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Volume VII, No. 2, Summer 2010

Table of Contents

President’s Column by Ann Swegle ................................................................. 4

Legislator’s Column: Keeping Our Promises to Kansans
by Stephen R. Morris, Kansas Senate President ............................................. 5

Executive Director’s Column: 2010 Legislative Session Review
by Steve Kearney ............................................................................................. 6

Guest Column: Upholding the Rule of Law
by Congressman Jerry Moran ......................................................................... 10

KCDAA Member Highlights: Bruce Flipse, Thomas County Attorney &
Steven L. Opat, Geary County Attorney by Mary Napier ............................. 12

KCDAA Milestones ......................................................................................... 15

Legislature Passes “Horn Fix” for Jessica’s Law
by Marc Bennett ............................................................................................. 16

Alternative Means and Avoiding Reversible Error
by Steven J. Obermeier .................................................................................. 17

Supreme Court to Review Whether Amendments Limiting Expungeable
Crimes Violates Ex Post Facto Clause
by Steven J. Obermeier .................................................................................. 19

Overcoming the Challenges of International Extradition
by Marc Bennett & Jan Satterfield .................................................................... 21

Competency: Don’t Fall Off the Precipice
by Steve Karrer ............................................................................................... 25

NDAA Summer Report by Nola Tedesco Foulston .................................... 28

KCDAA Spring 2010 Conference Photos ....................................................... 30

KCDAA Fall 2010 Conference ....................................................................... 31

About the Cover

The Johnson County Courthouse stands at the corner of Sante Fe and Kansas Ave. in downtown Olathe, KS. The courthouse was built in four phases, expanding to meet the growing needs of the county. In 1951, the original courthouse was demolished to make way for a more modern structure. A second addition was added in 1954. Two more additions came along, the first in 1968 and the second, the eight story tower, was started in 1972 and completed in 1976.

The Courthouse is home to the County’s district court system, housing all of its courtrooms and court services, the District Attorney’s office, the law library, and much of the Sheriff’s operations.

Photo by John D. Morrison, Prairie Vistas Photography

The Kansas Prosecutor
The official publication of the Kansas County and District Attorneys Association
Published by the Kansas County and District Attorneys Association, 1200 S.W. Tenth Avenue, Topeka, Kansas 66604.
Phone: (785) 232-5822 Fax: (785) 234-2433

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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The KCDAA Spring Conference held in Wichita June 10-11 was a great success; at least that was the tenor of the majority of evaluations we received afterward. I believe we had dynamic presenters, both from Kansas and from out-of-state, who displayed innovative and entertaining styles of teaching. If only all our continuing legal education (CLE) could be such fun! The CLE Committee chaired by Justin Edwards did a fantastic job planning this conference, and the KCDAA staff did a fantastic job making sure all operations ran as smoothly as possible. Thanks for those great efforts! Thanks also to Kearny County Attorney and KCDAA Past President Dennis Jones who hosted a prosecutor networking social on the first night of the conference. It provided a very nice opportunity for attendees to relax together and discuss topics of mutual interest.

Our ability to bring in outside, high-quality speakers such as Todd Winegar (Trials of the Century) and Kentucky Circuit Court Judge Steve Wilson and Kentucky Commonwealth Prosecutor Thomas Lockridge (Ethics: The Movie) is a direct result of increased revenues. Recognizing the need to keep Kansas prosecutors up-to-date on the law and ethical considerations and keep their skills honed, the Legislature amended the law in 2009 to increase the amount prosecutors receive for their training funds from docket fees in certain cases from $1 to $2. With some of these increased fees assigned to KCDAA, we could afford to present you with some exceptional resources we have not been able to provide in recent years. This has made a great difference. I believe you can count on KCDAA to continue to provide you with high level training and educational programming, including the training we get from our own Kansas county and district attorneys and the Kansas Attorney General’s Office.

Providing opportunities for prosecutors to get CLE tailored to their specific needs is one of the most important functions of this association. But our membership is diverse in prosecutorial experience, location, caseload numbers, and make up. We also vary in resource levels and needs. “One size fits all” doesn’t always fit us.

Because of this reality, the KCDAA Board and CLE Committee are looking for additional ways to provide our members with CLE that will fit their needs in content, timing, and method of delivery. While during many years the association has provided CLE opportunities only at the Fall and Spring Conferences, we would like to provide additional opportunities at other times of the year and perhaps with delivery mechanisms that aren’t the standard in-person lecture situation. Whatever we do, we must comply with the rules of the Kansas CLE Commission, which regulates what programming will be accredited for purposes of compliance with our yearly mandatory CLE requirements.

The CLE Commission currently has rules that govern the provision of CLE programming through “alternative delivery methods” such as interactive online computer seminars, interactive teleconferencing seminars, and satellite or video taped programs. It is my understanding that the CLE Commission will soon be exploring whether to amend its current rules to broaden the types of alternatively delivered programs that may qualify for accreditation, and whether to amend other requirements associated with the accreditation process for such programs. I would appreciate your thoughts on whether you would like us to consider using such alternative delivery methods for CLE programming.

Many of you who attended the Spring Conference provided valuable feedback to us and suggestions for future CLE presentations. We appreciate your feedback and will consider your thoughts. I solicit additional thoughts from all our members as to how we could serve you better through provision of CLE programming and in other ways. Please feel free to contact me, other KCDAA Board members, or staff with your suggestions. I can be reached via e-mail at aswegle@sedgwick.gov.
The 2010 Legislative Session: Keeping Our Promises to Kansans

The 2010 Legislative Session is now officially history. When this chapter of the Kansas story is written, it will go down as perhaps the most significant since the Great Depression. In fact, the challenges facing lawmakers this year were unprecedented. As we entered the election season, you may have heard a lot of misinformation about what actually happened in Topeka this year. I would like to set the record straight.

First, as the economy weakened, a series of very difficult decisions were made to cut or reduce the $6 billion state budget by roughly $1.5 billion … slashing budgets, furloughing state employees, cutting or eliminating programs, and forcing government to do more with less.

As the economic crisis continued to get worse, it was clear additional cuts would jeopardize critical programs that we, as citizens, depend on – like K-12 education, law enforcement, corrections, services for the elderly, veterans, and disaster aid to name a few.

As leaders, we are elected to make difficult decisions. After listening to Kansans in every corner of the state and hearing from economic experts at Wichita State University, we knew the only responsible way to move forward was to implement a modest, three-year, one-cent state sales tax increase. On July 1, 2013, the tax rate will drop to 5.7 percent. The remaining 0.4 percent will fund continued maintenance on our state’s roads and bridges under the comprehensive transportation program that will also create jobs in communities across Kansas.

The decision to increase the sales tax was not reached lightly. The one-cent sales tax increase was chosen because nearly everyone — including non-residents who work, shop or travel through Kansas — pay into the system. A one-cent sales tax allows Kansas to remain competitive with its neighbors which, despite having sometimes lower state sales taxes, often have higher local taxes. By spreading the burden across nearly everyone, we reduced the amount any one individual pays into the system, and we protected the poorest Kansans from the brunt of this increase by including food tax rebates and income tax credits.

Of course, some lawmakers and organizations chose a different path … one not part of the solution. It is not surprising these same people are now busy spreading false or misleading information in an effort to frighten Kansans and score political points.

In fact, some of the same legislators who vocally opposed this modest sales tax increase actually supported a 2002 effort to increase the sales tax rate, claiming it would be a catalyst for economic growth. They were right. Three years after that increase, the Kansas economy grew with more than 35,000 new jobs.

Kansans are resilient, and despite being in the throes of a stubborn recession, our state will come back better and stronger than ever. The start to economic recovery began in Topeka, but will end in coffee shops, diners, aircraft assembly lines, classrooms and Main Streets across our state when those who want to work, can find good jobs.

By cutting budgets, reining in spending, and providing a responsible approach to revenues, we have been able to meet the state’s obligations and keep our state fiscally whole. Kansans benefit from a sound, responsible, efficient, and effective state government.

At the end of the day, we take the trust voters place in us very seriously. We are not professional politicians; citizen-legislators are teachers, farmers/ranchers, doctors, retirees, lawyers, small business owners, and bankers-Kansans just like you. We come together every year for 90 days to make difficult decisions on behalf of our neighbors, our families, and our fellow citizens.

The one thing we all agree on is that our best days are ahead, and we are optimistic about the future. This year was about making choices. The steps taken by lawmakers who chose to be part of the solution will set the groundwork for increased economic growth and stability in the years to come.
Executive Director’s Column
by Steve Kearney, KCDAA Executive Director

2010 Legislative Session Review

Thanks to all of you who proposed legislation, testified before legislative committees, and gave generously of your time to make the 2010 Legislative Session a successful one for the KCDAA. We could not have done it without you!

We know you are aware that the 2010 legislative session was unprecedented in many regards. The unprecedented budget problems that the legislators had to cope with, the solutions that numbered as many as all 165 legislators, and the political consequences of their actions entering an election cycle, made this session particularly difficult through which to navigate a legislative agenda.

Even in light of the complex policymaking environment, the KCDAA legislative agenda was successful. Below are the bills that passed this past session of import to the KCDAA. KCDAA agenda items are listed first, followed by other measures of interest in numerical order.

**HB 2411**: HB 2411 amended the Kansas Uniform Controlled Substances Act to expand the list of Schedule I controlled substances to include the chemical compounds HU-210, JWH-018, JWH-073, BZP, and TFMPP. The bill was signed by the Governor and was effective upon publication in the Kansas Register (Now in effect).

**HB 2435**: Attempt, conspiracy, and solicitation of certain sex crimes when child is less than 14 years of age (“Horn Fix”); Aggravated Endangering a child; Controlled substances; Enhanced Penalty for Ballistic Resistant Material - Signed by the Governor; Effective upon publication in the Kansas Register (Now in effect). HB 2435 amended several criminal and sentencing statutes. The following is a breakdown of the bill’s effects.

**Attempt, Conspiracy, or Criminal Solicitation**

The bill amended the law to clarify that the penalty for an attempt, conspiracy, or criminal solicitation to commit certain sex crimes where the victim is a child less than 14 years of age is an off-grid offense. The sex crimes that require the imposition of a penalty for an off-grid offense are the attempt, conspiracy, or criminal solicitation to commit aggravated trafficking, rape, aggravated indecent liberties with a child, aggravated criminal sodomy, promoting prostitution if the prostitute is less than 14 years of age, and sexual exploitation of a child.

The bill clarified that a downward durational departure from a mandatory minimum sentence of 25 years for certain sex offenses is limited. A judge is not authorized to impose a downward durational departure for any crime of extreme sexual violence to less than 50 percent of the center of the range of the sentence for such crime.

The bill also amended the statute on terrorism and illegal use of weapons of mass destruction to provide that an attempt, conspiracy, or criminal solicitation to commit the crime is an off-grid felony.

**Aggravated Habitual Sex Offender**

The bill deleted the definition of “prior conviction event” in the aggravated habitual sex offender statute to clarify that any person convicted of two or more sexually violent crimes, despite the fact that the convictions occur on the same day, is a habitual sex offender subject to a mandatory life sentence without the possibility of parole.

**Aggravated Endangering a Child**

The bill amended the law to require the sentence for a violation of aggravated endangering a child to be served consecutively to any other term or terms of imprisonment imposed by the court. The bill clarifies the sentence is not a departure and is not subject to appeal.

**Sentence Enhancement of Certain Drug Crimes**

The bill added a definition of “minor” to mean a person under 18 years of age;

Made the crime of cultivation, distribution, or possession with intent to distribute certain drugs a drug severity level 2 felony, if the trier of fact finds that the offender is 18 years of age or more and the drug was distributed or possessed with the intent to distribute to a minor, or on or within 1,000 feet of
any school property;  

Made the knowing distribution or possession with the intent to distribute any drug paraphernalia used for a violation of any crimes involving controlled substances, except for those listed in subsection (b) of KSA 2136a06 (certain depressant drugs, stimulant drugs, and hallucinogenic drugs; any material, compound, mixture, or preparation which contains any quantity of certain substances, their optical isomers, salts, or salts of isomers; and anabolic steroids), a drug severity level 4 if the trier of fact finds that the offender is 18 years of age or more and the drug paraphernalia was distributed or caused to be distributed to a minor, or on or within 1,000 feet of any school property; and  

Made the knowing distribution or possession with the intent to distribute any drug paraphernalia used for a violation of subsection (b) of KSA 2136a06 (certain depressant drugs, stimulant drugs, and hallucinogenic drugs; any material, compound, mixture, or preparation which contains any quantity of certain substances, their optical isomers, salts, or salts of isomers; and anabolic steroids), a drug severity level 9, nonperson felony if the trier of fact finds that the offender is 18 years of age or more and the drug paraphernalia was distributed or caused to be distributed to a minor or on or within 1,000 feet of any school property; and  

Made the distribution, possession with the intent to distribute, or manufacture with the intent to distribute any simulated controlled substances a severity level 7, nonperson felony if the trier of fact finds that the offender is 18 years of age or more and the violation occurred on or within 1,000 feet of any school property.  

Sentence Enhancement for Ballistic Resistant Material  
The bill created a special rule in sentencing to add 30 months imprisonment to the sentence of any defendant convicted of a felony when the trier of fact finds beyond a reasonable doubt that the defendant wore or used ballistic resistant material during the commission of, attempt to commit, or flight from such felony. The sentence is presumptive prison and is required to be served consecutively to any other sentence imposed.  

HB2468 amended the Kansas Offender Registration Act to require a person convicted of any attempt, conspiracy, or criminal solicitation of certain sex crimes to register for life. The sex crimes requiring lifetime registration under the bill are the attempt, conspiracy, or criminal solicitation to commit aggravated trafficking, rape, aggravated indecent liberties with a child, aggravated criminal sodomy, promoting prostitution if the prostitute is less than 14 years of age, and sexual exploitation of a child. This bill was signed by the Governor and was effective upon publication in the Kansas Register (Now in effect).  

SB 67 (Sub. for SB 67) amended the crimes of mistreatment of a dependent adult, identity theft and identity fraud, and criminal possession of a firearm.  

Mistreatment of a Dependent Adult  
The bill made the knowing and intentional infliction of physical injury, unreasonable confinement, or unreasonable punishment upon a dependent adult a severity level 5, person felony;  

Deleted the requirement that taking unfair advantage of a dependent adult’s physical or financial resources be committed by a caretaker or another person, and makes a violation of this subsection:  

A severity level 2, person felony if the aggregate amount of the value of the resources is $1,000,000 or more;  

A severity level 3, person felony if the aggregate amount of the resources is at least $250,000 but less than $1,000,000;  

A severity level 4, person felony if the aggregate amount of the resources is at least $100,000 but less than $250,000;  

A severity level 5, person felony if the aggregate amount of the value of the resources is at least $25,000 but less than $100,000; and  

A severity level 7, person felony if the aggregate amount of the value of the resources is at least $1,000 but less than $25,000.  

Made the omission or deprivation of treatment, goods, or services that are necessary to maintain physical or mental health of a dependent adult a severity level 8, person felony and deletes the requirement that the crime be committed by a caretaker or another person.  

Identity Theft and Identity Fraud  
The bill amended the crime of identity theft to clarify that the crime is committed by obtaining, possessing, transferring, using, selling, or purchasing any personal identifying information belonging to or issued to another person, with the intent to defraud that person, or anyone else, in order to receive a
benefit. The penalty for the crime does not change;
Amended the crime of identity fraud (the penalty for which does not change) to clarify that the crime is committed by either:
Using or supplying information the person knows to be false in order to obtain a document containing any personal identifying information; or
Altering, amending, counterfeiting, making, manufacturing, or otherwise replicating any document containing personal identifying information with the intent to deceive;
Clarifies that it is not a defense that the person did not know the personal identifying information belonged to another person, living or deceased; and
Provides a definition for personal identifying information.

**Criminal Possession of a Firearm**

The bill amended the crime of criminal possession of a firearm by a person who has been convicted within the previous 10 years of certain violent crimes or certain felony drug crimes. The bill added the unlawful manufacture of controlled substances, unlawfully arranging a drug transaction using a communication device, and possession of chemicals with the intent to manufacture methamphetamine to the list of drug crimes covered by the crime of criminal possession of a firearm.

Additionally, the bill made an attempt, conspiracy, or solicitation to commit any of the specified felonies in the statute, including convictions of drug felonies as the crimes are identified in prior statutes, a severity level 8, nonperson felony.

The bill was signed by the Governor and was effective upon publication in the Kansas Register (Now in effect).

**SB 386**: Amended the law on discovery and inspection of documents in criminal cases and the admissibility of certain evidence in criminal cases. Specifically this bill dealt with the redaction of personal identifiers (includes Crawford clean-up) and remote discovery.

**Discovery**

The bill clarified that a prosecuting attorney is not required to provide unredacted vehicle identification numbers or personal identifiers to the defendant unless ordered by the court. If the prosecuting attorney does provide such information to the defendant’s attorney, the bill prevents the defendant’s counsel from further disclosing the unredacted numbers or personal identifiers except as authorized by order of the court.

The bill requires the prosecuting attorney to provide notice to the defendant’s counsel that the prosecuting attorney redacted books, papers, or documents that had numbers or personal identifiers. Any redaction of such information is required to be by alteration or truncation of such numbers or identifiers and not by removal.

“Personal identifiers” includes, but is not limited to, birthdates, social security numbers, taxpayer identification numbers, driver’s license numbers, account numbers of active financial accounts, home addresses, and personal telephone numbers of any victims or material witnesses.

**Admissibility of Evidence**

Additionally, the bill authorizes district and municipal courts, in any hearing or trial with a forensic examination report, to use two-way interactive video technology to take testimony from the person who prepared the report, if requested by either the prosecution or defense. The use of any two-way interactive video technology is required to be in accordance with requirements and guidelines established by the Office of Judicial Administration. All proceedings in a district court that use the technology are required to be recorded verbatim by the court.

Finally, the bill repealed the statute on admissibility of certain recorded statements of a child victim pursuant to KSA 22-3433.

The bill was signed by the Governor and was made effective upon the publication of the Kansas Register.

**Bills of Interest**

The following are other bills that may be of interest to members of the KCDAA. The full text of the bills are available at www.kslegislature.org. Just click on “Bills” on the left side of the screen, then click on “Full Text of Bills,” and then enter the bill number.

**SB 300**: License Plate; Texting While Driving; Wireless Device; Message; Motorcycle; Helmet; Window; Window Tint; School Bus; Fine; Traffic Regulation - Enrolled and presented to the Governor; Effective July 1, 2010.

**SB 306**: Personal and Family Protection Act (concealed carry) - Signed by the Governor;
Effective July 1, 2010.

SB 353: Human trafficking; prostitution; offender registration; Signed by the Governor; Effective July 1, 2010.

SB 368: Extends effective date for enhanced penalties for 3rd, 4th or subsequent DUI until 2011; Requires Interlock for Second Conviction - Enrolled and presented to the Governor; Effective July 1, 2010.

SB 381: Use of Force; State v. Hendrix, 289 Kan. 859 (2009)- Signed by the Governor; Effective upon publication in the Kansas Register (Now in effect).

SB 434: Unlawful sexual relations; traffic in contraband; parole board hearings; special rule in sentencing for burglary - Signed by the Governor; Effective July 1, 2010.

SB 458: Amends the Uniform Securities Act (proportionality) - Signed by the Governor; Effective July 1, 2010.

SB 497: Criminal use of weapons; definition of pocket knives - Signed by the Governor; Effective upon publication in the Kansas Register (Now in effect).

HB 2130: Primary Seat Belt - Enrolled and presented to the Governor; Effective upon publication in the

S Sub HB 2226: Concerning district court fines, penalties and forfeitures; Signed by the Governor; Effective July 1, 2010.

HB 2476: Relating to the Judicial Surcharge - Signed by the Governor; Effective upon publication in the Kansas Register (Now in effect).

HB 2482: Drivers Licenses; Amends Kansas Uniform Commercial Driver’s License Act to prohibit diversion agreements in lieu of criminal proceedings; Signed by the Governor; Effective upon publication in the Kansas Register.

HB 2506: Juvenile Offenders and EJJP; Clean-Up Language; Enrolled and presented to the Governor; Effective July 1, 2010.

HB 2509: Creating civil action for victims of child pornography - Signed by the Governor; Effective July 1, 2010.

HB 2517: Regarding Domestic Violence - Signed by the Governor; Effective July 1, 2010.

HB 2585: Codifying a journalist privilege - Signed by the Governor; Effective upon publication in the Kansas Register.

HB 2605: Regarding forensic science, laboratory, or computer examination services; DNA database fee; Signed by the Governor; Effective July 1, 2010.

HB 2661: Correcting errors in the last years drug Recodification bill 2009 HB 2332; Effective upon publication in the Kansas Register (Now in effect).

HB 2668: Recodification of the criminal code - Signed by the Governor; Effect July 1, 2011.

The Kansas Commission on Judicial Performance announces the September 1, 2010, posting of judicial performance evaluations for all Supreme Court Justices, Court of Appeals Judges, District Court Judges, and District Magistrate Judges who will stand for retention election on November 2nd. The address of the website is:

www.kansasjudicialperformance.org

Please review the evaluations and encourage your clients, friends, and family to do the same before voting on November 2nd.
Guest Column
by Congressman Jerry Moran

Upholding the Rule of Law

Prosecutors serve on the front lines of ensuring that our laws are enforced and Kansans are protected. Having served as a prosecutor, I know firsthand the importance of the rule of law so criminals cannot threaten the innocent and vulnerable in our communities. During my long and productive relationship with Kansas’ law enforcement community, I’ve heard the same question time and again: Moran, do you know just how much of our crime problem is tied to our drug problem, and just how much our drug problem is tied to our border problem?

Too often, I hear from Kansas law enforcement about the failure of U.S. Immigration and Customs Enforcement to detain illegal immigrants. For those charged with the responsibility of enforcing the law, few things are as discouraging as witnessing laws not being enforced.

Our nation is a nation of laws, and we must enforce them. Failure to do so weakens the order of our society and puts citizens at risk. This failure is part of the reason the state of Arizona rightly and justifiably has taken matters into its own hands cracking down on illegal immigration.

To fix this problem and restore the rule of law, the federal government must uphold its responsibilities to secure the border and dissuade illegal behavior. Without a secure border, drug smugglers, illegals, and even terrorists have an easy path into our country with potentially devastating consequences.

As a sponsor of the leading border security bill in Congress, the Secure America through Verification and Enforcement Act, we are working to force Washington to do something about our border problem. We need additional Border Patrol agents, we need to utilize technology to protect the border, and we need to expand detention facilities so when illegals are caught, they are actually detained.

That is only the first step. Equally important, we must also ensure that America is not rewarding illegals’ activity. That means no amnesty or benefits for illegals. Policies like that only encourage more illegal behavior, fueling an already out-of-control problem. Current ideas and proposals to give illegals more rights and privileges like providing them with in-state tuition benefits or even the ability to have drivers licenses would take our country in exactly the wrong direction, hurting law enforcement and the public at large. I’m proud to have always stood strong against amnesty and benefits for illegal aliens.

As we work to keep our community safe, ostensibly Kansas law enforcement faces other serious challenges as well. I’m proud to have worked on a range of them, including stopping the production, trafficking and use of meth -- a dangerous drug that has devastated too many Kansas families while hurting local governments that address it.

By championing historic anti-meth legislation, we made
Raised in Plainville, Kansas, Congressman Jerry Moran was taught from an early age the value of a hard day’s work, to look after one’s neighbors and to serve his community. It is these same values that guide Moran today as he serves his seventh term, representing the people of Kansas in the United States House of Representatives.

In the House, Moran is a leading advocate for protecting and preserving the way of life in Kansas. With rural populations on the decline throughout the nation, issues unique to rural communities are becoming less understood. Moran, who lives in Hays, Kansas, is one of the few remaining champions in Congress for rural America. As a senior member of the House Agriculture Committee and Ranking Member of the Subcommittee on General Farm Commodities and Risk Management, Moran works with colleagues to construct legislation allowing Kansas farms and ranches to remain viable.

Moran has been recognized for his agriculture efforts by many organizations, including the top legislative award from three of the nation’s largest agriculture groups: the American Farm Bureau, the National Farmer’s Union and the National Association of Wheat Growers.

In addition to serving on the Agriculture Committee, Moran is also an active member of the House Transportation and Infrastructure Committee and the House Veterans’ Affairs Committee, where he was the previous Chairman of the Subcommittee on Health. He also helps lead a number of Congressional caucuses and coalitions, including the Rural Health Care Coalition (RHCC), the Congressional Caucus to Fight and Control Methamphetamine and the National Guard Reserve Components Caucus. Through his work with the RHCC, Moran has led the fight to save rural hospitals and has sponsored legislation to bring more physicians to underserved areas. His efforts to restore Medicare funding for small hospitals has earned him the top legislative award from the National Rural Health Association and the Distinguished Health Care Advocate Award from the Kansas Hospital Association.

Since first coming to Congress in 1997, Moran has made it a priority to stay connected to the people he represents. Despite the distance between Washington, D.C., and Kansas, Moran returns home each weekend. The “Big First” Congressional District includes 69 counties and covers 57,575 square miles. Keeping in touch with Kansans across the district means a lot of driving. Moran’s last three cars have racked up more than 450,000 miles. Each year, he conducts 69 town-hall meetings, one in each county of the First District.

At home, Moran volunteers his time at several community organizations. He is a trustee of the Eisenhower Foundation, serves on the Board of Trustees of the Fort Hays State University Endowment Association, and serves on the Executive Committee of the Coronado Area Council of the Boy Scouts of America.

Before his election to Congress, Moran served eight years in the Kansas Senate in Topeka, the last two as Majority Leader. Moran attended Fort Hays State University (FHSU) and later the University of Kansas, where he completed degrees in economics and law. After an early career as a small-town banker, Moran established a law practice in Hays and returned to FHSU as an adjunct professor of political science.

Moran and his wife Robba continue to live in Hays. They have two daughters, both attend Kansas State University.
KCDAA Member Highlights: Bruce Flipse, Thomas County Attorney & Steven L. Opat, Geary County Attorney

by Mary Napier, Editor, Kansas Prosecutor

When an attorney takes the leap from private practice to being a county attorney, there are some differences they must overcome. That is also true if an attorney goes from a county attorney to private practice then back to a county attorney position. Let’s learn more about two KCDAA members who have these types of histories and experiences.

Bruce Flipse, Thomas County Attorney, has a varied background that includes teaching, farming, having his own private practice, and then becoming a county attorney. Steven Opat, Geary County Attorney, has a varied background that took him directly to a county attorney position after graduating from law school to a public defender, back to a county attorney, to a partner in a private law firm, and back to a county attorney. Let’s find out about these men and the different experiences they have had in their careers.

Bruce Flipse

Flipse graduated from Colby High School before going to Kansas State University. He was always interested in agriculture, was active in vocational education in high school, and he thought he would like teaching. So, he got a bachelor’s degree from KSU in teaching and taught for three years before obtaining his Masters Degree in Agriculture Education. After receiving his masters, he decided to work on the family farm. After several years on the farm growing corn, Flipse made the decision to go back to school. He entered Washburn’s School of Law in 1978.

“Farming wasn’t doing very good at the time, so I decided to try something new and go to law school,” said Flipse. “I had been out of school for eight years, so I wasn’t prepared at all for law school.”

Even though he didn’t feel prepared, Flipse made it through law school and graduated in 1981. After graduation, he went back to Colby and started his own private practice. It is important to note that while he went to law school, Flipse’s wife, Cleona, got her paralegal degree, so they were able to practice together under the name Flipse & Flipse. His wife got her law degree in 1988.

“After graduating from law school, my age worked against me,” said Flipse. “So, I started out on my own. I enjoyed being back in my hometown, but I did start from scratch. The biggest challenge with starting my own firm was the procedures, not the law. However, the other attorneys in town were a big help if you called them.”

Flipse does think his teaching degree and experience has helped with his career as an attorney.

“I think my teaching ability helps when I have to sit down and explain things to clients. It helps me start at zero and go through the steps needed to teach the clients what they need to know,” said Flipse.

In January 2009, Flipse took the leap and became a county attorney for Thomas County. He mentioned that the only person running was from another county, so he stepped up and ran for the position. The guaranteed income wasn’t a bad incentive either.

As Thomas County attorney, Flipse handles various cases including criminal, juvenile, CINC, care and treatment, property tax, etc., and he gives advice to county commissioners. His office handles 300-350 cases each year with him (county attorney), two secretaries, a half-time investigator, and one (volunteer) assistant county attorney. Flipse’s wife is the volunteer assistant who helps with CINC cases in order to get children into better situations.

Flipse believes the most difficult thing about being a county attorney is getting all the agencies to work together including police, the courts, sheriff’s office, etc. He mentioned that it takes a while to
get everyone to cooperate. However, the best thing about being county attorney is doing some good.

“We had lots of shoplifting at the local Wal-Mart before I took over,” said Flipse. “I have prosecuted lots of people, and Wal-Mart has seen a 50 percent decrease in shoplifting. Plus, taking drugs off the interstate and working on CINC cases for children are just a few examples of the good you can do.”

When asked about the biggest difference between the county attorney position and private practice, Flipse responded: “In a small town, you are still working with the same people in the community, but your role is different. As a county attorney, you have a responsibility to the community not just your client and you handle different types of cases.”

After law school, Flipse joined the Kansas Bar Association and became a member of the KCDAA in 2009 after becoming a county attorney.

“Associations like these are very important,” explained Flipse. “It would be hard to practice without their help. They are vital and provide needed seminars for members.”

When Flipse isn’t practicing law, he is tinkering with old cars, helping out in his community, or spending time with his six children and 10 grandchildren. An important accomplishment for Flipse was that he served on the community college board for eight years. His wife also served on the board for 16 years. So, in 2010 they both received honorary degrees from the college for having served a total of 24 years on the board between them.

Steven L. Opat

Opat graduated from McPherson High School and went to KSU. He was interested in politics and law while becoming active in ROTC. After graduating with a Bachelor of Arts in Pre-Law and History, Opat applied to KSU’s rival and attended the University of Kansas School of Law. He received his JD in 1973.

“After graduation I had offers from private practice, the IRS, and the Dickinson County Attorney’s office. The county attorney position interested me the most,” said Opat. “The position got me into court very quickly, which is what I wanted to do.”

After a short time as an assistant Dickinson County Attorney, Opat was elected as Dickinson County Attorney in 1975. Becoming a CA pretty soon after law school had its challenges.

“Law school doesn’t teach you the nuts and bolts of what you need to do,” said Opat. “So, the challenge was figuring out what to do in the office and having an opportunity to learn from your mistakes. That is how I learned to practice law – as a young lawyer in the courtroom.”

After a few years in Dickinson County, Opat was appointed Chief Public Defender for the Eighth Judicial District of Kansas. After a few years there, he was appointed Geary County Attorney in 1979. He was then re-elected two more times. In 1989, Opat decided to go in a different direction and became a partner in the law firm of Harper, Hornbaker, Altenhofen & Opat, Chtd.

“I wanted to see if I could succeed and make money in private practice,” said Opat. “It gave me an opportunity to do many different things like criminal defense and civil litigation. It definitely gave me an appreciation for the private sector and the need to be a good businessman.”

In 1985, Opat was appointed as the Geary County Counselor, so even while he was in private practice, he stayed in touch with the county. So, in 2003 when an opportunity came up for Opat to become county attorney again, he jumped at the chance.

“Frankly I missed the county attorney position,” explained Opat. “The timing was right, so I jumped back in.”

According to Opat, the biggest difference between the County Attorney’s office and a private firm is that in a county attorney office you don’t have to worry about where the money is coming from to run the firm. Another difference is the urgency. He said in a county office, if you don’t stay on top of things you will get eaten alive and trying to play catch up is extremely difficult.

In Geary County, Opat’s
The office handles more than 1,000 criminal cases, not including CINC, traffic, DUI and others. Opat said Geary has a very high caseload for its size, especially violent and person crimes. The office consists of five lawyers along with seven clerical and support staff.

The biggest challenge for Opat as a county attorney is getting things done timely and being responsive.

“You want to get things done quickly and in a way that makes people understand why you do what you do. Everyone wants justice, and it is different in every case,” said Opat. “But, you have to help people understand that getting justice is compounded by guidelines. So, you have to help them understand the processes and get them a result that they can live with.”

For Opat, the best thing about being a county attorney is “actually getting to work toward something that gives you an opportunity to get a result that is just.” Opat explained that everyone perceives what is just and fair differently, and the system makes it difficult. However, he says it can be a pretty satisfying job and you get to work with different people like the police, victims, etc.

Over the years, Opat’s experience and knowledge has allowed him to contribute to continuing legal education of attorneys through teaching, presenting, writing articles, and lecturing. He believes it is important to try to contribute to the betterment of your profession.

Opat has been a member of the KCDAA since 1981 and served as president in 1987. He has also been a member of several other professional organizations in the past or currently. He believes the KCDAA has two important functions: CLE and legislative duty.

“We have to educate our people and impress on the legislature things that need done for prosecution,” said Opat. “We have a duty to protect people in the state of Kansas, so we must point out and make improvements to the laws through our legislative presence.”

The highlights of Opat’s career include: the KCDAA Prosecutor of the Year Award in 1985, and his private practice receiving an “AV” Rating from Martindale Hubbell Rating Service in 2001.

“I was awed and humbled by the Prosecutor of the Year Award, since I was a relatively young lawyer,” said Opat.

When Opat isn’t working, he enjoys fishing, sports, reading to learn new things, and going to the activities that his three kids are involved in. In addition, he is an avid K-State fan. ☺
Job Changes

Katherine “Katie” (Kliem) McElhinney has been appointed Lenexa Municipal Court Judge. Katie was an Assistant District Attorney in Shawnee County from 1997-2007. In 2007, she became Assistant City Prosecutor in Overland Park then later became an Assistant Municipal Prosecutor in Shawnee. Effective June 4, 2010, she is the Lenexa Municipal Court Judge.

New Faces & Other News

Butler County Attorney’s Office

Joseph Penney joined the office as an Assistant Butler County Attorney in October 2009. He is handling the drug caseload. Joseph grew up in Andover, Kan., went to Wichita State University for his undergraduate degree, and graduated from the University of the Pacific, McGeorge School of Law in Sacramento, Calif. in May 2009.

Brett Sweeney became an Assistant Butler County Attorney in June 2010. He is handling the traffic caseload. Brett grew up in Wichita, Kan., got a Bachelors Degree from Wichita State University, and graduated from the University of Kansas School of Law in May 2009.

Debbie Likes retired from the Butler County Attorney’s Office on June 14, 2010 after 15 years of dedicated service as the victim/witness coordinator and office manager. Debbie will be spending more time riding her horses, relaxing on her deck in her new chair, and spending time with her husband, Alan. They reside on a ranch near Sylvia. Debbie was invaluable to the office and will be greatly missed.

Finney County Attorney’s Office

Brett Watson has joined the office as Assistant Finney County Attorney. Brett graduated from the University of Kansas School of Law in 2005. He then became employed as a research attorney for the Kansas Court of Appeals. Thereafter, he was hired to be the staff attorney for the Kansas Criminal Recodification Commission. During 2009, Brett spent a semester at the Lewis and Clark Law School in Portland, Oregon working toward an LLM in environmental law. However, his eagerness to engage in the active practice of law led him to his employment with the Finney County Attorney’s Office.

Wyandotte County District Attorney’s Office

Sister Mary Lex Smith, Coordinator of the Victim Assistance Department, celebrated her 50th Jubilee of taking her final vows with the Sisters of Charity of Leavenworth on June 27, 2010. Sister Mary Lex has worked for the Wyandotte County District Attorney’s office for 11 years in the Victim Assistance Department. Congratulations to Sister Mary Lex on such an accomplishment.

Correction:

In the Kansas Prosecutor, Volume VII, No. 1, Spring 2010 there was a misspelling in the headline of the article “Attorney General’s Appellate Brief Checklist” written by Kristafer Ailslieger. The error should not reflect on the author as it was not his mistake. We regret the error.
Legislature Passes “Horn Fix” for Jessica’s Law

by Marc Bennett, KCDAA Sex Crimes Division
Deputy District Attorney, 18th Judicial District, Sedgwick County

After the enactment on July 1, 2006 of K.S.A. 21-4643, “Jessica’s Law,” certain appellate court decisions have provided exceptions to the ostensible intent of the legislature: that each sex offender who offended against a child under 14 should receive the harshest sentence possible in all but the rarest of cases. In recent legislative sessions, the Kansas Legislature has taken steps to undo this case law.

With the passage of K.S.A. 21-4719, effective July 1, 2008, the legislature made clear that probation should not be an option for crimes of “extreme sexual violence” (certain delineated acts set forth in K.S.A. 21-4716(c)(2)(F)(i) including intercourse and sodomy) committed against children. Additionally, the statute capped the eligibility for durational departures at 50 percent of the mid number in the presumptive grid box for the crime of conviction. This effectively put an end to the holding in State v. Kendrick Gracey, 288 Kan. 252 (2009), wherein the court held that probation was available to defendants convicted of Jessica’s law offenses under K.S.A. 21-4643(d).

The recent legislative session saw the passage of House Bill 2435, the self-described “Horn fix,” which went into effect April 2010. Drafted in response to State v. Horn, 288 Kan. 690, 206 P.3d 526 (May 8, 2009), which had held all attempted crimes charged under Jessica’s Law (21-4643) were to be treated as severity level one offenses rather than off-grid offenses. The Horn decision had turned on the fact that, pursuant to K.S.A. 21-3301, all attempted off-grid offenses are severity level 1 offenses. While Jessica’s law clearly stated that attempts, conspiracies, and solicitations of Jessica’s Law crimes were expressly off-grid (see K.S.A. 21-4643(a)(1)(G)), the two statues had not been reconciled. During two committee arguments on HB 2435 that I attended, the legislators were clear that their intent had been to make all Jessica’s law offenses off-grid—whether or not the crime was charged as an anticipatory crime under K.S.A. 21-3301, 3302 or 3303. HB 2435 was designed to restore that intent.

An additional piece of language was included in HB 2435, which addressed eligibility for a sentence of life without parole pursuant to the Aggravated Habitual Sex Offender statute, K.S.A. 21-4642. Where only those with two prior “conviction events” had been eligible for this sentence since the effective date of this statute on July 1, 2006, the new language makes clear that defendants with two prior convictions are now eligible for that sentence. Meaning, a defendant with two or more prior convictions for Jessica’s law offenses—even if all the convictions occurred in one case—now face life without parole upon a new conviction.

For prosecutors who handle sex offense prosecutions, these new laws mean that nearly all defendants charged with Jessica’s law offenses are now ineligible for any sort of probation, can only be granted durational departures to 50 percent of the mid number in their grid box, and may face life without parole if they have a multi-count prior. In short, expect progressively stringent negotiations from defense counsel whose clients face less favorable outcomes than they may have come accustomed to since Jessica’s law passed four years ago.
A conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one. The U.S. Supreme Court and the Kansas Supreme Court disagree as to whether such an error is subject to a harmless error analysis.

In a recent U.S. Supreme Court case, there was insufficient evidence of one of the three objects of a conspiracy. The Court noted that constitutional error occurs when a jury is instructed on alternative theories of guilt and returns a general verdict that may rest on a legally-invalid theory. However, this determination does not necessarily require reversal of the conspiracy conviction — such errors are subject to the harmless error analysis.

The Kansas Supreme Court recently took a different approach. In State v. Wright, the jury was instructed on alternative means of committing rape: by force or fear; or by unconsciousness. The jury returned a general verdict of guilty. The Court of Appeals found sufficient evidence to affirm Wright’s conviction concerning the alternative means of unconsciousness. Citing State v. Dixon, the Court of Appeals in Wright held that an alternative means case can be affirmed if there is strong evidence supporting one theory and no evidence supporting the other theory because any error is harmless.

The Supreme Court granted Wright’s petition for review and addressed Wright’s argument that proof of rape by force or fear was insufficient because penetration and fear do not occur simultaneously. In dicta, the Kansas Supreme Court eschewed the Dixon analysis: Although Dixon has obvious pragmatic appeal,

“it simply cannot coexist with Timley peacefully, providing a benign route to harmless error.... [A] reversal mandated by Timley is a reversal for insufficient evidence. An insufficiency error cannot be harmless because it means the State failed to meet its burden of proving the defendant guilty beyond a reasonable doubt. This is a most basic guarantee of due process in criminal cases. [Citation omitted.]

“The Timley super-sufficiency condition evolved for a good reason. It evolved because we recognized that we were allowing uncertainty as to how the State persuaded each juror. We were comfortable with this uncertainty—at that particular level of generality in the jury’s factfinding-only because we insisted on assurance that each

Footnotes
3. Skilling v. United States, 561 U.S. __, 2010 WL 2518587, 31. The Supreme Court cited Hedgpeth v. Pulido, 129 S.Ct. 530, 172 L.Ed.2d 388 (2008)[instructing a jury on multiple theories of guilt, one of which is invalid, is not a structural error requiring that a conviction based on a general verdict be set aside but is subject to harmless error review].
5. 224 P.3d at 1163.
6. State v. Dixon, 279 Kan. 563, 112 P.3d 883 (2005). The court addressed whether Dixon’s burglary convictions could stand in spite of the absence of evidence sufficient to support each theory for the burglary charges. The theories were that Dixon made entry with intent to commit a theft or aggravated arson or criminal damage to property. 279 Kan. at 601. The Dixon court concluded there was strong evidence supporting at least one theory of each burglary and no evidence of at least one other theory. Therefore, the erroneous burglary instruction was harmless. 279 Kan. at 606.
8. See State v. Fortune, 236 Kan. 248, Syl. ¶ 3, 689 P.2d 1196 (1984)[Obiter dictum and dicta have been defined as words of a prior opinion entirely unnecessary for the decision of the case and as statements in opinions wherein courts indulged in generalities that had no actual bearing on issues involved.]. The Court decided there was sufficient evidence of the alternate means of force or fear. “There is no error under the [State v.] Timley alternative means rule here, because the evidence of each means of committing rape-by force or fear or by unconsciousness—was sufficient to uphold a guilty verdict on the rape charge.” State v. Wright, 224 P.3d at 1167.
juror’s vote was supported by a means for which there was sufficient evidence. Without that assurance, we are back to where we were before Timley. We have no guarantee that the jury was unanimous at the level of factual generality that matters most of all: guilt v. innocence.” Beier, Lurching Toward the Light: Alternative Means and Multiple Acts Law in Kansas, 44 Washburn L.J. 299.9

The Wright court was “now persuaded that the Timley alternative means rule is the only choice to ensure a criminal defendant’s statutory entitlement to jury unanimity. Any contrary language in Dixon is specifically disapproved.”10

For prosecutors, Wright complicates the task of charging alternative means cases. While Wright was a rape case, the problem will often arise in cases of burglary. There must be sufficient evidence of each alternative theory for the underlying crime by which entry is made.

One way to preserve the conviction, if there is insufficient evidence of one alternative theory, is to avoid a general verdict form. PIK Crim.3d 68.09-A states if the defendant is charged in the alternative, the jury should be free to enter a verdict upon each of the alternatives.

Perhaps the solution is found in State v. Saylor.11 Where there is a question in the mind of the prosecutor as to what the evidence will disclose at trial, the correct procedure is to charge the defendant in the alternative under those subsections that may possibly be established by the evidence.12 This may properly be done under Kansas law by charging several counts in the information to provide for every possible contingency in the evidence. “By so doing, the jury may properly be instructed on the elements necessary to establish the crime of theft under any of the subsections charged and the defendant will have no basis to complain that he has been prejudiced in his defense.”13

10. State v. Wright, 224 P.3d at 1167.
Footnotes

2.  The KBI shall notify the FBI, secretary of corrections, and any other criminal justice agency that may have a record of the arrest, conviction or diversion. K.S.A. 2009 Supp. 21-4619(f).
3.  Between 2005 and 2009, the KBI processed about 15,000 expungement orders.
4.  When the expungement statute was first enacted, a conviction could be expunged by every offender, as long as certain conditions were met. The legislature has often expanded the list of convictions that cannot be expunged. There have only been six years between 1978 and 2009 when K.S.A. 21-4619 was not amended. Under current Kansas law, a legislative amendment limiting offenses that can be expunged cannot apply retroactively to crimes that have already been committed. This has been the law in Kansas since 1987, when State v. Anderson was decided.
5.  In State v. Anderson, the defendant committed aggravated indecent solicitation of a child. At the time Anderson committed this offense in 1974, the crime was expungeable. However, amendments to the expungement statute eliminated that opportunity. The Anderson court concluded that denying the defendant the opportunity to expunge his criminal record constituted punishment.
6.  The Anderson court declined to apply the version of the expungement statute in existence at the time Anderson applied for expungement. Instead, it applied an earlier version of the expungement statute. The court held that applying the current version of the expungement statute to Anderson’s 1974 conviction “to retroactively eliminate the opportunity to remove defendant’s criminal record violates the Ex Post Facto Clause of the United States Constitution.”
7.  Other states have rejected the Anderson court’s analysis. In Toia v. People, the defendant was charged with driving under the influence of alcohol. On the effective date of his guilty plea, Illinois statutes allowed Toia to petition the circuit court for expungement of his DUI arrest record once five years had passed from the date his supervision was
The legislature amended its statutes stating a person placed on supervision for DUI shall not have his record of arrest sealed or expunged.\textsuperscript{12} The \textit{Toia} court noted the expungement of Toia’s arrest record was no longer a matter within the circuit court’s discretion as the passage of the new statute “clearly obviated that discretion and imposed an absolute bar to expungement.”\textsuperscript{13}

The \textit{Toia} court declined to adopt the decision in \textit{State v. Anderson}. “Anderson is not binding on Illinois courts and was decided 10 years prior to \textit{Kansas v. Hendricks}.”\textsuperscript{14} The \textit{Toia} court declined to accept the \textit{Anderson} court’s conclusion that “the mere existence of criminal record constituted ‘punishment’ for purposes of ex post facto analysis.”\textsuperscript{15}

In \textit{State v. Burke},\textsuperscript{16} the Oregon Court of Appeals stated the retroactive application of expungement exclusion did not violate the ex post facto clause. In \textit{In re the Matter of Dyer},\textsuperscript{17} the court held that a statute retroactively preventing the expungement of a criminal record was not an ex post facto violation. This was so, even though the arrest record caused the petitioner to lose a job.

The Missouri Supreme Court stated:

But this statute is not ex post facto in that it deals only with arrest records currently maintained. The statute does not affect conduct previously committed; it merely directs a court when it may tell an administrative agency to destroy a particular record it has in its possession. The statute is civil and not criminal. Dyer has never had a substantive or vested right in expungement of his arrest record as is required for a statute to be ex post facto.\textsuperscript{18}

In \textit{Kansas v. Hendricks},\textsuperscript{19} the Supreme Court determined whether Kansas’ Sexually Violent Predator Act constituted “punishment” that ran afoul of ex post facto. “The Ex Post Facto Clause, which ‘forbids the application of any new punitive measure to a crime already consummated,’ has been interpreted to pertain exclusively to penal statutes.”\textsuperscript{20} The Court stated because the Sexually Violent Predator Act did not impose punishment, did not criminalize conduct legal before its enactment, or deprive the inmate of any defense that was available to him at the time of his crimes, the Act was not impermissible under the ex post facto clause.

“Because the Act does not criminalize conduct legal before its enactment, nor deprive Hendricks of any defense that was available to him at the time of his crimes, the [KSVP] Act does not violate the Ex Post Facto Clause.”\textsuperscript{21}

The Kansas Supreme Court has recently agreed to consider whether any legislative changes in the expungement statute violates the Ex Post Facto Clause in light of \textit{Kansas v. Hendricks}. In \textit{State v. Jaben},\textsuperscript{22} the Supreme Court transferred the State’s appeal of the denial of an expungement on a question reserved from the Court of Appeals. This avoids one panel of the Court of Appeals having to disagree with the opinion of another panel.\textsuperscript{23}

In September 1977, a jury found Allen F. Jaben guilty of rape, aggravated sodomy, and kidnapping of L.D.M. Jaben committed these offenses in September 1974. After serving his “life” sentence, Jaben was paroled in 2001. He was discharged from parole in February 2004. In June 2008, Jaben petitioned for expungement of his convictions. He argued the expungement law in effect at the time of the offenses applied. The State opposed the expungement petition. The State argued the aggravated sodomy and the rape convictions were incapable of being expunged under the version of K.S.A. 21-4619 that was in effect at the time the expungement was sought. The State also argued the expungement statute did not violate the Ex Post Facto Clause. The

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12. 776 N.E.2d at 602-03.  
13. 776 N.E.2d at 603.  
14. 776 N.E.2d at 609, n. 4. The Hendricks case is discussed infra at n. 19.  
15. Id.  
18. 163 S.W.3d at 919.  
20. 117 S.Ct. at 2086.  
21. 117 S.Ct. at 2086.  
\end{flushright}
district court followed Anderson and granted Jaben’s motion to expunge all of his convictions. The State appealed the expungement of the aggravated sodomy and the rape convictions, which were unexpungeable under K.S.A. 2008 Supp. 21-4619.24

Prosecutors faced with an expungement involving Anderson may want to ask the district court to defer a decision on the expungement until after the Kansas Supreme Court has decided Jaben. If the district court declines a delay and relies on State v. Anderson in granting the expungement, prosecutors should consider appealing the adverse expungement ruling.24


Overcoming The Challenges of International Extradition

by Marc Bennett, Deputy District Attorney, 18th Judicial District, Sedgwick County and Jan Satterfield, Butler County Attorney

You receive news that the prime suspect in an important case is a foreign citizen who has fled the United States by crossing the border into Mexico or by boarding an airplane to Europe. How do you respond? Recent cases in Sedgwick and Butler Counties have shown that, with a little help from the Department of Justice, Office of International Affairs, you simply need to prepare yourself to proceed forward with an international extradition.

In 1998, Oscar Torres drove a car with seven passengers to the Plainview neighborhood in South Wichita, stopping long enough for his associate, Issac Saiz, to reach out the window and shoot a shotgun at two teenage boys. Saiz missed his targets and instead struck and killed Tony Galvan, an eight year old boy playing with his puppy in his front yard. Following his arrest minutes later, Torres posted a $50,000 bond, cut off his ankle bracelet, and fled to Mexico.

In 2004, 68-year-old Frank Powney committed Aggravated Indecent Liberties against several prepubescent members of his church in Wichita. After his arrest in 2005, Powney, a native of Great Britain, posted bail and fled the jurisdiction. He was apprehended in 2006 in France.

In November of 2007, Israel Mireles met Emily Sanders in a club in Butler County, took her back to his hotel room and, after sexually brutalizing her, stabbed her innumerable times. He removed Emily’s body from the blood-soaked room and dumped her body along the road before ultimately fleeing the United States and hiding in Mexico.

These three cases share a commonality beyond the flight of each suspect—all three men were ultimately successfully extradited back to the United States by way of international extradition and were then successfully prosecuted for their crimes in Kansas.

Immediate contact with the U.S. Department of Justice Office of International Affairs is critical. Because the paperwork necessary to effectuate an international extradition can be voluminous (depending on the country from which the suspect is sought), the expertise—and editing skills—of the D.O.J. is most helpful. While certain nuances may exist from country to country depending on both the language of treaties and the expectations of the court systems within the other country—as a general matter, you will need to prepare yourself to provide a host of documentation and information all within 60 days of the suspect’s arrest.

Initially, a provisional arrest warrant must be requested unless the suspect is already in custody. A letter of assurance will likely be required to attest that the death penalty is not a possible penalty for the crime charged and, further, a promise that you will not seek the death penalty if the extradition is granted. As one staff member of the DOJ pointed out—renge on this promise and Mexico, Paraguay or France, for instance, may never extradite to the United...
Information for Requesting Extradition from Mexico

The process for obtaining extradition of a fugitive from Mexico includes two major stages:

1. Request for provisional arrest
2. Formal request for extradition

In certain complex cases or if the fugitive is already in custody in Mexico, you may proceed directly to the preparation of the formal request for extradition. If you take the route of provisional arrest, your formal request for extradition will be due in Mexico 60 calendar days after your fugitive is provisionally arrested. This due date is mandated by the US/Mexico Extradition Treaty, making it essential that as much work as possible be completed before the fugitive is arrested.

A complete formal extradition request includes a prosecutor’s affidavit along the lines of the enclosed model, which gives an overview of the applicable law, charges, and procedural history of the case. In addition, the affidavit must incorporate by reference and attach as exhibits all of the following documentation:

1. A certified copy of the formal charging document against the fugitive, e.g., the indictment, information, or complaint. (Make this Exhibit A)
2. A certified copy of the outstanding arrest warrant in the US. (Exhibit B)

3. The text of the relevant statutes. Relevant statutes include the applicable penalty provisions, the statute of limitations, and all statutes referenced in all applicable counts of the charging document. **The relevant statutes should be typed out, not just photocopied from the code book.** Each statute should be situated on its own page within one word or word perfect document. It is advisable to redact a lengthy statute using ellipsis and asterisks so that your extract will include only the relevant provision(s). (Make this Exhibit C)

4. An affidavit from an investigating law enforcement officer giving a comprehensive summary of the investigation and evidence in the case. We encourage the law enforcement officer to reference and attach to his/her affidavit reports of evidence that are relevant to the charged offenses such as autopsy reports, ballistics reports, and lab analysis reports. Mexican officials have underscored that these kinds of items are effective in making their case for extradition before the Mexican courts. (Make this Exhibit D)

5. At least one, but preferably more than one, affidavit from a non-law enforcement witness with first-hand, personal knowledge of the facts of the case. Mexican courts are demanding in their evaluation of the evidence submitted in support of extradition. In addition to an agent’s affidavit, the Mexican courts require at least one affidavit of a non-law enforcement, civilian witness with first-hand knowledge of the defendant’s illegal activity. This witness could be a cooperating defendant or a confidential informant who can personally describe what happened and can identify a photograph of the fugitive as the perpetrator. After we have discussed the affidavits and exhibits and they are in final, the affidavits should be sworn to and signed before a judge. If it is not possible to obtain sworn affidavits from witnesses at this time, you may include transcripts of relevant sworn testimony of witnesses at earlier trials or hearings related to your case.

6. Identification information. This information should include a photograph of the defendant, as well as his fingerprints, if available. As noted above, the photograph should be referenced in and annexed as an attachment to the affidavit of a witness who identifies the person in the photograph as the same person who committed the offense. Similarly, any fingerprints should be referenced in and annexed as an attachment to the affidavit of the law enforcement officer, who can state when and under what circumstances the fingerprints were taken.

**Once your fugitive is arrested on the provisional arrest warrant, the timeframe for assembling the formal extradition request is very short.** To ensure that the request is assembled properly and within the treaty-mandated timeframe, there is a series of scheduled reviews that need to be carried out prior to the presentation of the formal request in Mexico. These are the latest possible dates to follow for successful preparation of the formal extradition request, and earlier preparation of the documents is always recommended.

1. Day 15 Structural Review
2. Day 30 Editorial Review
3. Day 43 Review of Executed Documents
4. Day 49 DOJ Final Certification
5. Day 50 Department of State and Mexican Consulate Certifications
6. Day 60 Last Day for presentation of Extradition Package to the Mexican Secretariat of Exterior Relations by the United States Embassy in Mexico City
1. The first review is a Structural Review with our Associate Director (AD) on the 15th day following the arrest. For the Structural Review, the affidavits drafted prior to the arrest must be accompanied by a full draft extradition package, including non-executed affidavits, date-stamped copies of the charging document and arrest warrant, relevant statutes, witness statements, and identification information (photos, fingerprints). The Structural Review is the opportunity for substantial changes to the affidavits, evidence, and charges included.

2. The second review is a Day 30 Review of the drafts by the OIA AD. The complete extradition package, as agreed upon by the prosecutor and OIA trial attorney, is submitted to the AD for approval prior to execution and translation. **You may swear out the affidavits only after the changes are made from this review by the OIA Associate Director.**

3. Two original executed copies of the extradition package and six photocopies are due at OIA via FedEx on Day 43 for review with the Spanish translations.

4. The final, executed, translated extradition request is presented to the AD for final Department of Justice certification.

5. OIA delivers the formal extradition request to the Department of State.

6. United States Embassy in Mexico City reviews the extradition package, obtains the Ambassador’s certification, and presents the package to the Mexican authorities prior to the expiration of the 60-day provisional arrest period.

As stated in Step 3 above, once the entire package is completed, duplicate original signed and unbound packages along with six photocopies (please **no staples**) should be shipped to the following address for authentication and transmittal to Mexico: Office of International Affairs, Criminal Division, U.S. Department of Justice, 1301 New York Avenue, NW, 9th Floor, Washington, DC 20005.

**The completed formal extradition documents must be translated into Spanish. The requesting office is responsible for the cost of translating the formal documents.** OIA can coordinate the translation through DOJ contracted translators, or you can use a local translator. If you decided to use a DOJ contracted translator:

- Federal prosecutors should enlist the help of their Administrative Officer in filling out fields 1-13 of DOJ 551.
- State and local prosecutors must provide OIA with a letter committing to pay for all translation costs.

***Again, please note that the Government of Mexico requires assurances that if the fugitive is extradited to the United States, the fugitive will not be sentenced to death.***

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If you would like more information about Extradition from Mexico or need samples of items talked about in this information, please contact:

Jan Satterfield, Butler County Attorney at (316) 321-6999 or jsatterfield@bucoks.com
As a young prosecutor, I was confronted with the following situation:

A scheduling hearing had just been conducted. The defendant appeared to be distant during the hearing. She stared out the window most of the time. However, there were no outbursts or outward signs of mental illness. At the end of the hearing she was taken from the Courtroom. The Court reporter began to tidy up and came to me and indicated that the chair that the defendant had sat in was soaked and smelled of urine. The question that screamed in my head was, “What should I do now?”

The answer of course was “go to the statutes.” K.S.A. 22-3301 defines “incompetent to stand trial” as the inability to understand the nature and purpose of the proceedings against them. Did my defendant meet this definition and how was I to get the question before the Court?

Competency is not just the defense attorney’s responsibility. The defendant, defense counsel, the prosecutor, or even the Judge may bring forth the issue of competency. Prosecutors should not be concerned that somehow we are assisting in a defense at trial, by requesting a competency determination. Competency determinations are unrelated to an insanity defense. Dealing with competency early in a prosecution will prevent later delay, appeal, retrospective hearings, and collateral attacks based upon ineffective counsel.

If a defendant is charged with a felony, a district judge must be the one to conduct the hearing. Once a judge determines that there is reason to believe the defendant is incompetent, the Judge suspends the proceeding and orders a hearing to determine competency. The period of time spent by the Court to determine competency is charged to the defendant for purposes of speedy trial.

The Court prior to the hearing may order the defendant to undergo a psychological or psychiatric examination pursuant to K.S.A. 22-3302(3). This provision is permissive and the Court is not required to order an evaluation prior to making a competency determination. If the defendant is charged with a felony, the Court can have the defendant evaluated at Larned State Security Hospital, but only after a director of the local county or a private institution recommends to the court and SRS that examination of the defendant should be performed at the state hospital. While this procedure may be the most common, there are two other procedures that can be followed. The court may designate any appropriate psychiatric or psychological clinic or two qualified licensed physicians or psychologists pursuant to K.S.A. 22-3302(3)(b) and (c). Statements made by the defendant during a competency examination are not admissible at trial.

Once an examination has been conducted or the Judge determines an exam is not necessary, the Court shall commence a hearing to determine competency. If the Court does not conduct a hearing after finding reason to believe the defendant is incompetent, it is a violation of the defendant’s constitutional right of due process. The Standard of review for any competency hearing is abuse of discretion.

The burden of proof in a competency hearing is preponderance of the evidence and it is presumed that the defendant is competent. The party who

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Footnotes

1. K.S.A. 22-3302(1)
3. K.S.A. 22-3302(2)
4. K.S.A. 22-3302(1)
5. State v. Prewett, 246 Kan 39, 44, 785 P. 2d 956 (1990) & K.S.A. 22-3402(5)(a)and(b)
7. K.S.A. 22-3201(3)(a)
8. K.S.A. 22-3302(3)
raises the issue of competence to stand trial has the burden of going forward with the evidence unless the Court raised the issue of competency, in which case the State is charged with presenting the evidence. This may be discomforting to some prosecutors, especially when the evidence is that the defendant is incompetent. It seems strange that we would be in a position to present evidence that eventually could lead to the defendant not facing criminal prosecution. However, remember that the State as well as the Court has the duty to provide due process and a fair trial to the defendant. The United States Supreme Court has long held that the trial of an incompetent defendant violates due process.

If the Court determines that the defendant is competent, the proceedings simply start again at whatever stage they were at prior to being suspended. If the Court finds the defendant is incompetent, then the Court must proceed pursuant to K.S.A. 22-3303. If the defendant is charged with a felony he/she will be sent to the State Security Hospital. If the defendant is charged with a misdemeanor, the Court may place them in any appropriate state, county, or private institution.

Once the defendant has been sent to a facility, the staff will begin to treat the patient and evaluate their ability to understand the Court process. Once staff believes that the defendant is competent, they will notify the Court and counsel and the Court will then conduct a new hearing pursuant to K.S.A. 22-3302. It has been my experience that one would be best served to stay in contact with the treatment facility to prevent any difficulty in notification regarding the status of the defendant. You do not want the defendant at the facility any longer than necessary. This will avoid later attack alleging the time determining competency was unreasonable and therefore should count against the state.

If the defendant is not deemed to be competent within 90 days, the Chief Medical Officer (C.M.O.) of the institution must certify to the court whether the defendant has a substantial probability of attaining competency in the foreseeable future. If the C.M.O. determines that there is substantial probability the defendant will regain competency, the court shall order the defendant to stay at the facility until he/she regains competency or 180 days from the date of original commitment, whichever occurs first. If at any point during the 180 days of commitment or at the end of the commitment, the C.M.O. determines substantial probability does not exist, then the Court shall order that the secretary of social and rehabilitation services to commence involuntary proceedings pursuant to chapter K.S.A. 59-2900 et.seq. This does not mean the criminal case is dismissed. DO NOT DISMISS YOUR CASE. DO NOT LET THE JUDGE DISMISS THE CASE. You’re not done.

Once a defendant has been admitted to a treatment facility, the State waits until the treatment facility determines that the defendant is ready to be discharged from their civil commitment. Once the treatment facility determines that the defendant is to be discharged they must notify the Court and prosecutor, and provide an opinion from the head of the treatment facility as to whether or not the defendant is now competent to stand trial. Once this notice is received, the State then has 10 days to request a hearing on the issue of competency restoration, but if no request is made the Court is required to discharge the defendant from commitment and to dismiss charges without prejudice.

There is one major caveat to the above procedure. In an ordinary civil commitment the Court cannot commit an individual who has only a diagnosis of alcohol or chemical substance abuse, antisocial personality disorder, mental retardation, organic personality syndrome, or an organic mental disorder. The Kansas Supreme Court in State v. Johnson, 289 Kan. 870, 883-885, 218 P.3d 46 (2009), sheds light on why this provision exists and how it creates great difficulty in the criminal arena: “Although K.S.A. 3301(1) mandates that the district court order SRS to commence proceedings to involuntary commit a defendant who had been adjudged incompe-

14. K.S.A. 22-3303(3)
15. K.S.A. 22-3303 (1)
16. K.S.A. 22-3305(2)
17. K.S.A. 22-3305(2)
tent to stand trial with no substantial probability of attaining competency in the foreseeable future, SRS cannot legally comply with that order under K.S.A. 59-2945 et seq. if the incompetency is due solely to an organic mental disorder such as a traumatic brain injury... Even the legislature apparently understood the problem as early as 2001.... As the legislature noted, the competing interests are protecting public safety on the one hand, and providing services and support for persons with disabilities on the other. If a person is incompetent to stand trial and also cannot be committed for mental illness treatment, that person is simply returned to the community without supervision, in derogation of public safety. Yet if a person has a condition that cannot be improved through treatment, e.g. a traumatic brain injury, then involuntarily committing that person under K.S.A. 59-2945 et seq. is akin to a life sentence without the possibility of parole. In 2001, the legislature struck a balance between the competing interests by amending K.S.A. 22-3303(1) to add a provision which would permit the involuntary commitment of persons who are incompetent to stand trial because of one of the expected diagnoses listed in K.S.A. 59-2946(f)(1), but who have been charged with certain crimes....”

Civil commitment of a criminal defendant who is charged with a felony or misdemeanor proceeds in the normal course unless the defendant is charged with an off-grid felony, any non-drug severity level 1 through 3 felony, or is charged with aggravated indecent liberties with a child, aggravated indecent solicitation of a child, aggravated sexual battery, aggravated incest, or aggravated arson. If a defendant is charged with one of these crimes, the court in the civil commitment case must only find the defendant is mentally ill as defined in K.S.A. 59-2946(e) and is likely to cause harm to self and others as defined by 59-2946(f)(3). The other provisions of K.S.A. 59-2946(f) shall not apply. If your defendant suffers solely from one of the conditions listed in K.S.A. 59-2946(f)(1), make sure you check to see if their charged crime fits the above list. If it does not, the Court will have to dismiss the criminal proceedings without prejudice, and the state will not be able to re-file unless there is reasonable grounds to believe that the defendant has regained competency.20

Kansas Legislature House Bill No. 2440, amends K.S.A. 22-3303 and 22-3305 to require the Court and in certain circumstances the Secretary of Social and Rehabilitative Services to notify the Secretary of Corrections when a defendant is committed or released from a treatment facility. The Secretary of Corrections is then required to notify victims of the defendant’s change in circumstances. It is important that you or your victim/witness coordinator monitor this to ensure that victims are being properly notified. This amendment takes effect July 1, 2010.

When I was first confronted with my defendant who appeared to be incompetent, I was not aware of the statutory requirements regarding competency. In fact, I was clueless. As indicated earlier, I went to the statutes and the case law. The problem I had was the one pointed out by the Supreme Court in Johnson, “We begin by describing the path which must be traversed to comport with the statutes governing a defendant’s competency to stand trial, albeit with the knowledge that our journey will dead end at the edge of a precipice which only the legislature can bridge.” Hopefully, now you will at least know when you have reached that precipice.  

19. K.S.A. 22-3303(1)&(2)  
This year’s national summer conference was held in California, July 11-15. There was an excellent schedule of courses, and the opening address was given by retired Justice Sandra Day O’Connor who spoke on the issues of domestic violence and measures to aid law enforcement and prosecution in this area of violent crime. I had the chance to visit with her for a few minutes after the speech. She is a delightful and thoughtful jurist. We will miss her on the bench…

The National District Attorneys Association is operating on a shoestring budget with a severe decrease in permanent faculty [3 attorneys] and limited funding. A combination award of $1 million from the US Department of Justice in July 2008 and a $1.6 million award that was included in the 2009 Omnibus Budget approved by the Department of Justice Bureau of Justice Assistance has kept the NAC open, but at a decreased level of training. Since the NAC’s usual budget level prior to Fiscal Year 2006 was $4.5 million, operations continue on a limited basis.

The NDAA is working “the hill” in hopes of confirming more than $1 million from the 2010 Congressionally Selected Awards Program that would permit NAC to hold 13 courses with six faculty and 30 maximum students per session, along with one conference with 75 students and seven faculty. The grant would allow up to $550 for travel and 5 nights of accommodations at the NAC [that also includes breakfast and lunch].

While the NDAA-TV has stopped production of new video programs, they are creating DVDs on seven select topics that will be disseminated to prosecutors at NAC and NDAA conferences free of charge.

Attendance at National Conferences continues to be effected by the economic impact of state and local prosecutors to pay for and attend out-of-state training. We are lucky that our Kansas prosecutors are afforded two quality seminars each year presented by the KCDAA. Not all states have the ability to put these events into play because of lack of funds. Prosecutors are urged to write their congressmen and women to support appropriations for the National Advocacy Center.
**John R. Justice Bill**

Around the nation, as of July 20, only 33 states have appointed administrators to facilitate awards under the John Justice Loan Forgiveness Legislation. Of course, in Kansas, we immediately worked to get acceptance by the Governor’s Office, and both the KCDAA and Tom Weilert of our office, are working to assure that the process is workable. Watch the KCDAA website for further information. The implementation date, previously scheduled for July 27, may be moved into August to allow for all the state regulations to be in place so that applications for awards may be submitted. Kansas has been allocated $100,000 for loan forgiveness. Of this amount, 50 percent is allocated to prosecutors and the public defender’s office. Nationally, we are continuing to work toward appropriations that would more adequately fund this program, with a price tag of more than $25 million that is now stalled in Congress. In addition to the NDAA, the American Bar Association and the National Association of Criminal Defense Lawyers continue to call for maximum funding. For updated information, please see the NDAA website at www.NDAA.org or www.ojp.usdoj.gov/BJA/grant/johnrjustice.html.

**National Academy of Sciences Report**

The NDAA continues to work closely with the Senate Judiciary staff and stakeholder groups on the formulation of a comprehensive forensics reform bill. A bill is currently being written in the Senate and preliminary discussions have begun in the house. No hearings have been scheduled and no bill has been introduced.

**NDAA GRANT APPLICATIONS**

The NDAA continues to apply for a number of grants from the Bureau of Justice Assistance to continue education and training in a number of diverse areas of criminal prosecution. These grants, if received, will assist in training and research in diverse areas of interest, including but not limited to: encouraging innovative programming in identity theft and mortgage fraud, prescription drug abuse, capital litigation improvement, internet crime, child protection in tribal communities, missing and exploited children, forensic science training and development, and domestic violence. Through our research and development at APRI we continue to produce effective and timely abstracts that are available to all prosecutors. Please check the website for specific available publications: www.ndaa.org.

**NDAA COLLABORATIVE PROJECTS**

In June, the NDAA conducted a three-day conference entitled “Domestic Violence and its Impact on our Community.” That’s not unique as the NDAA regularly presents this topic around the nation; however, the audience for this seminar just happened to be in the United Federation of Micronesia where to date, no state in the UFM has enacted anti-domestic violence legislation. The conference, attended by about 50 local activists, was held in the state of Chuuk and was made possible by the U.S. Compact of Free Association. It was a success, and our NDAA staff came back feeling that their work had shown the importance of collaboration between police, law enforcement, the community, and the prosecution in our country and around the world.

The NDAA, through its board members, continues to explore areas of cooperation with other entities, including the American Bar Association, The American College of Trial Lawyers, and the National Black Prosecutors Association.

**Upcoming NAC Courses:**

- Sept. 20-24 - Courtroom Technology
- Sept. 20-24 - NDAA Fall Conference
- Sept. 27-29 - Capital Litigation
- Oct. 4-8 - Arson
- Oct. 18-22 - Unsafe Havens
- Nov. 1-5 - Prosecutor Bootcamp
- Nov. 15-19 - Trial Advocacy I

**Upcoming National Courses in 2010**

- Sept. 12-16 - Prosecuting Drug Cases - Las Vegas
- Sept. 26-30 - Experienced Prosecutor - Marco Island, FL
- Oct. 3-7* - Prosecuting Homicide - San Antonio
- Oct. 27-31 - Domestic Violence - Washington, DC
- Oct/Nov* - Evidence for Prosecutors - Baltimore
- Nov. 14-18 - Prosecuting Sexual Assaults - San Francisco
- Nov. 7-11* - Government Civil Practice – Scottsdale, AZ
- Dec. 4-8 - Executive Program - San Francisco, CA
- Dec. 5-9* - Forensic Evidence - San Antonio

* = tentative dates
Photos from the 2010 KCDAA Spring Conference

June 10-11 ♦ Hyatt Regency Hotel ♦ Wichita, KS

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KCDAA

Fall 2010

Conference

Sunday, Oct. 10 -
Monday, Oct. 11, 2010

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Overland Park Marriott
Overland Park, KS

Watch www.kcdaa.org for more details.
IT’S TIME FOR THE 2010 KCDAA AWARD NOMINATIONS

Please take time to nominate a member of the KCDAA whom you believe to be deserving of an award. This is the opportunity to recognize the accomplishments of the hard-working prosecutors who make up the membership of the KCDAA. Two categories of awards will be presented at the 2010 Fall Conference: The Prosecutor of the Year and the Lifetime Achievement Award. The award winners are chosen by the KCDAA Board of Directors.

All nominations MUST BE received by 5 p.m. on Wednesday, September 15, 2010.

To make a nomination, please download the form at www.kcdaa.org. Then e-mail it to kpresley@kearneyandassociates.com or mail it to the KCDAA office.