

When a prosecutor seeks certiorari with a case of this posture, then the Supreme Court must preliminarily determine whether any state grounds (*viz.*, state law) upon which the lower court predicated its decision are adequate and independent of any federal grounds (*viz.*, federal law) that could have supported the lower court's decision. Consequently, if the Supreme Court finds that the state grounds are both adequate and independent from any federal grounds, then it will deny certiorari for want of jurisdiction.[9]

> **"The doctrine of adequate and independent state grounds is, at best, a complicated question, and at worst, a maddening one."**

The doctrine of adequate and independent state grounds is, at best, a complicated question, and at worst, a maddening one. In that sense, if *cert. seekers* are bemused with A and I, then they are in good company. The Supreme Court has been known to propound a question on this exact issue. To this end, let's look at an actual situation where this A and I dilemma has recently surfaced.

IV. Kansas v. Marsh

The situation arose in the current case of *Kansas v. Marsh*.[10] In Sedgwick County, Michael Lee Marsh II was convicted of murdering a mother and her 19-month-old child.[11] Marsh ultimately received a sentence of death and thereafter directly appealed his verdict to the Kansas Supreme Court.[12]

On appeal, the Kansas Supreme Court held, among other things, that Kansas' death penalty statute, Kan. Stat. Ann. § 21-4624(e), was facially unconstitutional.[13] In doing so, the Kansas Supreme Court concluded that the statute violated the Eighth and Fourteenth Amendments to the United States Constitution because, it reasoned, that the statutory weighing equation effectively imposes the death penalty if a sentencing jury determines that the aggravating and mitigating circumstances are in equipoise; that is, if the aggravating and mitigating circumstances are equal.[14]

Needless to say, concerning the equipoise issue, not everyone has met the Kansas Supreme Court's decision with the same degree of equanimity. The State

5. *See e.g., Coleman v. Thompson, 501 U.S. 722 (1991) (Supreme Court will not review question of federal law decided by state court if the lower-court decision is grounded on state law that is adequate and independent of federal question.).*
6. *See e.g., Hernandez v. New York, 500 U.S. 352, 366 (1991) ("Our cases have indicated, that, in the absence of exceptional circumstances, we would defer to the state court factual findings, even when those findings relate to a constitutional issue.").*
7. *See e.g., Smith v. Phillips, 455 U.S. 209, 221 (1982).*
8. *See e.g., Michigan v. Long, 463 U.S. 1032 (1983).*
9. *Robert L. Stern et al., Supreme Court Practice 195-97 (8th ed. 2002) (primary source of information concerning Supreme Court litigation).*
10. *State v. Marsh, 278 Kan. 520, 102 P.3d 445 (2004), cert. granted, 125 S. Ct. 2517 (U.S. May 31, 2005) (No. 04-1170).*
11. *Marsh, 278 Kan. at 520.*
12. *Id.*
13. *Id. at 542.*
14. *Id. at 534-45.*

of Kansas, through the Attorney General, responded by seeking judicial review of the decision in the Supreme Court of the United States.[15] While a writ of certiorari has been granted, the Supreme Court has concerns about whether it can reach the federal question as presented by the State. In turn, the Supreme Court requested the appealing parties to brief this preliminary question: "Whether the Kansas Supreme Court's judgment was adequately supported by a ground independent of federal law?"[16]

In response to this A and I question, Respondent Marsh has provided a narrow answer. He has maintained that the only issue decided by the Kansas Supreme Court was whether Kan. Stat. Ann. § 21-4624(e), the statutory weighing equation, could be severed from the rest of the Kansas death penalty statute.[17] Under this parochial view, Respondent Marsh argues that the Kansas Supreme Court's decision is based on adequate and independent state grounds; thereby, the Supreme Court lacks jurisdiction to review the case.[18]

In contrast, the State has submitted that the Kansas Supreme Court's decision to strike down our death penalty was predicated exclusively on federal constitutional grounds — not adequate and independent of state grounds.[19] Thereby, argues the State, the doctrine of A and I is not implicated, and therefore the Supreme Court can reach the merits of the case.[20]

To resolve this dilemma, the Supreme Court must weigh these competing arguments and reach a conclusion, which will have one of two effects. On one hand, if the Supreme Court agrees with Respondent Marsh, then the State's appeal is over and the current death penalty law in Kansas is voided. On the other hand, if the Supreme Court agrees with the State, it can move beyond the jurisdictional question to reach the central argument of whether the United States Constitution is violated when a sentence of death is deemed appropriate when a sentencing jury determines that the aggravating and mitigating circumstances are in equipoise.

On Dec. 7, 2005, the parties argued their positions before the Supreme Court. Then in late March 2006, the Clerk of the Supreme Court notified the parties that the Justices had reset the case for argument. Presumably this has happened because the Justices split 4-4. Since Justice Sandra Day O'Connor retired before an opinion was released, her initial vote no longer counted. Now, newly appointed Justice Samuel A. Alito, Jr. will sit to hear *Marsh* and arguably cast the deciding vote.

As seen so far, nothing is absolutely certain with certiorari. Notwithstanding that, when a prosecutor contemplates filing a petition, certain preconditions must exist.

V. A Rare But Not Quite Impossible Writ

Having discussed, *a priori*, the necessity of possessing a compelling case as a condition precedent in the calculus of seeking certiorari, a prosecutor with a justiciable case, including one replete with compelling reasons and empty of adequate and independent state grounds, might want to unhesitatingly move ahead. It would be prudential, though, to take heed. There are other considerations that should be weighed in the cost-benefit analysis of appealing to the Supreme Court because "Review on a writ of certiorari is not a matter of right, but of judicial discretion."[21]

A pragmatic yet preeminent consideration to weigh is the potentially prohibitive expenses

15. *Supra note 10; see petition at http://www.abanet.org/publiced/preview/briefs/dec05.html#kansas.*
16. *Kansas v. Marsh, 125 S. Ct. 2517, No. 04-1170 (U.S. May 31, 2005) (order granting certiorari), available at http:www.supremecourtus.gov/orders/courtorders/053105pzor.pdf; see also briefs of petitioner and respondent available at http://www.abanet.org/publiced/preview/briefs/dec05.html#Kansas; (In addition to the A and I question, the Supreme Court tacked on a separate jurisdictional question addressing whether the Kansas Supreme Court's decision in Marsh was final based upon the fact that Marsh is to be retried for the crimes of capital murder and aggravated arson. Marsh, 520 Kan. at 534.).*
17. *Brief for Respondent at 19-26, Kansas v. Marsh, 125 S. Ct. 2517 (No. 04-1170), available at http://www.abanet.org/publiced/preview/briefs/dec05.html#Kansas.*
18. *Id.*
19. *Brief for Petitioner at 12-14, Kansas v. Marsh, 125 S.Ct. 2517 (No. 04-1170), available at http://www.abanet.org/publiced/preview/briefs/dec05.html#Kansas.*
20. *Id.*
21. *U.S. Sup. Ct. R. 10.*

associated with a petition for writ of certiorari. As with other petitions, filing fees must be paid.[22] Moreover, a petition for writ of certiorari requires accompanying briefs, which printing costs can easily run in the thousands of dollars.[23] Not to mention, the likely expense of using (and handsomely paying for) a law firm or printing company that specializes in finalizing briefs submitted to the Supreme Court. In addition, it is also necessary that an appendix accompanies the petition,[24] which, depending on the question presented and supporting materials, may span several hundred pages.[25]

Another obligatory prudential consideration that should be weighed is the Supreme Court's application of its discretionary powers in granting petitions for judicial review. Today, about 100 petitions are granted judicial review per term.[26] This is noteworthy when viewed in the context that approximately 8,000 petitions are filed each term, which runs from the first Monday in October until the first Monday in October of the following year.[27]

Moreover, another consideration that should be balanced is the historical trend in the Supreme Court's docket. In 1981, the Supreme Court's docket consisted of about 5,311 cases, with only about 3 percent actually argued.[28] By contrast, in 2002, the Supreme Court's docket consisted of about 9,406 cases, with only about 1 percent actually argued.[29] More recently, in Justice O'Connor's last full term, the Supreme Court heard only about 80 arguments.[30] This continuing trend of approximately 1 percent of petitions being granted review is sobering for state prosecutors contemplating certiorari.[31]

By looking at these prudential considerations that a prosecutor needs to weigh before seeking certiorari, a clear conclusion can be drawn and that is, while rare and in most cases costly, certiorari is not impossible to achieve. For example, in the past two decades, the Supreme Court has granted certiorari in six cases where the State of Kansas, or a representative of the State, was either petitioner or respondent.[32] In each case, the Kansas Attorney General's Office represented the State during the briefing stages. Additionally, in all but two of these cases, the Attorney General personally participated in oral arguments.[33]

22. *U.S. Sup. Ct. R. 38 (The filing fee is $300.00.).*
23. *U.S. Sup. Ct. R. 25 mandates that petitioner file 40 copies of the merits brief and the same number of copies when a reply brief is submitted.*
24. *U.S. Sup. Ct. R. 14. (Attention to the Rules of the Supreme Court is indispensable as you do not want to have a meritorious case denied simply because you failed to mind the rules. For example, unlike before the Kansas Supreme Court, an instanter motion does not similarly apply before the Supreme Court of the United States. A petition that is jurisdictionally out of time will not be filed. Pursuant to U.S. Sup. Ct. R. 13, a petition must be filed within 90 days of the judgment or from the decision upon a motion for rehearing of that judgment.*
25. *In Marsh, Petitioner's Appendix was 142 pages.*
26. *http://www.supremecourtus.gov/about/justicecaseload.pdf.*
27. *http://www.supremecourtus.gov/about/briefoverview.pdf.*
28. *458 U.S. 1308.*
29. *539 U.S. 1302.*
30. *http://www.supremecourtus.gov/opinions/04slipopinion.html.*
31. *When an appeal by a state attracts the interest of the Office of the Solicitor General, and the Solicitor General adds his voice during the petition stage, the chances of cert. being granted increase. See generally Lee Epstein, Interest Group Litigation During the Rehnquist Court Era, 9 J.L. & Pol. 639, 673 (1993). (To that end, if the question appears to affect both state and federal prosecutors, for example a matter implicating the Fourth Amendment, a call to the Office of the Solicitor General is in order. A recent example of a cooperative effort by both a State Attorney General and the Office of the Solicitor General can be seen in the case of Illinois v. Caballes, 543 U.S. 405 (2005) (Fourth Amendment case involving canine search of a motor vehicle briefed and argued by both the Illinois Attorney General and the Office of the Solicitor General.)).*
32. *Negonsott v. Samuels, 507 U.S. 99 (1993); Kansas v. Hendricks, 521 U.S. 346 (1997); Kansas v. Crane, 534 U.S. 407 (2002); McKune v. Lile, 536 U.S. 24 (2002); Wagnon v. Prairie Band Potawatomi Nation, 126 S. Ct. 676 (2005); Kansas v. Marsh, cert. granted, 125 S.Ct. 2517 (May 31, 2005). (This does not include those appeals that are considered original actions where one state is in litigation against another state. The only Court that can sit to resolve such disputes is the United States Supreme Court. A classic example involving Kansas is the water litigation that continues with the State of Colorado. To get a better understanding of this original action, attention can be directed to the most recent opinion in this case, Kansas v. Colorado, 543 U.S. 86 (2004).*
33. *Negonsott (Stephan); Hendricks (Stovall); Crane (Stovall); Lile (oral argument handled by Kansas Solicitor, Stephen McCallister); Prairie Band Potawatomi Nation (oral argument handled by former United States Solicitor General, Theodore Olson); Marsh (Kline).*

VI. Conclusion

As described, a prosecutor's decision to seek certiorari before the Supreme Court of the United States should not be taken lightly. When contemplating whether to seek certiorari, it is crucial that the prosecutor first be seized with not only a compelling case but also one that provides the Supreme Court with jurisdiction.

Yet, these preconditions simply set the stage. Balancing the prudential considerations of time, cost, and the historical trend of less than 1 percent of all petitions being granted against the Court's discretionary power, a decision to proceed must not be whimsical but completely sound. This is not meant to discourage the effort but to put into perspective the reality of engaging in Supreme Court litigation.

At the end of the day, if you as a prosecutor have a case that you believe possesses the necessary conditions to draw the attention of the Supreme Court, then you should proceed, determined that the case is not over. Then, and only then, you can confidently turn to opposing counsel and utter the necessary phrase.

About the Author and Contributor

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Methamphetamine: A Recipe for Disaster

by R. Michael Jennings, Assistant District Attorney, 18th Judicial District & Debra S. Peterson, former Deputy District Appeals Attorney

Editor's Note: This article is reprinted with permission and was first printed in the Journal of the Kansas Bar Association, Vol. 73 #9, October 2004. The first photo was courtesy of the Kansas Department of Health and Environment for the article, and the rest of the photos were courtesy of the KBI. Mike Jennings has written a supplement to this article in order to update some information.

Introduction

Methamphetamine. What is it? How is it made? How does it affect the user? How does it affect the nonuser? What is being done to curtail manufacture of the drug? What issues have the Kansas Supreme Court and the Kansas Court of Appeals addressed in conjunction with the drug? This article addresses these questions. Knowledge about the "devil's drug" and its impact on society is the first step to stimulating thought about how to effectively rid ourselves of methamphetamine and its curses.

The Consequences

How can I make methamphetamine? Let me count the ways... The recipes are on the Internet and in the bookstores. Police clandestine laboratory investigators routinely explain the recipes for the manufacturing process in court under oath. You can even find recipes in Kansas' appellate decisions.[1] So, if the recipes are widely available in the public domain, what's the big deal?

Try long-term brain damage for starters.[2] This damage takes at least two forms: First, the presence of methamphetamine in the brain initiates chemical reactions that are toxic to neurons. In other words, methamphetamine deforms and kills brain cells.[3] Second, methamphetamine alters the way neurons

communicate with each other. It causes new connections between neurons to grow, and it causes other connections to atrophy. Such new connections also occur in learning.[4]

As far as brain structure goes, a methamphetamine user "learns" to be an addict simply by ingesting the drug.

The Addiction Mechanism

When methamphetamine is first ingested it stimulates the brain's neurons to release dopamine, which is a neural transmitter used throughout the brain. One of the systems that primarily uses dopamine is the limbic system. This system is the center of our neural substrate for pleasure. The surplus dopamine produces effects via the limbic system, which most people experience as pleasurable. Indeed, it has been observed that the rush following ingestion can produce a sexual orgasm.[5]

As usage continues, the toxic effects of methamphetamine gradually reduce the ability of the user's neurons to make and use dopamine. Initially, users tend to experience diminished dopamine levels only as an increased difficulty in achieving a high as pleasurable as the last one. As their dopamine levels continue to decrease, the inability to experience highs of intensity comparable to the first highs becomes a more generalized effect. The users find their ability to experience everyday enjoyments, pleasure in general, has become reduced. The loss of ability to experience pleasure is known as anhedonia. An almost clinical depression can result. The response of many users is to increase their dosage and, hence, their drug-seeking behavior. This response can become an obsession.

Unfortunately, more methamphetamine does not solve their problem. In physiological truth, ingesting more methamphetamine only makes the problem worse because the additional methamphetamine further reduces the brain's ability to supply dopamine while at the same time increasing its physical ability to accommodate ever larger quantities of the addictive substance through added dendrites. The neural circuitry added in response to the increased neural activity caused by the methamphetamine tends to create its own demand for more of the drug. If this demand is not met, the user experiences craving. Craving

among methamphetamine users can result in intense drug-seeking behavior, which may include criminality. The damage to the brain's ability to produce and/or process dopamine is long term in heavy users, extending over several years, and may be permanent.[6] This may account for the stubbornly high relapse rates for methamphetamine addicts who receive treatment.

In addition to long-term brain damage and the concomitant addiction to the drug, the physical effects include severe weight loss, tooth decay, and organ damage, including inflammation of the heart lining; rapid heart rate; irregular heartbeat; increased blood pressure; and irreversible, stroke-producing damage to the small blood vessels in the brain. Hyperthermia and convulsions occur with overdoses and, if not treated immediately, can result in death.[7]

In summary, the addict's dopamine baseline levels drop with continued ingestion. Once they fall below what the user requires for proper functioning, the user experiences unpleasant effects, including incoordination, fatigue, anhedonia, depression, and anxiety. (A point of comparison here is that people with Parkinson's Disease also have low levels of dopamine.) The brain is unable to respond to the dopamine deficit because the drug has caused it to lose too much of its reserve supply and, over time, its ability to make replacement dopamine. All too often the users attempt to restore their now diminished sense of pleasure by ingesting the drug again. This re-initiates the cycle of excess; insufficient levels of dopamine; and the concurrent anxiety, depression, and anhedonia. The only relief for the inability to achieve what were once pleasurable responses to the everyday experiences of eating, touching, smelling, and the like, is to ingest the drug again. Hence, the addiction.[8] (Another point of comparison is that dopamine levels are also elevated in schizophrenics.)[9]

The Need For Effective Control of Methamphetamine Use is Clear

Methamphetamine is relatively easy to make. Addicts can acquire everything they need to satisfy their cravings at the local Wal-Mart or other retailer, except anhydrous ammonia (which can be easily stolen from any of the great number of tanks in farm fields anywhere in the state). Addicts are no longer dependant on a long supply chain coming up from the Caribbean or through Mexico. They and their friends can make their own any time, any place.

The ability to make the drug virtually on demand has changed law enforcement's ability to control the drug's use. Traditional methods to control supply are ineffective. In their place, law enforcement is required to try to limit access to the admittedly lawful and commercially available ingredients by means other than search warrants, arrest, and confiscation of the drugs and proceeds of the enterprise. Before looking at some new and promising ways to limit such access, it will be helpful to sketch out the basics of the manufacturing process. By understanding the role each ingredient plays in the production of the drug, differing solutions can be objectively evaluated for their likely effectiveness.

In chemical terms, the manufacturing process is straightforward: Start with a pseudoephedrine molecule and remove one oxygen atom. The resulting molecule is methamphetamine.

The removal of an oxygen atom is called a reduction. Reduction of a pseudoephedrine molecule yields a methamphetamine base. The base form is not water soluble and hence cannot be readily absorbed by the human body. To make the base molecule water soluble, and thus absorbable by a user, hydrogen chloride is added to the (base) molecule. This then is the essence of the process: Start with pseudoephedrine, remove oxygen, and add hydrogen chloride. Voila! (Perhaps we should say, "Now you're cookin'.")

The first step: Get the pseudo out of the cold pills

The technology to carry out this process is also relatively simple. It can be done at home, in a car, in a field, and with equipment consisting of common household items sold at Dollar General or Wal-Mart. Here is the basic process: First, get some pseudoephedrine, which is contained in cold pills like Sudafed. It can be removed from the pills' bindings by placing the pills in a solvent. The pseudoephedrine dissolves from the binding materials in the cold

pills and is held in solution by the solvent, thereby separating it from the binding materials. Water, ether, or methanol can be used as the solvent. Methanol is the preferred solvent because it is an alcohol and evaporates faster than the water or ether, thereby accelerating the process.

After the pills are soaked for an hour or so, the entire mixture, including the binding materials and the liquid solvent that contains the pseudoephedrine, is passed through a filter, usually a coffee filter. Left in the filter is the binding material. The solvent containing the pseudoephedrine has passed on through the filter and is allowed to evaporate. What remains after evaporation is only pseudoephedrine. This is the first stage of the manufacturing process. It is usually performed using glass Mason-type jars to hold the pills and the solvent. Prior to being soaked, the pills can be crushed in a coffee grinder or similar appliance for a faster, more complete separation.

Methanol is wood alcohol and is the principal ingredient in over-the-counter gas line treatments such as HEET. Methanol is a respiration and fire hazard. Cooks may try heating the solution containing the pseudoephedrine to evaporate the methanol more quickly. Any open flame used for this purpose creates an obvious fire/explosion hazard.

The second step: Remove the oxygen atom from the pseudoephedrine molecule

The next step is the removal of an oxygen atom from the now pure pseudoephedrine molecule. Currently there are two ways to do this: One method uses lithium metal and anhydrous ammonia, and the other uses red phosphorous and iodine. Chemically, properly combining pseudoephedrine with either lithium and anhydrous ammonia or red phosphorus and iodine will cause the desired reduction to occur.

The third step: Add hydrogen chloride to the methamphetamine base molecule

Once the reduction step is complete, the next, and final, step is to make the methamphetamine base capable of being absorbed by the human body. This is readily accomplished by adding hydrogen chloride to the base molecule. Adding hydrogen chloride to an active ingredient is a common way to make a wide range of products capable of being absorbed by the human body. Many over-the-counter (and prescription) drug products have added hydrogen chloride. This is the reason for an "hcl" designation following the name of their active ingredient.

The hydrogen chloride is added by first dissolving the methamphetamine base into a liquid, such as the ether found in starting fluid, so that hydrogen chloride gas may be bubbled through it, allowing the hydrogen chloride to combine with the methamphetamine base in the ether. The methamphetamine base becomes visible at this point as a whitish substance due to the bonding with the hydrogen chloride. It then precipitates out of the ether solution and falls to the bottom of the container. This process is often described as "salting out."

The hydrogen chloride is made in two ways. The first is to combine table salt and sulfuric acid (available in drain cleaners); the second is to combine aluminum and muriatic acid. Both are readily available over the counter. Hydrogen chloride gas is produced when either of these two combinations occurs. Many cooks combine these materials in what is called a gassing generator. Gassing generators frequently consist of a two-liter pop bottle into which is placed rock salt and sulfuric acid or pieces of aluminum foil and muriatic acid. The pop bottle is capped with a long rubber tube. Once the reaction liberating the hydrogen chloride starts, the end of the tube is submerged into the solution containing the methamphetamine base. The reaction in the pop bottle is sufficiently vigorous to force the gas through the tube and into the methamphetamine base/ether solution.

This ease of production allows addicted individuals to support their habit by stealing checkbooks, credit cards, and identification papers; cashing the checks or fencing the goods bought with the credit cards; driving stolen cars to do all this; and then get the ingredients, cook the methamphetamine, get high, and continue the drill. There are a number of loosely organized users who specialize in one or more of the steps necessary to maintain this addicts' lifestyle. Some steal the cars containing the checks and credit cards and give the checks to someone else, who in turn may

have several crews of addicts who pass the checks or shop with the credit cards using forged identifications. Others may use computers to make the checks and identification. Still others manufacture the methamphetamine. Such associations function until the participants cannot continue. Because of economies of scale, the harm generated by these criminal associations is greater than the sum of the activities of the individual addicts. Such behavior is truly addiction-driven crime, since the motivation for the association's activities is to feed the members' collective addiction.

The most problematic consequence of the ease of production is that the limits on consumption imposed by the laws of supply and demand no longer operate to restrict consumption. Addicts can feed their own addiction anytime the hunger strikes simply by making more methamphetamine.

It is clear that without pseudoephedrine as a precursor, methamphetamine could not be manufactured as easily as it is today.

The addiction-driven production is made possible by the ease with which oxygen is removed from the pseudoephedrine. The process is, unfortunately, a no-brainer. In fact, without pseudoephedrine, cooks would be forced back into the days of making so-called biker dope from phenyl2propanone (P2P). This dope is not as potent as that produced by methods currently in vogue. Besides, the Drug Enforcement Administration has effectively controlled access to P2P and other ingredients used in the biker recipe. Consequently, until methods to make methamphetamine from pseudoephedrine became widely known, the drug was not a national problem. Usage was confined to a few areas, such as San Diego and Hawaii, where it had been the drug of choice, at least among arrestees, for 20 years or more. Methamphetamine use was being, if not eliminated, effectively controlled by existing legal structures.

This all changed when dopers realized they could easily make methamphetamine from pseudoephedrine. Once they realized that their access to pseudoephedrine was not legally controlled at the retail level, the land rush was on. Simply put, it was a marketing free-for-all. Law enforcement efforts to get the pills behind the counter have been rebuffed by the pill makers' lobbyists, even though store security and store pharmacists have provided excellent cooperation in the effort to limit the amount of pseudoephedrine being diverted via retail outlets to the cooks. Oklahoma enacted a statute that should effectively limit diversion of pseudoephedrine from its lawful use. The statute allows pseudoephedrine to be sold over the counter only in liquid capsule form. Any other form is controlled to the extent that prospective purchasers must obtain the substance from store personnel after identifying themselves. Quantities are limited over time. Over-limit quantities are available on a prescription-only basis.[10]

The measure has been effective not only in controlling the diversion of pseudoephedrine into clandestine channels, it appears to have curtailed the number of labs. The initial impact of the new law has been dramatic. Agent Scott Rowland of the Oklahoma Bureau of Narcotics and Dangerous Drugs has gathered the latest available statistics from official law enforcement reporting agencies and advised the authors via e-mail dated Aug. 11, 2004, that "In short, we're seeing a decrease [in the number of labs seized] hovering around 60 percent overall."

Pseudoephedrine in liquid capsules is not easily separated from the liquid solution and, therefore, is not sought by methamphetamine addicts for use in the manufacturing process, in contrast to that contained in the cold pills sold over the counter in Kansas. Consequently, the authors have personally noted that the only pseudoephedrine prosecutions for the last several weeks in Sedgwick County have been of individuals traveling up from Oklahoma to get the pills. Perhaps Kansas should consider legislation like that adopted in Oklahoma.

The Kansas Experience

History

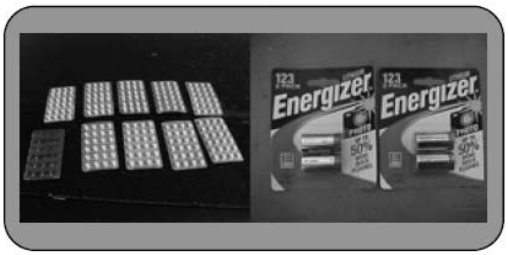
It appears methamphetamine was first mentioned in a Kansas appellate decision in 1970. In *Zimmer v. State*, 206 Kan. 304, 477 P.2d 971 (1970), the movant alleged his confession was involuntary because of his consumption

of methamphetamine. Another early case was *State v. Callazo*, 1 Kan. App. 2d 654, 574 P.2d 214 (1977). At issue were some hearsay statements linking the defendant to the sale of methamphetamine.

A number of the early cases concerning methamphetamine involved possession, possession with intent to sell, and sale of the drug.[11] According to the defendant in *State v. Mumpower* (Kan. Ct. App. No. 64,290 unpublished opinion issued Feb. 8, 1991), he sold methamphetamine, in part, to make his child support payments.

A number of the early cases involved search and seizure issues.[12] As might be expected, methamphetamine has been found in a variety of places: *State v. Alvarez*, 29 Kan. App. 2d 368, 28 P.3d 404 (2001) (in a bottle of "Lean Life" and box of dental floss); *State v. Bone*, 27 Kan. App. 2d 582, 6 P.3d 914 (2000) (in a commercial motor carrier); *State v. Morris*, 27 Kan. App. 2d 155, 999 P.2d 283 (2000) (methamphetamine lab found in home); *State v. Bartlett*, 27 Kan. App. 2d 143, 999 P.2d 274 (2000) (boxed methamphetamine found in car); *State v. Beal*, 26 Kan. App. 2d 837, 994 P.2d 669 (2000) (in a detached garage); and *State v. Bickerstaff*, 26 Kan. App. 2d 423, 988 P.2d 285 (1999) (in a car).

Seemingly, the first case to deal with the manufacture of methamphetamine was *State v. Davidson* (Kan. Ct. App. No. 60,779 unpublished opinion issued Nov. 18, 1987). Davidson and his cohorts had an arrangement with a Texas provider who manufactured large quantities of methamphetamine in a laboratory operation. The defendant helped finance the lab and made trips to Texas to pick up the drug and bring it back to Topeka. See also *State v. Dunn* (Kan. Ct. App. No. 65,597 unpublished opinion issued September 20, 1991) (methamphetamine purchased in California for sale and distribution in Kansas).



The first case mentioning the manufacture of methamphetamine in this state appears to be *State v. Fausnett* (Kan. Ct. App. No. 63,258 unpublished opinion issued Aug. 4, 1989). The defendant argued the trial court erred in failing to suppress evidence seized pursuant to a search warrant for methamphetamine and chemicals and equipment used in the manufacture of methamphetamine.

Legal issues

What are some of the current legal issues surrounding the manufacture of methamphetamine?

Search and seizure

Search and seizure issues continue. In *State v. Bowles*, 28 Kan. App. 2d 488, 18 P.3d 250 (2001), the district court suppressed evidence seized pursuant to a search warrant. Finding probable cause to support the warrant, the Court of Appeals noted the purchase of items associated with the production of methamphetamine, including John Deere starting fluid, which is a choice product in the manufacture of methamphetamine due to its high ether content; a strong odor of ether coming from the residence to be searched; a dubious explanation for the odor; refusal to consent to search; and statements by a confidential informant. In another case, the Court of Appeals held the mere odor of ether coming from a garage did not, however, supply the requisite probable cause to search.[13] "Although ether is used in the manufacture of methamphetamine, it is not illegal to possess it."[14]

Similarly, in *State v. Schneider*, 32 Kan. App. 2d 258, 80 P.3d 1184 (2003), while the court acknowledged that under K.S.A. 65-7006(a) it is illegal to possess ephedrine or pseudoephedrine with the intent to use it to manufacture a controlled substance, the purchase of two packages of cold pills containing pseudoephedrine was not sufficient to constitute reasonable suspicion of intent to commit a crime. The court found the state's argument about reasonable suspicion, "a little scary."[15]

In another case, Morris was parked in his pickup, with the engine running, on a rocky jetty-breaker area at the Douglas County State Lake. Officers pulled in behind the defendant's pickup "and activated [their] red lights and illuminated the back of [the defendant's] pickup with... spotlights."[16] As the officers approached the driver's and passenger's doors, they noticed a chemical odor associated with methamphetamine labs coming from inside the truck. The officers also observed items associated with the production of methamphetamine. Morris

was removed from the truck, and the officers observed more articles associated with methamphetamine labs. Based on what they saw and smelled the officers decided to search the truck and found a fairly complete lab.

The court held: (1) Morris' initial encounter with the police was not voluntary, but rather occurred under a show of authority. "The officers' conduct, the activation of the emergency lights in a remote area off a roadway, was a show of authority which would communicate to a reasonable person that there was an intent to intrude upon freedom of movement;"[17] (2) Morris submitted to the officers' authority by not attempting to leave, (3) therefore, he was seized for Fourth Amendment purposes; (4) there was no reasonable suspicion of criminal activity at the moment the officers pulled in behind the defendant; and (5) evidence of the fairly complete methamphetamine lab obtained as a direct result of that illegal seizure should have been suppressed.

Charging issues

The sufficiency of charging documents and determining the proper charge have also been the fodder of recent appellate decisions.

State v. Shirley, Kan., 89 P.3d 649 (2004), addressed the sufficiency of a charge of conspiracy to manufacture methamphetamine. Since the defendant first challenged the sufficiency of the charging document at the trial level, the Supreme Court focused on "technical compliance" in alleging the essential elements of the crime. The court held that under K.S.A. 21-3302(a) the state was required to set out in the charging document a specific overt act in furtherance of the conspiracy. The mere allegation that the defendant had committed "an overt act in furtherance of the conspiracy" was insufficient. The complaint was fatally defective and the court did not have jurisdiction. Shirley's conviction was reversed.

Further, the court held that under K.S.A. 21-3302(a), which requires that an overt act in furtherance of the conspiracy be alleged and proved, "both the factual allegation in the charging document and the proof of the same factual allegation are required for a conviction."[18] The specific actor, whether it be the defendant or a co-conspirator, must be identified in the charging document as well as the specific overt act. That is also what the state must prove in order to secure a conviction.

When is it manufacture of methamphetamine or only attempted manufacture? The answer can be found in *State v. Martens*, 273 Kan. 179, 54 P.3d 960 (2002). See also *State v. Peterson*, 273 Kan. 217, 42 P.3d 137 (2002).

In Martens, the court held that K.S.A. 65-4159(a) prohibits the manufacture of a controlled substance or a controlled substance analog. Attempted manufacture of a controlled substance is a separate crime under K.S.A. 21-3301(a).

"To prove the crime of manufacture of methamphetamine, the state must show that the defendant (1) intentionally, (2) completed the manufacture of methamphetamine, or (3) could have successfully manufactured methamphetamine."[19] In arriving at the "could have successfully manufactured methamphetamine" proviso the court looked to the definitions of "manufacture" and "controlled substance" set out in K.S.A. 65-4101(n) and (e).

To prove an attempt, the state must prove (1) an overt act toward the commission of a crime, (2) that the defendant did so with the intent to commit the crime, and (3) that the defendant failed to perpetrate the crime or was prevented or intercepted in the execution of the crime.

"[W]hile the crimes of attempt to manufacture methamphetamine and actual manufacture of methamphetamine may overlap somewhat, the distinction between the two crimes may be said to depend upon the degree of likelihood that a defendant's efforts will succeed in producing methamphetamine."[20]

Subsections (b) and (c) of K.S.A. 65-4159 mandate the imposition of the same penalty for attempting to unlawfully manufacture as for the actual manufacture of a controlled substance.

Sufficiency of the evidence

An example of sufficient evidence to support a conviction of manufacturing methamphetamine can be found in *State v. Gunn*, 29 Kan. App. 2d 337, 26 P.3d 710 (2001). In that case, numerous components of a methamphetamine lab were found in the defendant's motel room, there was an "overwhelming odor of anhydrous ammonia" in the room, and the defendant had "played an instrumental role in the purchase of...starter fluid earlier in the morning."[21] Law enforcement officials found a "64-ounce bottle containing liquid, which was still

smoking when removed from a sink," and this bottle contained anhydrous ammonia and methamphetamine. Further, a KBI forensic scientist testified the "finished product" was found in the room.[22]

In *State v. Sheikh*, 30 Kan. App. 2d 188, 41 P.3d 290 (2001), the court held the charge of attempted manufacture of methamphetamine based on the following evidence should not have been dismissed for lack of probable cause: (1) the defendant had opened 14 boxes of pseudoephedrine and removed approximately 672 pills from their bubble packs and (2) put the pills in a backpack together with an empty two-liter pop bottle, 48-inches of clear plastic tubing, four lithium batteries, a can of starter fluid, two cans of gas-line antifreeze, a container of drain opener, and a bag of rock salt. In reversing, the court relied on *United States v. Savaiano*, 843 F.2d 1280 (10th Cir. 1988), where the court stated:

> The purchase of a recipe might not be an attempt by itself. But, proceeding to obtain the required chemicals called for in the recipe, and actively locating and attempting to meet with a chemist for instruction, are certainly acts 'strongly corroborative of the actor's criminal purpose.' They are overt acts 'pointed directly to the commission of the crime charged.' The realistic emphasis on what had been done, rather than dwelling on what remained to be done is consistent with our decision in *United States v. Prichard*, 781 F. 2d 179, 181-82 (10th Cir. 1986), in which we held that reconnoitering the object of a crime together with collecting the instruments to be used in that crime, constituted an attempt.' [Citation omitted.] 30 Kan. App. 2d at 1919.

Sentencing issues

Clearly, the use of ephedrine or pseudoephedrine has enhanced the manufacture of methamphetamine. However, what penalty to apply to a conviction for possession of ephedrine or pseudoephedrine has been an issue perplexing our appellate courts. In *State v. Frazier*, 30 Kan. App. 2d 398, 42 P.3d 188 (2002), the defendant was convicted of the severity level 1 offense of possession of ephedrine or pseudoephedrine in violation of K.S.A. 2001 Supp. 65-7006(a). That statute provided:

> "It shall be unlawful for any person to possess ephedrine, pseudoephedrine, or phenylpropanolamine, or their salts, isomers, or salts of isomers with intent to use the product as a precursor to any illegal substance."

The defendant argued the trial court imposed an illegal sentence. He argued the conduct for which he was convicted was prohibited by both K.S.A. 2001 Supp. 65-7006(a) and the severity level 4 offense of possession of drug paraphernalia; therefore, he should have been sentenced only as a severity level 4 offender. It is a principle of Kansas law that when two criminal offenses have the same elements but are classified differently for purposes of imposing a penalty, a defendant may be sentenced under the lesser penalty provision only, regardless of the crime for which he was convicted.

K.S.A. 2001 Supp. 65-4152(a) prohibited the possession with intent to use "any drug paraphernalia to ... manufacture...a controlled substance." Drug paraphernalia was defined in K.S.A. 65-4150(c) to include "all equipment, products and materials of any kind, which are used or intended for use in ... manufacturing ... a controlled substance."

In finding possession of ephedrine or pseudoephedrine and possession of drug paraphernalia were identical offenses, the court concluded both statutes prohibited the possession of ephedrine or pseudoephedrine for use in the manufacture of a controlled substance. "Ephedrine and pseudoephedrine fall within the definition of drug paraphernalia because they are materials used to manufacture a controlled substance."[23]

The case was remanded with instructions to sentence the defendant as a severity level 4 offender. The Supreme Court denied the state's petition for review and the scramble was on. Defendants statewide sought to be sentenced in accordance with Frazier. In *Wilson v. State*, 31 Kan. App. 2d 728, 71 P.3d 1180 (2003), another panel of the Court of Appeals wrestled with whether the Frazier decision should be applied retroactively. That panel held Frazier should "not be retroactively applied in a K.S.A. 60-1507 collateral attack of an unappealed conviction after a favorable plea agreement."[24]

In a concurring opinion, Judge Knudson stated his belief that Frazier was wrongly decided.[25] Judge Knudson opined the two statutes in issue did not prohibit the same conduct:

> "K.S.A. 1999 Supp. 65-7006(a) prohibits possession of drugs

used to make methamphetamine. K.S.A. 65-4152(a)(3) prohibits possession of drug paraphernalia ...The elements test is tenuous, and the result wholly ignores legislative intent to ratchet up the penalty for possession of ingredients necessary to cook methamphetamine while imposing a less severe penalty for possession of drug paraphernalia."[26]

Again, the Supreme Court denied review.

In *State v. Campbell*, 31 Kan. App. 2d 1123, 78 P.3d 1178 (2003), Judge Elliott, who was on the panel that decided Frazier, Senior Judge Larson, who authored the Wilson opinion, and Judge Johnson concluded that Frazier was wrongfully decided and declined to follow it.[27]

The court reasoned that when one looked at the "definition of 'drug paraphernalia' found in K.S.A. 65-4150(c), which is broadly stated as including 'products and materials,' but in the main describes physical objects or tools used in the manufacture of controlled substances, it becomes apparent that K.S.A. 65-7006 was intended to criminalize the possession and use of specific substances (such as ephedrine) which are used as a precursor to any illegal substance."[28] Thus, the more specific statute controlled and a person in possession of ephedrine or pseudoephedrine with the requisite criminal intent should be sentenced as a severity level 1 offender.[29] Legislative intent was key to the court's decision.[30]

Addressing a second issue, the court in Campbell held that the crimes of manufacturing methamphetamine, K.S.A. 65-4159, and possession of ephedrine/pseudoephedrine, K.S.A. 65-7006, require the proof of different elements; therefore, the defendant was properly charged with and convicted of both offenses.

In order to prove the defendant guilty of the unlawful manufacture of methamphetamine, the state was required to prove that he manufactured a controlled substance known as methamphetamine. In order to prove the defendant guilty of possession of ephedrine, the state was required to prove that he knowingly possessed the substance with intent to use the product to manufacture a controlled substance. The court reasoned, "The Legislature clearly provided for the criminalization of two different and distinct acts. The crimes have different aims and different prerequisite intents."[31]

This time, the Supreme Court granted review. The case has been briefed and argued and a decision is pending. In *State v. Layton*, 276 Kan. 777, 80 P.3d 65 (2003), the court held the penalty provision applicable to a violation of K.S.A. 65-4159, manufacture of a controlled substance, is the penalty contained in that specific statute. K.S.A. 65-4159(b) provides that manufacturing or attempting to manufacture a controlled substance is a severity level 1 felony. A defendant's sentence would be ascertained based on the severity level 1 classification and the defendant's criminal history.

The defendant had argued that the penalty provision of K.S.A. 65-4127c should apply.

That would have rendered manufacture of a controlled substance a class A non-person misdemeanor. The defendant's argument was based on the following provision in 65-4127c: "except as otherwise provided in K.S.A. 65-4127a and 65-4127b and K.S.A. 2001 Supp. 65-4160 through 65-4164 and amendments thereto, any person violating any of the provisions of the uniform controlled substances act shall be guilty of a class A non-person misdemeanor."

The court held that K.S.A. 65-4159 is not a part of the uniform controlled substances act. K.S.A. 65-4159 is part of the act concerning drug paraphernalia which starts at 65-4150. While the Legislature expressly included some parts of the drug paraphernalia act as part of the uniformed controlled substances act, i.e. 65-4160-65-4164, it did not include 65-4159. Therefore, 65-4127c was inapplicable to a violation of 65-4159.

The chaos surrounding methamphetamine-related crimes continues.

Conclusion

The manufacture of methamphetamine literally endangers children, kills, and destroys careers. That much is clear from reported Kansas appellate decisions.[32]

In Florida, some of the hardest hit by the manufacture of methamphetamine, "the devil's drug," are children. It is reported law enforcement officials found a 9-day-old baby in a methamphetamine kitchen — the child's skin stained red from chemicals used to manufacture the drug; a 10-year-old addict fed methamphetamine by her mother; a 4-year-old child

who boasted about helping his father in a methamphetamine lab chalked full of explosive chemicals; and adolescent girls prostituted by their parents to pay for more of the highly addictive drug.[33]

On June 29, 2004, the Wichita Eagle reported about a 15-month-old child, "her body poisoned by methamphetamine,"[34] who had been taken to a local hospital.

In that article, Lt. Alan Prince of the Wichita Police Department was quoted as saying, "When you use methamphetamine, you don't think like a normal person would think; you do things a normal person wouldn't do. [E]ating, bathing, and 'taking care of your kids' can become secondary to drug abuse."[35]

Dr. Sheldon Preskorn, professor and chair of the Psychiatry and Behavioral Sciences Department, University of Kansas Medical Center – Wichita, was quoted as saying that methamphetamine-exposed toddlers could encounter neurological problems and warped brain functioning. About methamphetamine itself, Preskorn said, "It is highly addictive. It's not something you should screw around with."[36]

Somehow we can do better by our children and, for that matter, their parents. The first step is to understand the severity of the methamphetamine problem and the need to effectively curtail production of the drug. That, against the backdrop of how our appellate courts are dealing with methamphetamine cases, has been the aim of this article.

About the authors

Debra S. Peterson was the deputy district appeals attorney for the 18th Judicial District of Kansas when this article was written. She served as chief of that department since 1989. Prior to 1989, she was with the Kansas Court of Appeals in various capacities, the last position as a research attorney for the late John E. Rees. She has taught on the national, state, and local levels on a variety of topics and is a contributing author for the second and third editions of the KBA "Appellate Practice Handbook."

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ENDNOTES

1. *State v. Lamae*, 268 Kan. 544, 547, 998 P.2d 106 (2000).
2. See National Institute of Drug Abuse, "Research Report Series – Methamphetamine Abuse and Addiction," National Institute of Health Publication No. 02-4210, Printed April 1998, Reprinted January 2002, 'What are the long-term effects of Methamphetamine abuse?'
3. See NIDA Research Monograph, Chapter: "Potential New Insights Into the Molecular Mechanisms of Methamphetamine-Induced Neurodegeneration," Wrona, Yang, Zhang, and Dryhurst, pp. 146-174.
4. Research on mice published in the May 2001 Nature showed that a single exposure to cocaine — comparable in humans to a recreational dose — causes dramatic changes in the brain that are like those underlying learning and memory. The study measured the increase in neural connections. Lead author Mark Ungless, PhD, and a post-doctoral scientist at the University of California San Francisco, in an interview accompanying the publication of the study, said: "When you learn something, you might expect to see change in a very few synaptic connections – the junctions between neurons. What's so amazing is that nearly all dopamine neurons are affected by this single cocaine exposure. This kind of response is extremely rare, and would have a profound effect throughout the brain, particularly other are as involved in addiction." (Emphasis added)
It should be pointed out that since the dopamine reward system permeates most areas of the brain, the study's results suggest that a single dose will produce robust neural changes affecting a wide range of behaviors related to drug abuse, particularly the neural process underlying increased sensitivity to repeated drug exposures, which is the essence of addiction. The researchers added that the powerful neural changes documented by the study may underlie drug relapse, in which just a single dose after prolonged abstinence can induce renewed drug-seeking behavior. The strong neural responses they found most likely occurs, the study's authors indicate, with exposure to other drugs of abuse as well since nicotine, morphine, amphetamine, and alcohol all effect the same receptors as cocaine.
5. Goldstein, Avram, M.D. Addiction: From Biology to Drug Policy (2d Ed.). Oxford University Press, 2001; p. 182.
6. The National Institute of Drug Abuse (NIDA), in an Infofax dated January 22, 2001, reported that "[a]nimal research going back 20 years shows that high doses of methamphetamine damage neuron cell endings. Dopamine – and serotonin – containing neurons do not die after methamphetamine use, but their

nerve endings ("terminals") are cut back and re-growth appears to be limited." NIDA has also reported in a Research Report on Methamphetamine: Abuse and Addition, dated January 24, 2001, that "[i]n animals, a single high dose of the drug has been shown to damage nerve terminals in the dopaminecontaining regions of the brain." (Emphasis added). In addition, "[r]esearchers have reported that as much as 50 percent of the dopamine-producing cells in the brain can be damaged after prolonged exposure to relatively low levels of methamphetamine. Researchers also have found that serotonin-containing nerve cells may be damaged even more extensively."

7. NIDA, Research Report Series, "Methamphetamine: Abuse and Addition," January 24, 2001.

8. The emphasis on anhedonia should not be interpreted as a denial of the importance of the other negative effects of drug usage, of which there are many. It is, however, the authors' view that the production of so many unpleasant and often painful effects cannot explain the basis of the addict's reasons for continuing to take their drug. In our view, it is the addict's expectation that they will experience the drug's pleasant effects, its euphoria, its high, that motivates at least initially each user to seek the drug again. Early on, the pleasant effects are predominant and the negative effects are nascent. As we point out in the text, this state of affairs does not last. All too soon for most users, their body's response to their drug use becomes a negative experience, which can only be partially alleviated by continuing to take the drug. The self destructive cycle of addiction has started. One important lesson learned from the documentation in the last 10 to 15 years of the physiological damage to the brain is that total abstinence is the best way to promote the public health. (Don't even try it. That stuff really is bad for you.) The physical changes in the brain start with the first exposure. Obviously, experiencing the first high does too. See Vanderschuren, Schmidt, De Vries, Van Moorsel, Tilders, and Schoffelmeer, "A Single Exposure to Amphetamine Is Sufficient to Induce Long- Term Behavioral, Neuroendocrine, and Neurochemical Sensitization in Rats" in The Journal of Neuroscience. November 1,1999, 19 (21):9579-9586 in which the authors conclude "that a single exposure to amphetamine is sufficient to induce long-term behavioral, neurochemical, and neuroendocrine sensitization in rats." This study was cited in a 2001 study reaching the same conclusion for methamphetamine. Schmauss, C. (2000). "A Single Dose of Methamphetamine Leads to Long Term Reversal of the Blunted Dopamine D1 Receptor-mediated Neocortical c-fos Responses in Mice Deficient for D2 and D3 Receptors." Journal of Biological Chemistry 275: 38944-38948.

9. The similarity between amphetamine-induced paranoia and schizophrenia has been noted in Goodman and Gilman, Pharmacological Basis of Therapeutics, Macmillan Publishing Company, 1985, p. 168. See also a paper by Floresco, Todd and Grace published in The Journal of Neuroscience, July 1, 2001, 21(13):4915-4922, which notes the hyperexcitable state of the dopamine system that is present in schizophrenia.

10. See 63 O.S. 2-212.

11. See e.g. *State v. Garcia* (Kan. Ct. App. No. 63, 511 unpublished opinion issued December 8, 1989); *State v. Drum* (Kan. Ct. App. No. 62,759 unpublished opinion issued June 16, 1989)(possession with intent to sell); *State v. Davidson* (Kan. Ct. App. Case No. 61,761 unpublished opinion issued February 17, 1989)(possession with intent to sell); *State v. Thomas* (Kan. Ct. App. No. 61,733 unpublished opinion issued February 10, 1989); *State v. King* (Kan. Ct. App. No. 62,105 unpublished opinion issued January 6, 1989)(possession with intent to sell); *State v. Ford* (Kan. Ct. App. Case No. 61,362 unpublished opinion issued July 29, 1988); *State v. Hughes* (Kan. Ct. App. Case No. 59,937 unpublished opinion issued July 1, 1988)(sale of); *State v. New* (Kan. Ct. App. No. 60,750 unpublished opinion issued March 31, 1988)(sale of); *State v. Hunt* (Kan. Ct. App. No. 60,361 unpublished opinion issued October 29, 1987) (possession of); *State v. Schiffelbein* (Kan. Ct. App. No. 55,990 unpublished opinion issued February 14, 1985)(possession with intent to sell); *State v. Logan*, 9 Kan. App. 2d 353, 678 P.2d 181 (1984) (1981 conviction for sale of methamphetamine).

12. See e.g. *State v. Garcia* (Kan. Ct. App. No. 63, 511); *State v. Davidson* (Kan. Ct. App. Case No. 61,761)(probable cause for search warrant); and *State v. King* (Kan. Ct. Ap p. Case No. 62,105).

13. *State v. Blair*, 31 Kan. App. 2d 202, 62 P. 3d 661 (2002).

14. 31 Kan. App. 2d at 208.

15. 32 Kan. App. 2d at 264.

16. 276 Kan. at 13.

17. 276 Kan. at 20.

18. 89 P.3d at 655.

19. 273 Kan. 179, Syl. ¶ 6.

20. 273 Kan. 179, Syl. ¶ 8.

21. 29 Kan. App. 2d at 341-42.

22. 29 Kan. App. 2d at 339.

23. 30 Kan. App. 2d at 405.

24. 31 Kan. App. 2d 728, Syl ¶.

25. 31 Kan. App. 2d at 734.

26. 31 Kan. App. 2d at 735-36.

27. 31 Kan. App. 2d at 1137.

28. 31 Kan. App. 2d at 1134.

29. 31 Kan. App. 2d at 1135.

30. 31 Kan. App. 2d at 1137 ("We hold the clear legislative intent in K.S.A. 65-7006 was to criminalize the specific items found in Campbell's possession and with his clearly shown usage a drug severity level 1 felony resulted.").

31. 31 Kan. App. 2d at 1132.

32. See *State v. Finley*, 273 Kan. 237, 42 P.3d 723 (2002); In re Webb, 262 Kan. 679, 941 P. 2d 1387 (2002); *State v. Lamae*, 268 Kan. 544, 998 P. 2d 106 (2000); *State v. Sperry*, 267 Kan. 287, 978 P. 2d 933 (1999); *State v. Humphrey*, 258 Kan. 351, 905 P. 2d 664 (1995); In re C.C., 29 Kan. App. 2d 950, 34 P. 3d 62 (2001).

33. Wes Smith, 'Devils Drug'; Methaphetamine Madness has Ravaged the Panhandle, Ruining Lives. Now the War is Heading for Central Florida, Orlando Sentinel, Orlando, Fla., June 24, 2004, at A1

34. Adam Smeltz, Kids' Exposure to Meth Rising, Wichita Eagle, June 29, 2004, at 1A

35. Id.

36. Id.

Developments Since First Publication of this Article

by Michael Jennings

1. Pseudoephedrine

There have been a number of developments since this article appeared in the Kansas Bar Journal. Perhaps the most beneficial has been the Kansas Legislature's enactment of an Oklahoma-style pseudoephedrine law. Legally, the statute places pseudoephedrine on Schedule V as a controlled substance. This places relatively mild restrictions on what had been unregulated access to pseudoephedrine as an over-the-counter cold/allergy remedy by the consuming public. Under the new law, pseudoephedrine containing products must be placed behind the counter of a licensed pharmacy to be sold only under the supervision of a licensed pharmacist. Prospective purchasers must display identification and sign a register to buy the products. In addition there are quantity limits. If a customer needs over-limit quantities they may obtain them with a doctor's prescription. All liquid based products remain available over-the-counter with no limit on quantities.

There has been complimentary legislation from the United States Congress.

The dollar savings for Kansas criminal justice systems (law enforcement, environment, child and health care, custody and non-custody supervision) has been significant. The Kansas Bureau of Investigation has reported an approximately 50 percent decrease in the number of meth labs found by law enforcement statewide. In Sedgwick County, the number of smurfers (people going store to store to store buying under store-limit amounts of starch-based cold medicine) has dropped to virtually zero. This is significant because the large number of shoppers from Oklahoma before the law's enactment is now zero. The law has been a great success, and we're keeping our fingers crossed for its continued effectiveness.

2. Search and Seizure

There have been no bombshells in this area since the article was published. However, we should mention that there have been no cases published which have upheld an entry to look for a working lab. Exigent circumstances have always been a problematic justification in drug cases; and, somewhat surprisingly (given the clear exigencies inherent in a working lab), no court, State or Federal District of Kansas, has upheld a warrantless home entry on exigent circumstances. There have been some rejections of the rational. See and evaluate *United States v. Carter*, 360 F. 3d 1235 (10th Cir. 2004) (warrantless entry of backyard and sweep of garage absent exigent circumstances, remanded for additional findings); *United States v. Rhiger*, 315 F.3d 1283, (10th Cir. 2003) upholding a warrantless home entry where agents smelled a working lab and entered to protect the public from the fire/explosion hazard. Kansas' own Judge Briscoe dissented from the ruling upholding the warrantless entry, attacking the credibility of the agent's claim they were protecting the public because, the judge asserted, nobody was home next door and because it took the agents half an hour to find a key rather than smash their way in immediately; the location was rural; and, the officers' conduct "belies," the judge alleged, the "claim" of exigency [curiously, the trial judge had found that exigent circumstances were present and the dissenting jurist does not even discuss the clearly erroneous standard of review in denigrating the officers' "claim" of exigency]; the *Rhiger* dissent would also require that there be "some actual evidence of an existing danger to the public" - one does wonder what the dissent thought about the presence of the odor of an active lab. The substance of the dissenting judge's views does, unfortunately, accurately characterize the reception Kansas courts extend to exigent circumstances in drug cases. We simply are not going to be able to justify a warrantless seizure of a meth lab because of the presence of exigent circumstances; at least we haven't yet; *United States v. Dighera*, 2 F. Supp. 2d 1377 (Kan. 1998) (sweep upheld based on lab equipment in plain view). In fact, when your scrivener ran "'exigent circumstances' w/50 methamphetamine" on LexisNexis on May 18, 2006, no lab cases decided by Kansas' state courts were found.

3. Charging Issues

State v. Schoonover, Ks. Sup. Ct. No. 90, 360, decided April 28, 2006, 2006 LEXIS 229. Defendant had a rolling meth lab in his vehicle. He was convicted of manufacturing and six related counts. Our Supreme Court held none of the convictions violated The Double Jeopardy Clause. Adding some refreshing clarity to this area of the law, the

Court applied the elements test established by *Blockburger v. United States*, 284 U.S. 299 (1932): if a defendant's conduct constitutes a single act or transaction, but violates more than one statute, the defendant may be convicted of all violations for which an identity of elements does not exist. If there is one different element, a conviction for the crime with the different element does not constitute double or multiple punishments for the same conduct. The Court correctly observed that this test is correctly applied by looking only to the statutory elements of each crime and not to whether the same evidence is used to prove each element. "Under the test, evidence and proof offered at trial are immaterial." *Schoonover*, at p. 31. The Court then ruled that the "single act/merger" rule found in many Kansas cases should no longer be applied when deciding double jeopardy and multiplicity issues for violations of multiple statutes arising from the same course of conduct. Id, at 87. See *State v. Patten*, 280 Kan., at 393.

The *Schoonover* court concluded: manufacturing does not require proof of possession and there is no identity of elements between these offenses; the same is true for manufacturing and possession of anhydrous ammonia, pseudoephedrine; and, possession of manufacturing paraphernalia. All are separate offenses, even though based on the same act or transaction. Further, the court ruled that there is no identity of elements for K.S.A. 65-7006 and 65-4152 (paraphernalia), even though the special sentencing rule of *Frazier/Campbell* still applies.

Schoonover is a true tour-de-force. It is a must-read for prosecutors.

State v. Martens, 274 Kan. 459, (2002), actually decided only that K.S.A. 1997 Supp. 65-4159 did not criminalize attempts to manufacture a controlled substance because the Legislature dropped the phrase "or attempt to unlawfully manufacture" from the section in 1994. It rejected the State's argument that under K.S.A. 21-3107(2)(c) an Information charging Manufacturing, but not Attempted Manufacturing, nonetheless gave the District Court subject matter jurisdiction to convict for an attempt because the attempt was a lesser included offense of Manufacturing.

Somehow, the Court determined that an attempt to manufacture was a "separate offense" controlled by K.S.A. 21-3301. Apparently, the Court reached this conclusion because it read K.S.A. 65-4159 as being "focused" on the "successful or potentially successful" manufacture of a controlled substance. Seemingly, if the focus is on potential success it is on whether an overt act has been committed, rather than on some thumbnail estimate of the probability of success.

Then the Court offered its view by way of dicta that the elements of an attempt to manufacture and manufacturing "may overlap somewhat." This result appears to be predicated on an overly literal and opaque reading of the statutory definition of controlled substances as including immediate precursors. Although the Court's reasoning is not expressed, the Court's italicizing of the words "or immediate precursor" in quoting the definition of "controlled substance" suggests the Court believed commission of the crime of manufacturing did not require that the process [of manufacturing a controlled substance] need be complete to the point of actually producing a controlled drug since immediate precursor would satisfy the definition of controlled substance, and hence of manufacturing.

This result overlooks the settled meaning of "immediate precursor" as a substance which is an immediate chemical intermediary used in the manufacture of a controlled substance (see K.S.A. 65-4101(m)). Immediate precursors are also controlled substances and are themselves the result of a completed manufacturing process. Thus, to infer, as the Court appears to do, that a manufacturing process has not been completed simply because immediate precursors are produced, prepared, propagated, compounded, converted to, or processed, is incorrect and leads to the court's next erroneous conclusion that the only difference between an attempt to manufacture and the completed crime is one of degree.

Chemically, this makes little sense. The difference is one of kind, not degree. Once one molecule of a controlled substance is produced [usually from an immediate precursor], the manufacturing of that substance has occurred. If no molecule of the prohibited substance has been successfully produced, manufacturing thereof has not occurred. And, if no trace of the substance has been produced, the act of manufacturing has not occurred

even though the effort to do so has been protracted, laborious, intensive, and done with a high likelihood of success.

Such an effort may, however, be an attempt. Whether it is an attempt depends, not on the likelihood of success, but rather on whether an overt act has been committed with the requisite intents. An overt act in turn occurs whenever the act which is alleged to be overt constitutes a first or subsequent step in a direct movement toward completion of the crime which is alleged thereby to have been attempted. This may, or may not, be determined by the degree of likelihood of success, particularly in cases where the effort is interrupted. Thus, prior to the removal of the first oxygen atom from one of the pseudoephedrine molecules being cooked, no meth has been manufactured. See the process described in the original article.

4. Sentencing issues.

At the time of the initial publication, our Kansas Supreme Court had ruled on whether a Level 1 penalty was properly imposed for manufacturing. The Court said only a Level 3 penalty could be lawfully imposed. This resulted from the appearance in the list of acts that were included in the definition of manufacturing and the list of acts that were included in prohibitions of K.S.A. 65-4163(a) of the same word. The offending word happened to be "compounding" in the definition of manufacture and the word "compound" in K.S.A. 65-4163. Strictly speaking, not the same word, but close enough.

The Court had not, however, ruled on the significance [if any!] of the word "product" in K.S.A. 65-7006(a) and the word "products" in K.S.A. 65-4150(c). Again, not the same word, but close enough. Or was it? The word "product" in 65-7006 plainly refers to "ephedrine, pseudoephedrine, red phosphorous, lithium metal, sodium metal, iodine, anhydrous ammonia, pressurized ammonia, or phenylpropanolamine, or their salts, isomers, or salts of isomers" for its meaning. The word "products" in 65-4150 does not refer to a list of named items. Instead, it refers to a list of *described* items, including, as follows: "all equipment, [products], materials of any kind which are used or intended for use in planting, propagating, cultivating, growing, harvesting, manufacturing (sic), compounding (sic), converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body. . . . Kits . . . devices . . . .etc." So, on the face of it, the Legislature has used the word "products" in the 1981 Drug Paraphernalia Act descriptively; and, the word "product" in the 1999 Chemical Control Act *nominally*. Two different uses, two different statutes, two different words [product vs. products]; so, two different meanings?

In *State v. Campbell*, 278 Kan. 410 (Opinion filed December 3, 2004), opinion withdrawn by *State v. Campbell*, 279 Kan. 1 (opinion filed January 31, 2005), the Court said different uses, different statutes, different words - SAME MEANING! The Court had to withdraw its first opinion saying the meaning was the same because they had affirmed lower court judges who had said the meanings were different. Since this contradicted their own ruling, they could not leave the lower court rulings standing; and, either had to reverse them, or reverse themselves. The Court chose the former. Thus, all through 2005 possession of pseudo was a Level 4 drug felony and the matter seemed at an end . . . . finally . . . . .

And, just when you thought it was safe to come out, WAIT! THERE'S MORE!!! We now have, at last, a legislative fix for *Frazier/Campbell*. The House/Senate Judicial Conference Committee deleted the word "products" from the Paraphernalia Act. This leaves "all equipment and materials of any kind" as the operative language. Do we still have ***identical*** offenses? And soooo, boooys and girrrls, Little Red Riding Hood again started walking to Grandma's house. . .

HAVEN'T RECEIVED YOUR KCDAA YEARS OF SERVICE PIN?

Contact Kari Presley at the **KCDAA office, (785) 232-5822.** KCDAA lapel pins are available for members who have served **5, 10 and 20 years in prosecution.**

KCDAA Member Highlights:

Members Change Jurisdictions

by Mary Napier, Editor, Kansas Prosecutor

Ed Brancart , Wyandotte County Assistant District Attorney

When county and district attorneys look for opportunities in their line of work, where do they look? How do they decide where to go or which county they want to work in? Changing counties or jurisdictions can be a hard decision. It can be even harder if you have to consider changing the size of the jurisdiction, and deciding if that size is right for you. Ed Brancart and Mark Frame, have both moved to different jurisdiction sizes as they changed jobs over the years. Brancart moved from Ford County to Wyandotte County, and Frame moved from Shawnee County to Edwards County.

Frame graduated from Washburn University Law School in 1991. After graduation, he practiced in Topeka for five years doing some criminal defense work as well as banking and collection. As the job in Topeka became less fulfilling, Frame decided he wanted to have the opportunity to prosecute; thus, the move the Edwards County. He knew going into law school that he wanted to practice law with his father someday. This gave him that opportunity. The family law practice was established in 1893 in Kinsley, by Frame's great grandfather, G.E. Wilson. At one time or another, Frame's great grandfather, grandfather, Jerome K. Wilson, his father, D. Allen Frame, and himself have all been the Edwards County Attorney. So, this was a job worth taking. He is currently the Edwards County Attorney and partner in the law firm of Wilson & Frame, LLC in Kinsley, Kan.

Brancart was in a different situation. He graduated from Washburn University Law School and went to work as an Assistant County Attorney in Ford County. After being a law enforcement officer for more than 12 years, serving as a dispatcher and jailer, then in patrol, investigations, and administration, law school was the next step for him. During his third year of law school, he interned in the Shawnee County District Attorney's office. He started in Ford County as an Assistant County Attorney, and worked himself through the ranks from August 1994 to January 2005. He left Ford County as the County Attorney and joined the Wyandotte County Attorney's Office as an Assistant District Attorney II. This change was made primarily to be closer to his family in eastern Kansas.

Jurisdiction Similarities and Differences

When you make the move from one jurisdiction size to another, there are bound to be a lot of differences and some similarities. According to Brancart, the similarities consist of having the same statutes, the same Supreme Court, and the same kinds of cases. While these elements of law remain the same, other differences emerge.

Frame commented on his time in Topeka versus his time in Edwards County.

"In Topeka, criminal law cases were either settled extremely fast or were dragged on extremely long back in the early 1990s," said Frame. "In Edwards County, each case gets some attention by me as the County Attorney, and overall the cases get disposed of faster." Frame also noted that since there are a smaller number of attorneys in western Kansas, his relationship with the defense bar makes it easier to facilitate a just result.

Brancart moved from Ford County with a total population in 2005 of 33,751 to Wyandotte County with a total population in 2005 of 155,750. He definitely noticed some differences between the jurisdiction sizes.

"The pace is more brisk in Kansas City because caseloads are greater than those in Dodge City," said Brancart. "In Dodge City, we generally knew most things about each other's cases, but in Kansas City, there was a period of several months where I hadn't even met all the other prosecuting attorneys."

Other differences Brancart noticed include the number of judges and the commute time. In Dodge City, there are three district judges, so you got to know the individual characteristics of each one. But in Kansas City, there are 16 district judges, which makes it a challenge to know your audience. The commute time also is different

because in Dodge City it was about three or four minutes depending on a couple of stoplights, but in Kansas City, one collision can strand you between exits for over an hour.

Advice for Prosecutors

While there are differences in every jurisdiction, Frame and Brancart have some advice for prosecutors thinking about changing jurisdiction sizes. Frame's advice about a smaller jurisdiction.

"Prosecution in a small jurisdiction puts you under more of a microscope because most of the people in the community know the person who is being prosecuted," said Frame. "Consistency in your prosecution is your greatest ally."

This is something you should think about if you are considering a move to a smaller jurisdiction. Another thing to consider is the culture of the place according to Brancart. He said it is important to consider the job as well as the culture of the area including restaurants, entertainment, and other things to do. He suggested that you make sure the culture will fit the lifestyle you prefer, so you are happy there.

KCDAA Involvement

A difference in jurisdictions and sizes of jurisdictions doesn't effect how the KCDDA can benefit you, though.

"The information networking is invaluable," said Frame. He also expressed how he is grateful for the conferences, and enjoys them very much.

Brancart summed up KCDAA involvement in one word: vital. He has been on the board since 2000 and is currently in the Vice President position.

"It is essential for modern prosecutors' offices to participate in the KCDAA," said Brancart. "We are all joined by a common Supreme Court and common statues, so what effects one county will most likely affect another. The KCDAA also helps fix things that break along the way, like poorly drafted statutes or case law that is adverse to our profession."

The American Academy of Forensic Science

Contemporary Wonders in the World of Science and Law

by District Attorney Nola Tedesco Foulston, American Academy Member

Perhaps you were not aware that in the world of science, there exists a phenomenal consortium of scientists, educators, attorneys, physicians, and other professionals who are devoted to the improvement of the administration of justice and the achievement of justice through the application of science to the processes of law.

Enter the world of the American Academy of Forensic Sciences and be amazed! Founded in 1948 as a non-profit professional society, the Academy has grown and prospered in the intervening years. With nearly 6,000 members, the Academy is divided into 10 sections that span forensic enterprise. Included among the Academy members are physicians, attorneys, dentists, toxicologists, physical anthropologists, document examiners, psychiatrists, physicists, engineers, criminalists, educators, and attorneys who form the jurisprudence section. This is where I find my niche.

Admitted to membership in 2004, upon invitation, I have been well-impressed with the goals of the Academy to provide opportunities for professional development, personal contacts, awards, and recognition. Members are found from the 50 states and 55 different countries that make up this mensa society of regularly practicing forensic scientists, educators, and attorneys. Entry into the Academy is governed by by-law that provides for six levels of membership: There shall be six classes of membership in the Academy: Fellow, Member, Associate Member, Retired Fellow, Retired Member, and Honorary Member.

To be eligible for membership in one of the various classifica-

in the Academy: Fellow, Member, Associate Member, Retired Fellow, Retired Member, and Honorary Member.

To be eligible for membership in one of the various classifications, the candidate must be of professional competence; integrity and good moral character; and be actively engaged in their field of forensic science, having made a significant contribution to the literature of forensic sciences. Membership is by invitation and the applicant must have Fellows of the Academy sponsor your admission, and you must be endorsed by the section to which applying. Applicants are judged by the Board of Directors on the basis of their individual qualifications.

In 2004, I was honored to have been recommended to the Academy for my work in prosecution, and was accepted as an Associate Member of the Jurisprudence Section where lawyers from around the world gather to support this section's endeavors. To climb the ladder of success in this prestigious organization, we strive to put forth superior efforts toward the work and purposes of the Academy and forensic science to be ultimately named as a "Fellow" of the American Academy of Forensic Sciences. This is my goal.

As a member of the Jurisprudence Section, I have been asked to speak on various topics in the law, and most recently at the February Annual Meeting of the Academy in Seattle, Wash. There, I presented my first paper…over 110 pages of research, study, and commentary on the History of Capital Punishment and the Role of the Prosecutor in Contemporary Capital Litigation. For me, this was an exceptional achievement and one that I worked on diligently. Months of research and preparation culminated with this significant document. I was educated as I wrote to educate others on this timely topic. The tome was presented at one of the Jurisprudence workshops in Seattle, entitled "Psychological and Legal Considerations for the Death Penalty in America: Justifiable Deterrent or Exercise in Futility?" I found myself in the company of well-known forensic scientists including Dr. Michael Baden, pathologist and celebrity analyst, who was my panel mate. The all-day workshop explored the issues leaving participants with a wealth of medical and legal information to ponder.

Attending the annual meeting of the Academy is akin to being a kid in a candy shop. With thousands of members and participants surging on the chosen city, there are opportunities to attend virtually any forensic science workshop or seminar. The trick is to sign up in advance for your choices, as the classes remain small, and attendance is limited to about thirty participants per class. When the schedule is published, you need to make haste to choose the plum classes so that you are not left wandering the halls waiting for the open seminars. The conference usually starts over a weekend. Workshops, which cost upwards of $200 per session, present an all-day topic with exceptional, well-known speakers during the day. While expensive to sign up for multiple workshops, the events are singularly excellent. In addition to workshops, there are plenary sessions and then open classes and exhibits that are "free" to participants. There also are presentations of slides by members in the "Bring your own slide" evening, where you can see things that you never have seen before. Quite an extraordinary display of talent and crime analysis…

In addition to being a featured speaker at a workshop, I attended an all-day workshop on homicide, presided over by Vernon Gebreth, an exceptional trainer who presented extraordinary materials on death investigation. Members of the Wichita Police Department Homicide Unit have trained with Gebreth, and he continues to lecture and publish excellent materials, including a new "Practical Homicide" book that he presented me. He is quite an enthusiast for the Academy, and a unique person to discuss current issues in law enforcement.

You can access the American Academy web site as follows: http://www.aafs.org. Take the time to view this site. It's not your "ordinary" seminar…

The Academy's annual scientific meeting is held in February at which time over 500 scientific papers, breakfast seminars, workshops, and other special events are presented. The AAFS consists of 10 sections representing a wide range of forensic specialties, and the annual scientific meeting gathers these professionals who present the most current information, research, and updates in this expanding field. The AAFS 59th Annual Scientific Meeting will be held in San Antonio, Texas at the Henry B. Gonzalez Convention Center, Feb. 19-24, 2007.

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