

The Kansas Prosecutor



The official publication of the Kansas County and District Attorneys Association
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 The purpose of the KCDAA is to promote,
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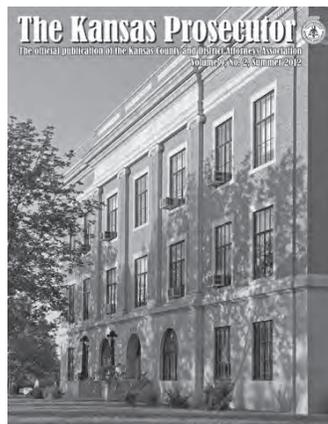
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About the Cover

Osage County was organized on February 11,
 1859. The county contains the cities of Quenemo,
 Burlingame, Overbrook, Melvern, Olivet, Osage,
 Carbondale, Scranton and Lyndon.

The Osage County Courthouse is located at 717
 Topeka Ave. in Lyndon, Kan. The architectural
 style is late 19th and 20th century revivals and was
 designed by W.E. Hulse.

In 2007, the Osage County Courthouse was added to
 the National Register of Historic Places.

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



President's Column

by **Melissa Johnson, KCDA President**
Assistant Seward County Attorney

You Are All Heroes

“There are heroes in this world. They’re called District Attorneys. They don’t get to have clients, people who smile at them at the end of the trial, who look them in the eye and say, “thank you.” Nobody is there to appreciate the District Attorney, because we work for the state. And our gratitude comes only from knowing there’s a tide out there. A tide the size of a tsunami coming out of a bottomless cesspool. A tide called crime, which, if left unchecked will rob every American of his or her freedom. A tide which strips individuals of the privilege of being able to walk down a dark street or take \$20 out of an ATM machine without fear of being mugged. All Congress does is talk, but it’s the District Attorney who grabs his sword, who digs into the trenches, and fights the fight. Who dogs justice day after day after day without thanks, without so much as a simple pat on the back? But we do it. We do it, we do it because we are the crusaders, the last frontier of American justice. Knowing that if a man cannot feel safe, he can never, never feel free.” -- Character Richard Bay from *The Practice* on ABC, 1997.

Over the top? Yes. What do people remember about the court process from television? Quite a bit. Since I first started prosecuting in 1995, it seems like jurors expectations are the things that have changed the most. Sure, there have been legislative changes, the statutes have all been renumbered and some penalties have changed drastically, but the ideas that jurors have about what we do, how we do it, and what they can expect as far as evidence in jury trials seems to have changed even more.

In jury trials, we all talk about the “CSI effect” during jury selection. Jurors all tell us that they understand that is just television, but do their verdicts really reflect that? Generally yes, but there are the exceptions like a case where jurors wonder why we don’t do dental impressions of the defendant to match a half-eaten cucumber at the scene of a residential burglary or why we didn’t do DNA testing to corroborate a mother’s eyewitness testimony and “prove” that an infant who was being abducted was really inside of the defendant’s duffel bag.

It will continue to be a challenge for prosecutors and law enforcement officers to anticipate everything that jurors may believe is readily available as far as forensic testing. One of the most positive changes toward advancing the forensic services available in Kansas is the addition, in the near future, of additional computer analysis capability through the Kansas Bureau of Investigation. The added capacity to analyze computers for local prosecutors and law enforcement will undoubtedly be of great value in the years to come.

As an organization, we also want to continue making positive changes through the legislative process during the years to come. The Legislative Committee and the Board of Directors are continuing to seek your input for changes that need to be proposed for future legislative sessions. We welcome all of your proposals and suggestions.

We are also now accepting nominations for the awards to be presented at what I’m sure will be an outstanding fall conference. Please consider taking time out of your schedule to nominate someone for Prosecutor of the Year, Policymaker of the Year, Associate Member of the Year, and/or the Lifetime Achievement award. You will find a nomination form at www.kcdaa.org or on the next two pages. We truly have many deserving members within our organization.

As a final note, by the time this article has been published, the primary elections will be over and there will be some of our members who have retired, some that are newly elected, and probably more newly hired graduates that are beginning their careers as prosecutors. Regardless which of these categories you may fall into or if you are a prosecutor continuing to work every day trying to make sure that justice is served, I want to make sure that just in case no one has looked you in the eye lately and said thank you for the job you do that someone did. So, thank you for your hard-work and dedication to making Kansas a better and safer place to live. You are appreciated and are all my heroes. It has been a pleasure to serve this organization as President during the past year. 🙏



2012 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 and a policymaker who has helped with interests of the KCDAA.

FOUR categories of awards will be presented at the 2012 Fall Conference: The Prosecutor of the Year, the Lifetime Achievement Award, Associate Member Prosecutor of the Year, and Policymaker of the Year. The award winners are chosen by the KCDAA Board of Directors.

Award Qualifications:

The Prosecutor of the Year Award is presented to a prosecutor for outstanding prosecution of a case or cases throughout the year. Nominations may be made by either the prosecutor himself/herself or by a colleague. The nominee must be a regular member of KCDAA.

The Lifetime Achievement Award is presented to a regular KCDAA member for his/her longevity as a prosecutor. The nominee must have served no less than 25 years in a prosecutor position, and not previously received this award. Nominations may be made by either the prosecutor himself/herself or by a colleague.

The Associate Member Prosecutor of the Year Award is presented to a prosecutor for outstanding prosecution of a case or cases throughout the year from an office other than a County or District Attorney's office. Nominations may be made by either the prosecutor himself/herself or by a colleague. The nominee must be an associate member of KCDAA.

The Policymaker of the Year Award is presented to an individual who is determined to have made the most significant impact on policy related to county and district attorneys either during the past year or over an extended career of public service. One award is presented each year. The award is open to individuals having public policy making authority as evidenced by legislative support of the KCDAA.

The awards will be presented during the Fall Conference taking place October 7-9, 2012 at the Sheraton Hotel in Overland Park, Kansas.

To nominate yourself or one of your colleagues, please use the nomination form on page 2. You may send your nominations to:

KCDAA
Attn: Kari Presley
1200 SW Tenth Avenue
Topeka, Kansas 66604
Fax: (785) 234-2433
E-mail: kpresley@kearneyandassociates.com

**All nominations MUST BE received by 5 p.m. on
Friday, August 31, 2012.**

For questions, please contact Kari Presley at (785)
232-5822 or via e-mail to
kpresley@kearneyandassociates.com.

Mail it, fax it, or e-mail it by August 31!



2012 KCDAA AWARD NOMINATION FORM

Name of Nominee: _____

Place of Employment: _____

Title: _____

Award being nominated for (please check one):

- | | |
|--|---|
| <input type="checkbox"/> Prosecutor of the Year | <input type="checkbox"/> Lifetime Achievement Award |
| <input type="checkbox"/> Associate Member Prosecutor of the Year | <input type="checkbox"/> Policymaker of the Year |

Nominee's number of years as a prosecutor (if applicable): _____

Length of time in current position: _____

Community involvement: _____

KCDAA involvement: _____

Please provide examples of nominee's **excellence in prosecution or as a policymaker** (may use additional paper as necessary):

Nominator's name: _____

County: _____

Title: _____

Please return this form with any additional pages to:
Kansas County and District Attorneys Association
Attn: Kari Presley • 1200 S.W. 10th Ave • Topeka, Kansas 66604
Or FAX to: (785) 234-2433
ATTENTION: DEADLINE AUGUST 31, 2012 at 5 P.M.

Time to Exercise Your Freedom.....

by Steve Kearney, KCDAAs Executive Director



.....VOTE!



The election season is upon us. Our right to vote should be even more on the minds of every one of us in light of our friends and neighbors that are in harm's way right this second defending democracy. Be sure to vote this year. It has never been more important to the well-being of your profession and the KCDAAs membership.

If you are not registered to vote, it has never been easier than it is today. Just go to www.kssos.org and download the application and return your completed application to your county election officer's office. The addresses for the all of the county election offices are on the back of the application. Your county election officer will mail you a notice when your application has been processed. Be certain to postmark the application by the 15th day before the election in order to be eligible to vote in that election. Simple steps: exercise your freedom, register, then vote.

Also, remember that you can vote in Advance at your local election office. Advance voting must begin by October 30th and may begin earlier if the Secretary of State opts to. If it is earlier, we will send you all information by e-mail. This election,

more than any other in recent memory, may well shape the course of Kansas for a decade or more to come. With Advance Voting, there is no reason to miss your opportunity to exercise your right to vote.

With legislative races sometimes being settled by only one vote, one in the recent past by a dead tie resulting in the flip of a coin, do not doubt whether or not your vote counts. As this organization becomes more and more politically active on your behalf, your obligation to be aware of the political climate and to participate at a minimum by voting is even more acute.

During this cycle, all 125 House seats are up as well as all 40 Senate seats. With the Court having redrawn the legislative district maps, there is an unprecedented number of incumbents running against each other, either as a result of their districts being collapsed together by the Courts or House members running against incumbent Senators.

With the geography of our membership many of you can have an impact on your local races. Watch for more information via e-mail blasts from the KCDAAs Office. As always, thank you for your support of our efforts on your behalf. 🗳️



Stay current by checking the
KCDAAs web site and reading e-mail blasts!

www.kcdaa.org

New information is updated regularly and information relevant to KCDAAs members is added to the members only section. Just login and check it out.

If you need the username and password, contact the KCDAAs office -
kpresley@kearneyandassociates.com

Legislation Proposed by KCDAA Member Gets Passed

Todd Thompson, Leavenworth County Attorney, discovered nearly two years ago that anyone had access to electronic cigarettes. He found that in kiosks in malls and stores, there was no prohibition for children to have access to these devices and that someone under age could ingest nicotine. In fact, these devices not only gave a person a dose of nicotine, but it could be done in a variety of flavors from fruits like peach and cherry, to cheesecake or cotton candy flavors.

Although these devices are advertised as a way for smokers to work on quitting and that the water vapor that they emit to the public is safer than smoke, it does not make it appropriate for children. He viewed this in the same light as other cigarettes and also feared an early addiction to this could lead to further addictions.

Thompson proposed legislation to the Kansas House Corrections and Juvenile Justice Committee in 2012 making it unlawful to furnish electronic cigarettes to people under 18 years of age. Once proposed, Rep. Pat Colloton and Rep. Melanie Meier worked with the bill to assure its passing. Throughout the process, Kari Presley of Kearney

and Associates stayed on top of the bill as it occasionally hit a few road bumps. However, she made sure no one forgot or dropped the ball on its passing.

The legislation passed and was signed into law by the Governor making Kansas one of a limited number of states that has this protection for our youth. 



Rep. Melanie Meier; Todd Thompson, Leavenworth County Attorney; Rep. Tom Sloan and others watched Governor Sam Brownback sign the legislation into law.

When Planning Your Estate -- designate to KPF --

Projects under Development by the Kansas Prosecutors Foundation, include:

- KCDAA Law School Scholarships
- KCDAA Undergraduate Honors Stipends
- KPT&AI National Speaker Bureau for Prosecutor Continuing Legal Education
- KCDAA Law Day Activities in Kansas High Schools
- 'Finding Words' – helping child victims speak
- Grant for a Statewide Victim/Witness Notification System
- Sponsor KVAAs
- And so much more...

Learn more at www.kpfonline.org

Don't Forget: A tax deductible contribution can be made out to KPF and sent directly to:

Kansas Prosecutors Foundation, 1200 SW 10th Ave., Topeka, KS 66604



KCDAA Member Highlight: John Wheeler

by Amanda G. Voth, Assistant Attorney General

Photo courtesy of the Garden City Telegram



John Wheeler's intrigue of the courtroom started when he was only 12 years old. He stood in line with the adults, eagerly awaiting admittance into the courthouse to watch Richard Hickock and Perry Smith stand trial for the brutal killings of the Clutter family. Each day of the trial, John would get to the door of the courthouse, and the deputy would turn him away, telling John he was too young to watch the trial. "Someday I will be in that courtroom," the 12-year-old told himself.

Fewer than 20 years later, John had joined the Air Force and served overseas, graduated from Washburn Law School, and joined a general practice law firm in Garden City, Kan. At that time, attorneys who practiced in Finney County automatically became subject to court appointment for indigent defendants. Ironically, the first case John was ever appointed to was a first degree murder case. It went to jury trial. During his work as a defense attorney, John developed a good relationship with law enforcement. "He made my life miserable as a cop," recalls Russ Jennings, a colleague and friend to John. He viewed cross-examination as "his opportunity to teach me something," Russ says. In one auto theft case, Russ recalls that there was no doubt in anybody's mind that the defendant committed the crime, and there was no doubt John knew it too. "John worked his magic and the judge found no probable cause." John's work in the courtroom was a lesson in the justice system, Russ says. "He is a good, high quality attorney, and paints the best picture for whoever

he is representing." Despite their early opposition in the courtroom, John and Russ developed a friendship that continued to grow throughout both of their career changes.

John decided to run for Finney County Attorney in 1992. He was elected and took office in 1993. The County Attorney's Office was only 900 square feet when he began, and "you couldn't even find pencils," recalls John, "but there were two young attorneys." These two young attorneys stayed with John for 20 years, and are still there today. "John brought a stabilizing force to the Office of the County Attorney," Russ says, "and professionalized the office in significant ways." John made it his goal early on to establish a good working relationship with the County Commission. Due to the economic boom of the 80s and 90s, the population of Finney County had grown by thousands of people, in turn increasing the crime rates. The relationship John had formed with governmental bodies proved to be very beneficial. John was instrumental in convincing governmental bodies that not only did the County Attorney's Office need to expand to meet the increased rate and nature of criminal offenses, but that there was an existing street gang problem.

In 2000, the County Attorney's Office moved into a building 10 times the size of the 900 square foot office in which John started. With the help of the strong relationships he had formed with



Deputy County Attorney Tamara Hicks, John Wheeler, Deputy County Attorney Brian Sherwood



governmental bodies, he was able to triple the number of attorneys in the office to correspond with the crime rates brought on by the growth in population.

“This is more than just a job [to John]”, Russ notes. “He has a passion for the law and in particular, a passion for being a prosecutor. His genuine empathy and concern for victims is noteworthy.” John says representing the peace and dignity of Kansas has always been of paramount importance. He tells the prosecutors that work for him: “Don’t ever do anything that violates your conscience. When you walk away, you can walk away with your head held high. You may have made mistakes along the way, but do not intentionally violate your conscience.” John is known for his commitment to public safety, while being fair in the process, and taking a balanced and appropriate approach.

John is very proud he had the opportunity to rise through the ranks at KCDA. He notes he has “worked with some very fine people,” and it is “an experience that he is greatly appreciative of.” He is currently the immediate Past President.

His decision to not seek reelection has been very difficult. “He will miss his staff every bit as much as they will miss him,” Russ says. Even after he announced that he would not be running this year, many people approached John and said they were going to vote for him anyway; a true testament to John’s character, reputation, and abilities.

John “doesn’t have the slightest idea” what he’ll do in retirement. He had aspirations to be the best Wal-Mart greeter in the world, but he says

it’s getting to be a pretty competitive position. John will be happy to travel freely

Trooper Brodi Gosch & John Wheeler

and not have to worry about returning to sign a grant of immunity or inquisition documents. However, he does want to remain active. Although John may be leaving this particular profession, the passion and ambition he felt as a 12-year-old boy waiting to witness justice be served, will never leave him. He notes: “I am going to be leaving this profession, but I hope I am able to retain an association with my brother and sister prosecutors and with the KCDA. I still think I have something of value to lend to our profession, so I hope I can continue with the Association and that if they ever need someone to call upon, I am available.” 🍷



*Don’t let John do his own shredding!!!
Assistant County Attorney Jennifer Cunningham, Office Administrator Pam Winder, Assistant County Attorney Megan Massey, John Wheeler*

KCDAA Milestones

Awards

Nola Foulston, District Attorney for the 18th Judicial District of Kansas and a member of the National District Attorneys Association (NDAA) Board of Directors, was the recipient of the Norm Maleng Minister of Justice Award for 2012 by the American Bar Association. The award is bestowed on a prosecutor who embodies the principles enunciated in the ABA Standards for Criminal Justice, Prosecution Function, particularly that “the duty of the prosecutor is to seek justice, not merely to convict.” Nola accepted the award at a meeting of the ABA Criminal Justice Section.



Babies

Kathleen Britton, Assistant District Attorney, Douglas County, and her husband Clay had their first child on January 17. They named their son Grant Daniel.



Marriage

Robin Hathaway (Assistant Attorney General working in Wichita) and Brandon Sommer were married June 9, 2012 in Chicago, Ill.



New Faces

Stephen Hunting is the new county attorney in Franklin County.

Office Moves

John Bryant has joined the Attorney General’s Office as an Assistant Attorney General in the Medicaid Fraud and Abuse Division. Bryant will be prosecuting Medicaid Fraud and related crimes throughout the state. Bryant was formerly the Deputy County Attorney in Leavenworth County.

Amanda Voth has joined the Criminal Litigation Division of the Attorney General’s Office as an Assistant Attorney General. Previously, Voth worked in the Medicaid Fraud and Abuse Division of the office.



Retirement

David L. Miller has been the Miami County Attorney since January 1989. He did not file for re-election to another term.

Next Submission Deadline: October 26, 2012

In Memory of Keith D. Hoffman, Dickinson County Attorney By Steve Opat, Geary County Attorney

It is with a great deal of sadness that I write about the passing of one of our fellow prosecutors. Keith D. Hoffman, 61, died unexpectedly at his home on August 11. He was the Dickinson County Attorney, serving from 1979-1987, and again from 2004 until his death. Like some of the rest of us old guys, he could not stay away from the part of law that he really loved.

Keith graduated from Chapman High School where he had been inducted into the Chapman Sports Hall of Fame and received his law degree from Washburn University. He was an avid fisherman and hunter and loved sports to the extent that he coached the Solomon High School girls’ basketball team during his “spare time.” Keith had served in the Marine Corps during the Vietnam War and was a member of numerous veterans and legal organizations. He is survived by his wife, Ruth, three step-children, 10 step-grandchildren and five great step-grandchildren.

On a personal note, I became acquainted with Keith in trying my first big case as a public defender, and it was Keith’s first big case as a prosecutor. We battled tooth and



nailed for a week in front of one of the great old-time judges: John Rugh. It was an experience I will never forget, and suffice it to say Keith and I did not like each other very much for quite a while. But things have a way of coming around. Before too long, we became good friends to the extent that he asked me to help prosecute an infamous homicide case in Abilene, State vs. Joe Buddy Myers. It was a privilege to be asked, and we remained lifelong friends and comrades. We laughed at each other quite a bit when we both came back to the prosecutor ranks at about the same time, asking each other “why the hell are we doing this?” but knowing the answer without saying it. Keith was a dedicated public servant and a quality advocate. The night before he passed away, he had gotten a guilty verdict in a jury trial. Doing the job we do takes its toll, especially when you are as fiercely competitive as Keith was in the pursuit of justice. One of the highest accolades we can pay to a fellow prosecutor is that “he was tough but fair,” and he was. We who knew him are better for it, as is the community that he served so protectively. We will miss you. Semper Fi!

Stowaway Constables in the Modern Age

by Angela Wilson, Senior Assistant District Attorney, 18th Judicial District of Kansas

An overview of the Supreme Court's Decision in *U.S. v. Jones*

“[A]ttachment of Global–Positioning–System (GPS) tracking device to vehicle, and subsequent use of that device to monitor vehicle’s movements on public streets, was [a] search within meaning of Fourth Amendment.”¹

For the purely practical application of this opinion, one need look no further: for law enforcement to place and monitor a GPS tracking device on a suspect’s vehicle, the placing and monitoring of the suspect’s movements must be supported by probable cause as determined by a neutral and detached judicial officer.

Many in law enforcement cautioned and encouraged the use of a court order supported by a probable cause finding even before the opinion was released.² This advice was based on reasoning that should the placement of such a device be found to be a search, that search would only be admissible if supported by probable cause.

That cautionary advice is now law: **Any monitoring of a government-placed GPS device is a search and the intrusion must be supported by probable cause.**

Though the rule from *Jones* can be stated simply, the rationale for the 7-0 decision was varied across the Court. The analysis leading to the conclusion reaches back to the framers’ intent, and includes debate about a hypothetical diminutive 18th century constable stowing away for an extended period in a suspect’s coach to gather evidence of

wrong-doing. Briefs of Amicus Curiae on behalf of the Respondent Jones were received from at least a dozen groups, and one was submitted in support of the Government.³

To understand the implications of the decision, it is instructive to look at the facts in the case. Jones, a nightclub owner, was suspected of drug trafficking. A federal warrant authorizing tracking was sought and granted – to be placed within the District of Columbia within 10 days. Eleven days later in a public parking lot in Maryland a GPS device was placed on Jones’ jeep (registered to his wife, but everyone agrees he drove it exclusively) and monitored for 28 days. A motion to suppress at the district court was granted in part – the Government was allowed to use only the information that was obtained from the GPS when the vehicle was away from the defendant’s home. Among other evidence, the GPS device provided a connection between Jones and a stash house containing \$850,000 in cash, 97 kilograms of cocaine, and one kilogram of cocaine base. Jones was ultimately convicted and sentenced to prison for life.⁴

In the D.C. Circuit, the court addressed several issues, including wiretaps and co-defendants who invoked rights against self-incrimination, but only one issue survived that court’s scrutiny to reach the Supreme Court.⁵ The Circuit Court found that the GPS monitoring was a search, and that the search was not controlled by *United States v. Knotts*,⁶

Footnotes

1 *United States v. Jones*, ___ U.S. ___, 132 S. Ct. 945, 181 L.Ed.2d 911 (2012).

2 Agencies in Kansas have been using a statement of probable cause and an order allowing placement and monitoring of the device. These orders generally allow monitoring for a specific time and return is made after a follow-up warrant authorizing retrieval. Indeed, even in the *Jones* case the government sought and obtained an order allowing the placement and monitoring of the device.

3 Supreme Court Docket for case number 10-1259. Briefs of Amicus Curiae on behalf of Respondent Jones were received from Gun Owners of America, et. al., Electronic Privacy Information Center, et. al., Center for Democracy and Technology, et. al., National Association of Criminal Defense Lawyers, et. al., Yale Law School Information Society

Project Scholars, Cato Institute, Owner-Operator Independent Drivers Association, Inc., Constitution Project, Council on American-Islamic Relations, Fourth Amendment Historians, American Civil Liberties Union, et. al., The Rutherford Institute and the National Motorists Association. The Center on the Administration of Criminal Law filed a brief in support of the Government.

4 *Jones*, 132 S.Ct. at 948-950.

5 See, generally, *U.S. v. Maynard*, 615 F.3d 544 (D.C.Cir. 2010). Maynard was the manager of Jones’ club and an indicted co-conspirator in the cocaine sale enterprise. 615 F.3d at 549.

6 *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983), holding the use of a “beeper” tracking device placed in a barrel of materials suspected to be used in the manufacture of drugs was not a search.

but rather was something that a reasonable person would not believe was being recorded for 28 days. The court found the extended period of monitoring was a violation of the “reasonable expectation of privacy” articulated in *Katz v. United States*.⁷ The Circuit Court further discussed that the quantity of information obtained through a GPS device was more detailed than that available in *Knotts*, further distinguishing this case from a beeper.⁸

Ultimately the Supreme Court affirmed the D.C. Circuit Court’s holding that the monitoring of Jones’ car for 28 days without a warrant was an illegal search. The rationale for that decision went far afield from the opinion in *Maynard*, however.

At oral argument⁹ the Justices immediately began to focus on a hypothetical situation: Could the Government install a GPS device on the cars of each of the Justices of the Court and monitor their activities for a month without suspicion of any criminal activity? The answer, based on the caselaw, was “yes.”¹⁰ Further questioning focused on similarities between GPS monitoring and Orwell’s novel “1984,” comparing the use of GPS to “round-the-clock visual surveillance,” which was conceded not to implicate either search or seizure.¹¹

Justice Scalia wrote the opinion, joined by Chief Justice Roberts, and Justices Kennedy and Thomas. Justice Sotomayor filed her own concurring opinion and Justice Alito filed a different concurring opinion joined by Justices Ginsburg, Breyer and Kagan.

Scalia’s position, as he began discussing at oral argument¹², was that the placement of the GPS device on the car Jones routinely drove was a trespass at common law, and therefore was a search when the device was placed. “It is important to be clear about what occurred in this case: The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a ‘search’ within the meaning of the

Fourth Amendment when it was adopted.”¹³

The majority says the reasonable expectation of privacy test of *Katz* was “added to, not substituted for, the common-law trespassory test.”¹⁴ The Court then proceeded to base the distinction between existing cases of electronic monitoring; *Knotts* and *United States v. Karo*¹⁵, by noting that when the beepers were placed in *Knotts* and *Karo*, the Government had the consent of the original owner but not of the defendant. Therefore, the difference between these actions which were not a search, and the GPS monitoring in this case, was who was in possession of the defendant’s “effect” when the electronic device was installed.

By relying on this common-law approach, the majority appears to achieve the result of prohibiting the type of widespread monitoring of all citizens that the Justices discussed at length in oral argument without doing violence to any existing Fourth Amendment jurisprudence. However, they also did nothing to address the questions beyond this very limited fact scenario.

Among the questions not addressed in the majority opinion is the use of a factory-installed GPS monitor. As the majority points out, “Situations involving merely the transmission of electronic signals without trespass would remain subject to *Katz* analysis.”¹⁶ Thus, as the concurrence point out, the holding in *Jones* does not address a question of user-specific GPS data that may be stored by the GPS provider.¹⁷ What of a factory-installed GPS unit that can be remotely activated without the user’s knowledge: the owner of a Chevy Tahoe who doesn’t sign up for OnStar? Can the Government activate, then monitor, that GPS unit without the consent of the owner and without showing probable cause? Clearly there is no trespass in such a circumstance. Can OnStar be required to produce stored location data on request, or something less than probable cause?¹⁸

7 *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967).

8 *Maynard*, 615 F.3d at 556-565.

9 Complete transcript of the argument is available for download from the U.S. Supreme Court website at www.supremecourt.gov/oral_arguments

10 Transcript of Oral Argument, pp 9-10.

11 Transcript of Oral Argument, page 41

12 Transcript of Oral Argument, page 7, 31.

13 *Jones*, 132 S. Ct. at 949.

14 *Jones*, 132 S.Ct. at 952.

15 468 U.S. 705, 104 S.Ct. 3296, 82 L.Ed.2d 530 (1984),

16 *Jones*, 132 U.S. at 953.

17 132 U.S at 955, (Sotomayor, J., concurring in judgment)

18 132 S.Ct. at 962 (Alito, J., concurring in the judgment)

The concurrence penned by Justice Alito would conclude that the long-term monitoring of the defendant's movements violated the defendant's reasonable expectation of privacy, and on that basis would affirm the Circuit court.¹⁹ Alito dismisses the majority's opinion that the trespass of installing the GPS was a search, because if the device never functioned, there would have been no violation. He scoffs at the idea that framers' intent could have any place in the analysis, "it is almost impossible to think of late-18th-century situations that are analogous to what took place in this case. (Is it possible to imagine a case in which a constable secreted himself somewhere in a coach and remained there for a period of time in order to monitor the movements of the coach's owner?)"²⁰

Still, even with a holding that there was a violation of the defendant's reasonable expectation of privacy in this case, the concurrence bases that finding largely on the number of days the surveillance lasted. The opinion suggests that something less than four weeks may have been acceptable and may NOT have been found to be a search under their analysis.²¹

More than the holding of this case, the variety of approaches to this integral part of criminal investigation gives some indication of what the court may do when presented with novel applications of technology. These comments by the various Justices in addressing the unique facts of this case can help the perceptive prosecutor avoid the pitfalls from *Jones*.

Though not the rationale of the decision, the point that the Government could have obtained a court order, and *did* obtain a court order, but failed in the precise adherence to that order was mentioned by all parties and throughout the opinion. The Government relied on the premise that they didn't need a warrant, but the surveillance would have been allowed had they either obtained a new warrant or

complied with the one they obtained.

Kansas prosecutors must ensure that when working with law enforcement to seek warrants for GPS surveillance, or for other types of technologically based evidence, that probable cause requirements are scrupulously heeded. While the Kansas legislature has not provided a framework for obtaining orders specifically for GPS-based monitoring, existing search warrant statutes and procedures provide a guide.²² The process for compliance must be considered.

Jones requires that probable cause support the placement of a GPS device. It follows that an order to monitor and an order to remove the device would also be appropriate, though not addressed specifically. The United States Department of Justice used orders to retrieve at least some of the devices they turned off in the wake of the *Jones* decision.²³ While the actual location data is not implicated in the *Jones* decision, the Supreme Court left that specific question open.

A common-sense approach to when GPS tracking is used is also advised. "Just because you can, doesn't mean you should," as millions of grandparents have said, may be an appropriate adage for this situation. Law enforcement seeking GPS monitoring, or the contents of stored GPS data, or other such information which others may reasonably believe to be private, should be prepared to describe how the information they seek will aid the investigation.

Further, the probable cause to support the electronic surveillance data should be tied to that information sought. Probable cause to believe a crime was committed is not sufficient; the Fourth Amendment also requires particularity for the search. The prudent prosecutor should not ignore that particularity requirement even if the courts are not scrutinizing the connection.

The prudent prosecutor should consider whether,

19 132 S.Ct. at 958 (Alito, J., concurring in the judgment)

20 *Id.*

21 "In this case, for four weeks, law enforcement agents tracked every movement that respondent made in the vehicle he was driving. We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4-week mark. Other cases may present more difficult questions. But where uncer-

tainty exists with respect to whether a certain period of GPS surveillance is long enough to constitute a Fourth Amendment search, the police may always seek a warrant." 132 S.Ct. at 964.

22 K.S.A. 22-2501 et. seq.

23 <http://abcnews.go.com/blogs/politics/2012/03/supreme-court-ruling-prompts-fbi-to-turn-off-3000-tracking-devices/>

when the search warrant return is filed, an inventory summary should be filed as well. Consider what form that inventory should take, whether a list of locations or a summary. Preparation of a detailed return will require law enforcement to be mindful of the information obtained, and what that information means in the context of the investigation.

Particularly when seeking an extension of the monitoring period, the drafter of the warrant should consider whether the information obtained during the first period justifies extending the period. Does the information obtained during days 1-30 provide additional probable cause to renew the electronic surveillance, or does that information actually diminish the articulable probable cause that supported the warrant in the first place? If 30 days of GPS surveillance reveals only trips to the grocery store, the prudent prosecutor should consider whether an application to extend that surveillance should, include this fact. If the same date range of data from a different warrant shows daily visits to known drug dealers, should that information be included in the application for extension?

The Supreme Court in *Jones* limited its actual decision to the facts before it, but signaled other changes that might develop. For example, Justice Sotomayor in her concurrence expresses

24 132 S.Ct. at 957.

25 132 S.Ct. at 962-963. "...[J]udges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks."

26 See, e.g. The Electronic Communications Privacy Act, 18 U.S.C. §§ 2510 et. seq.

a willingness to revisit otherwise fundamental tenets of Fourth Amendment jurisprudence; "[I]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties.²⁴"

Whether society evolves to change expectations of what privacy is reasonable²⁵, or whether legislatures act to provide protections where the Constitution does not²⁶, fruits of a search supported by probable cause as determined by a neutral judge will likely be admissible evidence.

When it is possible, law enforcement should be encouraged to seek and obtain judicial approval of the search. By careful and thoughtful application of the Constitutional requirements, prudent prosecutors can foresee and avoid future suppression issues. 

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The Effect of Giglio on Law Enforcement Records

by Megan Fisher, Assistant District Attorney, Johnson County

Increasingly, defense attorneys have been requesting that prosecutors turn over the personnel and disciplinary records of law enforcement officers. These requests typically come in the form of motions to compel discovery.

The heart of the defense argument centers around *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed 104 (1972). In *Giglio*, the U.S. Supreme Court determined that the prosecution in a criminal case must turn over all evidence that relates to a witness's credibility. The facts in *Giglio* were that the government used the testimony of a co-conspirator of the defendant and had promised him that they would not indict him based on his cooperation. This information was not disclosed to the defendant.

The Court held that in order to require disclosure of impeachable evidence, the defendant must show materiality and the court must find that the requested evidence is material to the defense. *Id.* at 154, 766. Further, the Court held that a finding of materiality would hinge upon whether the government's case depended nearly entirely on the witness's credibility. *Id.*

Courts have repeatedly held that withholding impeachment evidence when the case depends almost entirely on that witness's testimony requires a new trial. *Stockton v. Commonwealth of Virginia*, 227 Va. 124, 314 S.E.2d 371 (1984).

The Fourth Circuit Court of Appeals addressed this issue as it relates to police officer misconduct in *U.S. v. Robinson*, 627 F.3d 941 (4th Cir. 2010). That case gives a good statement of the law with respect to *Brady* issues:

Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 216 (1963) covers impeachment as well as exculpatory evidence. It applies wherever evidence is suppressed, regardless of the prosecutor's motivations. See e.g., *United States v. Agurs*, 427 U.S. 97, 110, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). *Brady* does not stop at the prosecutor's door, however. The knowledge of some of those who are part of the investigative team is imputed to the prosecutors regardless of the prosecutors' actual awareness. See e.g., *Kyles v. Whitley*,

514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995) (“[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the governments behalf in the case, including the police.”). *Id.* at 951-52.

The Fourth Circuit goes on to note, “it is one thing to require prosecutors to inquire about whether police have turned up exculpatory or impeachment evidence during their investigation. It is quite another to require them, on pain of possible retrial, to conduct disciplinary inquiries into the general conduct of every officer working the case.” *Id.* at 952.

Robinson was cited in *United States v. Wilson*, 2011 WL 5842583 (D.Md.). In *Wilson*, the defendant argued the government should have to review the personnel files for impeachment or exculpatory information of all witnesses. The District Court denied the defendant's motion stating that, “to rule otherwise would place an ‘unacceptable burden’ on prosecutors and law enforcement, and the Government need not ‘conduct disciplinary inquiries into the general conduct of every officer working the case.’” *Id.* (citing *Robinson* at 951).

The 10th Circuit addressed this in *State v. Muse*, 708 F.2d 513 (10th Cir. 1983). The court held that the government is required to turn over personnel files in their possession which would contain information useful for impeachment but that a *carte blanche* order to turn over all the records was not necessary.

K.S.A. 22-3212 dictates what must be turned over to a criminal defendant as part of discovery. It is incumbent upon the defendant to demonstrate relevancy and materiality of discovery requests. *Id.* at (1)(a) and (b)(1). The argument made by the defense in these motions is centered around the notion that because they do not know what is in the personnel files, they cannot demonstrate relevance or materiality. Moreover, the defense argues that they should not have to show relevance or materiality.

For support of this argument, they rely on *State v. Shoptaw*, 30 Kan.App.2d 1059 (2002). In *Shoptaw*, the Kansas Court of Appeals held that the defendant's right to a fair trial was violated when

the district court quashed the defendant's subpoena ducas tecum for the victim's mental health records and refused to conduct an *in camera* inspection of the records. The Court of Appeals noted that no one involved in the case had looked at the records so it was unclear whether any information contained within the records would have changed the outcome of the case. Because of this, the Court of Appeals remanded the case for the requisite *in camera* inspection to determine if any information contained within the records would have changed the outcome of the trial. *Id.* at 1066.

However, the Kansas Supreme Court has repeatedly cautioned against allowing defendants to go on fishing expeditions by abusing the discovery process. The Kansas Supreme Court noted in *State v. Dykes*, "For evidence to be discoverable, the defendant *must show* that the evidence requested is in the possession or control of the prosecution and that it is relevant or material in the preparation of the defense. The mere entertaining of a hope that something of aid may be discovered is not sufficient." 847 P.2d 1214, 1218 (1993) (citing *State v. Campbell*, 217 Kan. 756, 782, 539 P.2d 329, *cert denied* 423 U.S. 1017, 96 S.Ct. 453, 46 L.Ed.2d 389 (1975)).

There are two cases in Kansas that are on point with respect to requiring the State to turn over police officer's disciplinary and / or personnel files; *State v. Griswold*, 140 P.3d 452 (Kan.App. 2006) (unpublished) and *State v. Riis*, 178 P.3d 684 (Kan. App. 2008).

Griswold is unpublished and pursuant to Kansas Supreme Court Rule 7.04(f) it is not precedent or favored for citation. It is, however, mentioned in *Riis* and so the facts behind both cases bear reviewing.

In *Griswold*, the Kansas Court of Appeals ruled that a district court judge should have reviewed the disciplinary files of two detectives *in camera*. The Court of Appeals ruled this way because the two detectives in question were under investigation by the Kansas Bureau of Investigation (KBI). The investigative reports from the KBI were in the possession of the State. That fact had become known to the defense in that case and they requested the files. *Griswold* at 452.

In *Riis*, the Court of Appeals ordered that a

judge should have reviewed the Kansas Bureau of Investigation's reports on a police officer who signed the affidavit for a search warrant of the defendant's residence. Again, the police officer was being investigated by the KBI for suspected wrongdoing. Also noteworthy is that the investigative reports from the KBI were in the possession of the State.

In both cases, the Court of Appeals ordered the *in camera* review of the records as they pertained to the officer's credibility as it pertained to *that case* and not in general.

Note that the records being in the possession of the State does not mean that the records are in the hands of the prosecutor. The KBI is a State organization and the prosecutor could therefore, be ordered to produce the records for an *in camera* review by the court.

Because these defense motions are for records that are typically in the custody of a municipality, prosecutors should argue that the State is not the custodian of those records and does not have access to them. K.S.A. 22-3212 does not contemplate forcing the State to procure records which would be unduly burdensome to produce. The State cannot force a municipality to hand over those records. Such a request must come from the defendant via a subpoena ducas tecum served on the proper party at the local police department so that their legal team could become involved.

It should be noted that although the State cannot be required to produce disciplinary and / or personnel records of individual police officers absent some sort of information that the officer involved has disciplinary issues, the State should request that the local police department conduct a review of the personnel records and determine if there is any information in it which could be exculpatory. Typically, the police department would then review those files and write a letter indicating the existence, or lack thereof, of *Giglio* materials.

Ultimately, for a defendant to get personnel or disciplinary records of police officers reviewed *in camera*, the defendant must show relevance and materiality. For a case to be overturned for not turning it over, the defendant would have to show both of those things as well as prejudice to his case such that the verdict may have been different because of it. 🌀

K.S.A. 60-1507: A Civilly Criminal Action

by Kristi Barton Edwards, Assistant District Attorney, 18th Judicial District of Kansas

“A writ employed to bring a person before a court, most frequently to ensure that the party’s imprisonment or detention is not illegal”
-Bryan Garner, *Black’s Law Dictionary, 8th Edition*

Habeas corpus relief, or the ability to challenge being locked in a secret dungeon indefinitely, was first mentioned in the Magna Carta in 1215. In Kansas, the first territorial legislature acknowledged the existence of habeas relief in 1855. One of the first Kansas cases was recorded in 1873.¹

K.S.A. 60-1507 was born in 1963.² It appears to have *ironically* been placed in the Code of Civil Procedure, as it very specifically states “prisoner” and precedes a “divorce.”

In 1967, our Supreme Court examined K.S.A. 60-1507 and explained:

“Thus, the statute provides what is generally known as a post-conviction remedy, superseding, in many instances, the old and familiar remedy of habeas corpus. The new procedure has this advantage - it permits alleged errors to be reviewed by the court which tried the prisoner and is familiar with his case. It also eliminates the congestion which formerly existed in judicial districts where penal institutions were located.” Stahl v. Board of County Com’rs of Geary County, 198 Kan. 623, 426 P.2d 134 (1967).

Following codification, it became clear that additional guidance was needed.³ The current Supreme Court Rule 183 appears to have been intelligently designed to bridge the gap between the underlying criminal case and the civil case designation.⁴

Historically, 1507 cases were sporadically issued and mostly unpublished. Arguably, this was largely

the result of a conservative application of the factual requirements.

“The solicitude with which society, in the guise of the state, surrounds a prisoner’s right to an adequate hearing of substantial grievances *does not, however, extend to the protection of trivial, frivolous, or insubstantial claims.* The corollary of the requirement that a full, or plenary, hearing be accorded a prisoner, when substantial questions are raised, is the court’s right to dispense with such a complete hearing and to determine the questions submitted in a more summary fashion whenever ‘the files and records of the case conclusively show that the movant is entitled to no relief.’ [Emphasis added.]” State v. Burnett, 194 Kan. 645, 647, 400 P.2d 971 (1965).

Today, K.S.A. 60-1507 contains three essential parts: (1) factual requirements for seeking relief; (2) limitations on review; and (3) procedural/substantive bars.⁵ Rule 183 provides additional, procedural guidance.⁶ The recent, increased appellate caseload has also highlighted important trends in 1507 litigation: (1) endless litigation; (2) structural error arguments; and (3) attacks on plea negotiations.

Factual Requirements

K.S.A. 60-1507(a) requires that a movant must:

- (1) Be “in custody;”**
- (2) Seek “release;”**
- (3) Allege a “violation” of the Constitution; and**

Footnotes

1 In Bloss v. State, 11 Kan. 462 (1873), a writ of habeas corpus was utilized to attack the amount of bail.

2 The statute’s predecessor, K.S.A. 62-1304 was also part of the Code of Civil Procedure.

3 “Soon after K.S.A. 60-1507 became effective it was apparent that rules would be required to govern its procedures.” Stahl, 198 Kan. at 624.

4 Supreme Court Rule 183 was preceded by Supreme Court

Rule 121.

5 There is currently a debate on whether the successive/timely limitations are procedural bars or “affirmative defenses.” See, e.g., Dudley v. State, Unpublished Opinion No. 106,271 (March 23, 2012).

6 Supreme Court Rule 183 was heavily revised, effective July 1, 2012. Notably, the statute’s use of “shall” was changed to “may” and the one-year time limitation was finally included.

(4) Request relief in the same court that imposed the challenged conviction.

A movant is “in custody” only “if he or she is subject to detention, confinement, or restraint on the sentence subject to challenge by the K.S.A. 60-1507 motion when the motion is filed.” Rawlins v. State, 39 Kan. App. 2d 666, 670, 182 P.2d 1271 (2008). This equates to simultaneous attack and confinement. In addition, if a 1507 was filed while the movant was in custody, then the 1507 remains valid even after the movant has been released. See Rawlins, 39 Kan. App. at 671.

Notably, physical confinement is not required. Probation has been deemed “custody,” leaving open for argument whether post release supervision and/or parole equate to “custody.”⁷ Confinement out of state may also qualify as “custody” if the confinement is subject to a Kansas sentence.⁸

The plain language of the statute requires that a movant demand to be “released;” the liberal construction rule, however, suggests that any attack on the conviction or sentence may be addressed in a 1507 proceeding.⁹ Clearly, however, challenges to the *length* of a sentence are not properly addressed in a 1507 because they constitute attacks on sentence computation.¹⁰

Rule 183(c)(3) addresses the substance of violations that are properly raised in a 1507. In particular, “mere trial errors,” or claims that *should* have been or *were* raised on direct appeal, are not cognizable under 1507.¹¹

“Mere trial errors” that clearly should have been raised on direct appeal include prosecutorial/judicial misconduct, evidentiary rulings, and jury instruction challenges.¹² Trial errors affecting constitutional rights, however, *may* be raised for the first time in a 1507 if the movant asserts “exceptional circumstances” excusing the failure to raise the issues on direct appeal.¹³ The burden is on the

movant to demonstrate the exception to the general prohibition on treating a 1507 like a direct appeal.

Trial errors that were raised on direct appeal are simply barred by the doctrine of *res judicata*, which holds that a movant cannot re-litigate decided issues:

“In Kansas, there are four requirements to apply *res judicata*: (1) identity in the thing sued for, (2) identity of the cause of action, (3) identity of persons and parties to the action, and (4) identity in the quality of persons for or against whom claim is made.” State v. Kelly, 291 Kan. 868, 875, 248 P.3d 1282 (2011).

Finally, Rule 183 explains that 1507 relief may only be sought “in the county where the petitioner was confined.”¹⁴ This jurisdictional component insures that the court of conviction is the only district court that reviews the conviction.

Limitations on Review

In Lujan v. State, 270 Kan. 163, 170-1, 14 P.3d 424 (2000), our Supreme Court outlined a procedure that may be used by the district court:

“First, it may determine that the motion, files, and records of the case conclusively show that the petitioner is entitled to no relief, in which case it will summarily deny the petitioner’s motion.

“Second, the court may determine from the motion, files, and record that a substantial issue or issues are presented, requiring a full evidentiary hearing with the presence of the petitioner.

“Third, the court may determine that a potentially substantial issue or issues of fact are raised in the motion, supported by the files and record, and hold a preliminary hearing after appointment of counsel to determine whether in fact the issues in the

7 In Rawlins, the court explicitly stated that being on probation equates with being “in custody.” 39 Kan. App. 2d at 674.

8 Maggard v. State, 27 Kan. App. 2d 1060, 1063, 11 P.3d 89, *rev. denied* 270 Kan. 899 (2000).

9 State v. Kelly, 291 Kan. 563, 565–66, 244 P.3d 639 (2010).

10 See McKinney v. State, 27 Kan. App. 2d 803, 9 P.3d 600 (2000) (sentence computation is the responsibility of the KDOC and properly a K.S.A. 60-1501 action).

11 A K.S.A. 60-1507 action cannot be used as a second appeal, or a substitute for an appeal of trial errors. See Trotter

v. State, 288 Kan. 112, 125-26, 200 P.3d 1236 (2009); Pabst v. State, 287 Kan. 1, 6, 192 P.3d 630 (2008).

12 See Hollingsworth v. State, Unpublished Opinion No. 106,357 (March 2, 2012) (misconduct and jury instruction challenges are mere trial errors).

13 The most common example is ineffective assistance of trial counsel, which arguably is the most common claim litigated in 1507s.

14 Compare K.S.A. 60-1501, which must be filed in the county where the movant *is* confined.

motion are substantial. [Emphasis Added.]”

When reviewed in light of subsequent caselaw, it is clear that Lujan provides a desired schedule of events. First, the district court reviews the motion, files, and records. If it concludes that movant is not entitled to relief (a factual requirement is missing), then the motion is properly, summarily denied. If the court concludes that the motion “potentially” contains a substantial question of law or fact, then counsel must be appointed and a preliminary, nonevidentiary hearing must occur. And, at the preliminary, nonevidentiary hearing, the district court’s review is limited to only “the motion and the files and records of the case” (without the movant’s presence).

Alternatively, if at the preliminary, nonevidentiary hearing the district court concludes that a substantial question of fact exists, then a “full evidentiary hearing” must occur (with the movant’s presence). And, if at the evidentiary hearing the district court concludes that movant has shown by a preponderance of the evidence that he or she is entitled to the relief requested, then the district court must order the relief.

Notably, the district court must, at each stage, “make findings of fact and conclusions of law on all issues presented.”¹⁵ The failure to issue findings of fact and conclusions of law will result in remand.¹⁶ Yet, written findings and conclusions are not the only means to fulfill the statutory mandate. See Robertson v. State, 288 Kan. 217, 233, 201 P.3d 691 (2009) (holding that remand was not required when the district court’s journal entry *combined* with its oral expressions allowed the appellate court to review the decision).

Historically, the district court was granted great deference by our appellate courts. Specifically, an abuse of discretion standard of review was applied.¹⁷ This radically changed in 2007. In Bellamy v. State, 285 Kan. 346, 354, 172 P.3d 10 (2007), our Supreme

Court disapproved of the abuse of discretion standard of review in favor of de novo review when the district court summarily dismisses the motion based solely on the motion, files, and records in the case without holding an evidentiary hearing. A panel of our Court of Appeals explained the logic underlying this decision: “Because we are in as good a position as the judge hearing the 60-1507 motion to consider its merits, our review is de novo.” Barr v. State, 287 Kan. 190, 196, 196 P.3d 357 (2008).

In addition to the radical change in the standard of review, our appellate courts significantly altered the district court’s ability to conservatively approach 1507 review. Before 2007, “trivial, frivolous or insubstantial claims” were summarily denied; now, the district court must make favorable assumptions when reviewing the motion, files, and records:

“It is error to deny a K.S.A. 60–1507 motion without a hearing where the motion alleges facts that if true would entitle the movant to relief and the motion identifies readily available witnesses whose testimony would support such facts or other sources of evidence. Swenson, 284 Kan. at 939.” Ballard v. State, Unpublished Opinion No. 103,526 (July 15, 2011).¹⁸

Rule 183(a)(2) explains that the 1507 procedure is “governed by the rules of civil procedure . . . to the extent the rules are applicable.” The “extent” has yet to be determined, and recent cases indicate the intersection of criminal law and civil procedure may demand more clarification.¹⁹ For instance, in LaPointe v. State, 42 Kan. App. 2d 522, 550, 214 P.3d 684 (2009), *rev. denied* 290 Kan. 1094 (2010), the panel found the “liberal discovery procedures” for civil practice are incompatible with “the purpose of a K.S.A. 60–1507 proceeding.” Yet, in Dudley v. State, Unpublished Opinion No. 106,271 (March 23, 2012), our Court of Appeals applied the rules of civil procedure to conclude that the one-year limitation is an “affirmative” defense that must be raised by the State:

15 Supreme Court Rule 183(j); But see State v. Murray, 285 Kan. 503, 533, 174 P.3d 407 (2008) (district court’s correct result may be upheld for alternative reasons).

16 See, e.g., Olds v. State, Unpublished Op. No. 104,055 (July 15, 2011) (remanded for “explicit findings of fact and conclusions of law” because the district court must “address all of the individual allegations raised in his motion”)

17 Gaudina v. State, 278 Kan. 103, 107-8, 92 P.3d 574 (2004).

18 Swenson v. State, 284 Kan. 931, 169 P.3d 298 (2007).

19 Moll v. State, 41 Kan. App. 2d 677, 204 P.3d 659 (2009) (find the expert disclosure requirement is not applicable to 1507s)

“Indeed, this court has held that ‘the running of the 1-year period in K.S.A. 60-1507(f) does not constitute an absolute bar which divests the court of jurisdiction to consider the motion. The 1-year time limit in K.S.A. 60-1507(f) is not jurisdictional but may be waived if not asserted. [Citations omitted].”²⁰

Procedural and Substantive Bars

There are three procedural bars to 1507 relief: (1) pending on direct appeal; (2) out of time; and (3) successive motions. As mentioned above, there are two substantive bars to 1507 relief: (1) mere trial errors; and (2) res judicata.

Pending on direct appeal

Rule 183(c)(2) explains that a 1507 “may not be filed” while an appeal is pending or during the time an appeal may be perfected. This prohibition exists to avoid concurrent jurisdiction, or piecemeal litigation.

Out of time

K.S.A. 60-1507(f)(1) went into effect July 1, 2003.²¹ It states that a 1507 must be brought within **one year** of either (1) The final order of the last appellate court in this state to exercise jurisdiction on a direct appeal or the termination of such appellate jurisdiction; or (2) the denial of a petition for writ of certiorari to the United States Supreme Court or issuance of such court’s final order following granting such petition.

Clearly, the proverbial 1507 clock begins ticking the moment the direct appeal mandate is issued. Less clear is the impact of different types of “appeals” on the 1507 clock. Our Court of Appeals

has determined that the appeal of a decision to revoke probation does not reset the 1507 clock, in terms of attacking the conviction itself.²²

The statute and rule also include an exception: “the time limitation herein may be extended by the court only to prevent a manifest injustice.” Manifest injustice has been described as something obviously unfair or shocking to the conscience. *State v. Kelly*, 291 Kan. 868, Syl. ¶ 3, 248 P.3d 1282 (2011).²³

Notably, a 1507 movant cannot claim ignorance of the time limitation to establish manifest injustice.²⁴

Successive

K.S.A. 60-1507(c) prohibits a “second or successive” motion for “similar relief.” Rule 183, however, allows a successive filing when “justice” would be served by reaching the merits of the subsequent motion.²⁵ In sum, a successive motion is procedurally barred if the “ground” for relief has already been litigated on its merits and movant has not shown that “justice” demands review.

In considering the propriety of a successive 1507, our Supreme Court has defined exceptional circumstances as “unusual events or intervening changes in the law that prevented the defendant from raising the issue in a preceding 60-1507 motion.” *State v. Mitchell*, 284 Kan. 374, 379, 162 P.3d 18 (2007). In practical application, this exception has required a showing of an applicable change in the law, newly discovered evidence or that ineffective assistance of counsel occurred during the first 1507.

Recent Trends

Recent trends in 1507 litigation include: (1) endless litigation; (2) structural error; and (3) plea negotiations.

20 See, e.g., *Jones v. State*, Unpublished Opinion No. 99,370 (March 27, 2009) (finding habeas petitioner’s failure to comply with the statute of limitations in K.S.A. 60-1507(f) is an affirmative defense which is waived if not asserted)

21 Prior to the passage of the time limitation, the doctrine of laches was applied. See *Roach v. State*, 27 Kan. App. 2d 561, 564-65, 7 P.3d 319, rev. denied 270 Kan. 899 (2000); see also *Woodberry v. State*, Unpublished Opinion No. 90,114 (February 13, 2004)

22 *Wilkerson v. State*, 38 Kan. App. 2d 732, 171 P.3d 671 (2007); *Baker v. State*, 42 Kan. App. 2d 949, 219 P.3d 827 (2009) (petition for review pending).

23 Discussing what may qualify as manifest injustice and/

or exceptional circumstances, a panel opined, “A watershed change in the law applicable retroactively or the discovery of facts that could not have been uncovered earlier demonstrating innocence might be of that type.” *Percival v. State*, Unpublished Opinion No. 106,190 (May 4, 2012).

24 “[A] pro se K.S.A. 60-1507 movant is in the same position as all other pro se civil litigants and is required to be aware of and follow the rules of procedure that apply to all civil litigants, pro se or represented by counsel. [Citation omitted.]” *Guillory v. State*, 285 Kan. 223, 229, 170 P.3d 403 (2007).

25 Supreme Court Rule 183 was heavily revised, effective July 1, 2012.

Endless Litigation

Previously, Kansas courts did not recognize a right to effective assistance of counsel in post conviction proceedings.²⁶ In 2004, however, our Supreme Court acknowledged the existence of a statutory right to effective assistance of counsel in 1507 proceedings.²⁷ Thereafter, an endless pit of despair began to evolve:

“This case somewhat resembles a set of Matryoshka nesting dolls: a claim of ineffective assistance of 60-1507 counsel inside a claim of ineffective assistance of appellate counsel, inside an overall K.S.A. 60-1507 claim of ineffective assistance of trial and appellate counsel.” *Pittman v. State*, Unpublished Opinion No. 99,211 (June 19, 2009).

Recently, the United States Supreme Court appears to have begun reconsidering the propriety of a complete disregard for constitutional claims of ineffective assistance of post conviction counsel. In *Martinez v. Ryan*, ___ U.S. ___, 132 S.Ct. 1309, 1315, 182 L.Ed.2d 272 (March 20, 2012), The Court stated that, in order to “protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991), that an attorney’s ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default.”

Clearly, every aspect of trial counsel’s contact with a criminal conviction may soon implicate either a constitutional or statutory right to effective assistance and, therefore, it is critically important that a record (explaining action/inaction) is made as often as possible.

Structural error

Structural errors automatically mandate a new trial. Prejudice is not at issue when the court determines an error was structural. And, therefore, for 1507 purposes a structural error is the proverbial

end-of-the-road.

An exact definition of what constitutes a structural error has not been provided. Caselaw indicates that a structural error may occur whenever a fundamental right of the movant has been violated and, historically, the logic and reasoning was applied in very narrowly defined circumstances. See, e.g., *State v. Calderon*, 270 Kan. 241, 245, 13 P.3d 871 (2000) (addressing the need for an interpreter as a fundamental right).

Notably, in *Hilson v. State*, Unpublished Opinion No. 99,421 (February 6, 2009), the panel extended the “structural error” analysis to a 1507 claim of perceived trial error. In this case, the movant was involuntarily absent from courtroom for a few moments of trial testimony. Finding that the mere fact of the occurrence qualified as a structural error, the Panel granted movant a new trial.²⁸

Recently, considerable effort has been made to extend structural error analysis to all trial error allegations.²⁹ As a result, every effort must be made to clarify the instances when an error is truly structural, and to prevent the insidious application of the short-circuited analysis to everything that happens during a trial.

Plea Negotiations

This Spring, the United States Supreme Court tackled the topic of trial counsel’s performance during plea negotiations. Observing that our system “is for the most part a system of pleas, not a system of trials,” the Court issued two very, very important decisions.

Finding that the Sixth Amendment right extends to the “critical point,” known as the plea-bargaining process, the Court targeted two areas: (1) trial counsel’s communication of a plea offer; and (2) trial counsel’s advice regarding a plea offer.

As to communication, in *Missouri v. Frye*, 566 U.S. ___, 132 S.Ct. 1399, 182 L.Ed.2d 379 (March 21, 2012), The Court explained:

“This Court now holds that, as a general rule, defense counsel has the duty to communicate

26 *Robinson v. State*, 13 Kan. App. 2d 244, 250, 767 P.2d 851, rev. denied 244 Kan. 738 (1989).

27 *Brown v. State*, 278 Kan. 481, 101 P.3d 1201 (2004).

28 Compare *Boldridge v. State*, 289 Kan. 618, 215 P.3d 585 (2009) (finding it is not a structural error to have trial counsel

operate with a “conflict of interest”)

29 See, e.g., *State v. Ahmedin*, Unpublished Opinion No. 105, 378 (May 18, 2012); *Shaha v. State*, 44 Kan. App. 2d 334, 236 P.3d 560 (2010).

formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Any exceptions to that rule need not be explored here, for the offer was a formal one with a fixed expiration date. When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires.”

As to advice, in Lafler v. Cooper, ___ U.S. ___, 132 S.Ct. 1376, 182 L.Ed.2d 398 (March 21, 2012), The Court explained:

“If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a trial resulting in a conviction on more serious charges or the imposition of a more severe sentence.”

The announcement from Justice Scalia (joined by Justices Thomas and Roberts in his dissent in Lafler) effectively captures the true impact of these cases:

“With those words from this and the companion case, the Court today opens a whole new field of constitutionalized criminal procedure: **plea-bargaining law**. The ordinary criminal process has become too long, too expensive, and unpredictable, in no small part as a consequence of an intricate federal Code of Criminal Procedure

imposed on the States by this Court in pursuit of perfect justice.[Emphasis added.]”

To date of submitting this article, a published or unpublished opinion involving these two cases has not been issued by *our* appellate courts.³⁰ But, if history is any indication, this new universe of “plea bargaining law” will soon descend and permeate 1507 litigation.³¹ Hopefully, trial counsel will be ready for it.

In sum, the universe of 1507 litigation is full of evolving, and/or devolving, policy and procedure. It represents the last attack on the integrity of a conviction and the last chance to reiterate the guilt of a movant. It also presents, in application, the possibility of retrial and/or the complete loss of a conviction.³² Therefore, as with any arcane procedure dictated by ever-changing policies, the best bet is always to err on the side of caution. Or, better yet, phone a friend. ☺

30 Ruiz v. U.S., Slip Copy 2012 WL 2438983 (June 27, 2012) (distinguishing Frye and Lafler, observing that Frye demands evidence a plea offer was actually made and Lafler requires a showing that movant received a more severe sentence than offered)

31 See, e.g., Robey v. State, Unpublished Opinion No. 98,982 (December 19, 2008) (remanded for an evidentiary hearing to determine if trial counsel was ineffective in the plea process)

32 Sayree v. State, Unpublished Opinion No. 104,218 (March 2, 2012). Panel remanded for an evidentiary hearing to address movant’s contention he was “materially misinformed” about the possible sentence he could receive when he entered his plea 30 YEARS AGO!



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DUI: CRIMINALIZING A REFUSAL

by Karen C. Wittman, Assistant Attorney General, Kansas Traffic Safety Resource Prosecutor

(reprinted with permission from *Street Legal*, volume 5, issue 2, June 2012)

House substitute for SB 60¹ was signed by Governor Brownback on June 1, 2012 and went into effect on July 1, 2012.

Things about the law:

1. Refusal is defined as a person's failure to submit to or complete any test (**that is not a PBT**) of blood, breath, urine or other bodily substance. This includes refusal of any test on a military reservation².

2. You must have a prior refusal (as defined above-administrative refusal aka DI5) **or** conviction for DUI (remember diversion counts as a conviction) to be charged with this offense³.

3. Prior Conviction for the charge of DUI-refusal include⁴:

On or after July 1, 2001

- 1) Prior conviction/diversion
- 2) You may count ONE prior administrative refusal w/o conviction

OR IN PERSON'S LIFETIME:

- 1) DUI-refusal
- 2) Commercial DUI
- 3) Boating DUI
- 4) DUI-Manslaughter
- 5) Agg vehicular Homicide
- 6) Vehicular Battery-DUI
- 7) Code of Military Justice-DUI

4. There are two ways to charge out DUI-refusal. The first way is when the person has an administrative refusal without a criminal conviction⁵ OR if a person has one or more prior criminal conviction/diversion for DUI or other specified priors⁶.

5. The prior (administrative refusal or conviction) MUST BE on or after July 1, 2001⁷.

(remember everyone was born on July 1, 2001-for counting purposes)

EXAMPLE: Girl has one prior administrative refusal (DI5) and no conviction for that refusal. The offense date is June 5, 1999. Girl gets new arrest on December 7, 2012 and refuses. She cannot be charged with 1st DUI-refusal because she has no priors (admin refusal or prior conviction) on or after July 1, 2001.

EXAMPLE: Guy has one prior conviction for DUI on Aug. 9, 2001. Guy refuses on October 5, 2012. Guy can be charged with DUI-refusal 1st offense. (because he has a prior on or after July 1, 2001)

6. The prior conviction is an **element of the crime** of DUI-refusal and it shall not be used for the purpose of determining whether a conviction is a first second, third or subsequent and shall not be used for determining sentencing⁸.

EXAMPLE: Guy has administrative refusal (DI5) without conviction-offense date of July 4, 2012. He gets caught on July 23, 2012 and refuses... you can charge a 1st offense DUI-refusal using the guys first DI5 as the prior. (it does not count as his 2nd DUI-refusal because you cannot count the one used to charge him)

EXAMPLE: Guy goes diversion for DUI on July 5, 2012. He gets caught again and refuses. He can be charged with 1st DUI-refusal (cannot count the diversion to make it a 2nd offense).

7. Only persons 18 years or older can be charged with this offense To count a prior conviction-the person must have been 18 at time the prior occurred⁹.

EXAMPLE: If you have a prior DUI Diversion when you were 16 years old...and then you refuse to take a test when you are 17 years old...you cannot be charged with 1st DUI-refusal.

Footnotes

1 http://www.kslegislature.org/li/b2011_12/measures/documents/sb60_enrolled.pdf

2 K.S.A. 8-1013(i)-see Sec. 15

3 See New Sec. 2 (a)(1) & (2)

4 See New Sec. 2 (h)(1) & (2)

5 New Sec. 2 (a)(1)

6 New Sec. 2 (a)(2)

7 New Sec. 2 (a)(2)(A)

8 New Sec. 2 (h)(6)

9 New Sec. 2 (a)(1)(B) and (a)(2)(B)

8. You cannot plea bargain a DUI-refusal¹⁰.
9. First conviction of DUI-refusal is an A misdemeanor¹¹.
10. Second offense DUI-refusal can be charged as an A misdemeanor or felony depending on whether the person has a prior conviction within the preceding 10 years.¹²
- EXAMPLE:** Girl is convicted of DUI on August 1, 2005 and October 9, 2012. On January 6, 2013 girl is arrested and refuses. Girl can be charged with 2nd DUI-refusal FELONY because she has a prior conviction within 10 years of the January 6, 2013 date. She could also be charged with DUI 3rd offense (felony).
11. Third or subsequent DUI-refusal is a felony¹³.
12. If there is a child in the vehicle under the age of 14 and a person is convicted of DUI-refusal, punishment shall be enhanced by one month on the minimum mandatory penalty and must be served consecutively¹⁴.
13. When sentencing a DUI-refusal, the judge can consider **ANY** convictions or diversions occurring during the person's lifetime in determining the sentence within the limitations provided for a 1st, 2nd, 3rd or subsequent¹⁵.
- EXAMPLE:** Guy charged with DUI-1st refusal-offense date of February 2013. His criminal history includes a DUI conviction in 2006 and 5 prior DUIs in the 90s. The 5 prior convictions in the 90s can be taken into account for the judge to sentence Guy on the A misdemeanor.
14. DUI-refusal is a separate and distinct offense. It can be charged with a DUI. Multiple crimes from the same incident is **ONE** conviction¹⁶.
- EXAMPLE:** Guy has conviction date of January 15, 2013 for both 1st offense DUI-refusal (under (a)(1)) and 1st offense DUI all stemming

from the same offense date of November 2012).

On February 18, 2013 he is arrested for DUI and refuses the test. He **can** be charged with a 2nd felony DUI-refusal under (a)(1) (because of the prior administrative refusal with no conviction and the prior conviction of Jan. 15, 2013). He **cannot** be charged with a 3rd DUI offense. He only has **ONE** prior conviction. (Remember he only drove a car once while impaired **and** got convicted). So he could be charged with and DUI-2nd offense and 2nd Offense DUI-refusal (FELONY).

EXAMPLE: Guy has one prior conviction for DUI on Aug. 9, 2001. Guy refuses on October 5, 2012. Guy can be charged with DUI-refusal 1st offense **and** DUI 2nd offense.

15. Diversion for a DUI-refusal is allowed--but only one in a person's lifetime¹⁷.

EXAMPLE: Person has a prior diversion for DUI January 13, 2007. Person gets arrested and refuses test on December 7, 2012. Person can be charged with 1st DUI-refusal and could go diversion on this charge.

SUGGESTION: Written policies on diversions should exclude diversions for DUI-refusals or at least limit diversion to only a DUI-refusal based on a (a)(1) violation (i.e. They have **no** prior conviction for DUI only an administrative refusal (DI5) on their driving record.).

16. The Implied Consent, K.S.A. 8-1001 changed. The DC-70, which officer's read to persons they wish to take the test, now includes language indicating refusing is a separate crime¹⁸. Also changing are the DC-27, DC-28, and CDL-5.

17. Can obtain restitution for any victim who suffered loss due to a violation of DUI-refusal¹⁹.

To help navigate how to charge this new offense, go to <http://www.ktsro.org/files/TSRP-SB-60-FLOW-CHART.pdf> for a flow chart with penalties. (Or see one of the flow charts located on the next page.)

10 New Sec. 2 (l)

11 New Sec. 2 (b)(1)(A)

12 New Sec. 2(b)(1)(C)

13 New Sec. 2 (b)(1)(D)

14 New Sec. 2 (c)

15 New Sec. 2 (h)(1)

16 New Sec. 2 (h)(5)

17 New Sec. 2 (h)(7))

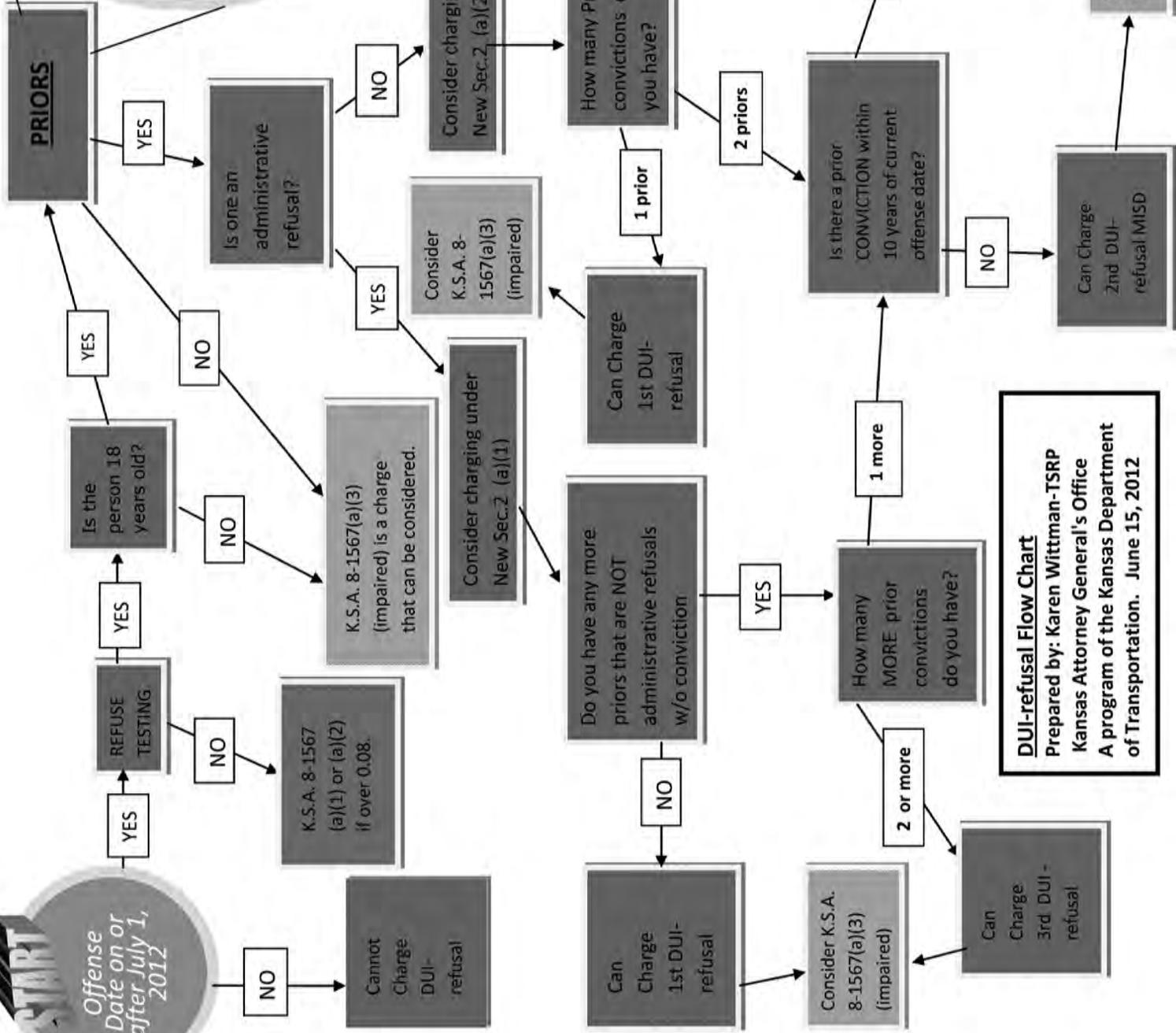
18 Sec. 12 K.S.A. 8-1001 (k)(4)(A&B)

19 New Sec. 2 (j)(4)

Offense Date on or after July 1, 2012

Priors for REFUSAL charge include:
 MUST have been 18 at the time of these priors for any of these to count
 On or after July 1, 2001
 1) Prior conviction/diversion
 2) You may count ONE prior administrative refusal w/o conviction
 OR IN PERSON'S LIFETIME:
 1) DUI-refusal
 2) Commercial DUI
 3) Boating DUI
 4) DUI-Manslaughter
 5) Agg vehicular Homicide
 6) Vehicular Battery-DUI
 7) Code of Military Justice-DUI

One prior cannot be used to determine severity due to it being an element of the crime of refusing- New Sec.2 (h)(6)



DUI-refusal Flow Chart
 Prepared by: Karen Wittman-TSRP
 Kansas Attorney General's Office
 A program of the Kansas Department of Transportation. June 15, 2012

TEST YOUR SKILLS (Tip: Use Flow Chart)

EXAMPLE 1:

Offense Date: 8/12/12-refused
DOB 12/07/60

PRIORS:

Prior Admin refusal without conviction on 8/1/03

EXAMPLE 2:

Offense Date: 8/12/12-refused
DOB 12/07/60

PRIORS:

Has prior diversion 8/1/03 and prior conviction
1/15/07

EXAMPLE 3:

Offense Date: 8/12/12-refused
DOB 12/07/60

PRIORS:

Has prior administrative refusal without conviction
8/1/03
Prior Diversion 1/15/07

EXAMPLE 4:

Offense Date: 8/12/12-refused
DOB 12/07/60

PRIORS:

Agg vehicular Homicide-5/6/92 conviction
Administrative refusal without conviction 5/6/91

EXAMPLE 5:

Offense Date: 8/12/12-refused
DOB 12/07/60

PRIORS:

Administrative refusals without conviction on
4/18/06
9/7/07
10/15/08
Diversion on 5/6/03

EXAMPLE 6:

Offense Date: 8/12/12-refused
DOB 3/21/86

PRIORS:

Diversion on 10/12/01
Administrative refusals without conviction on
4/18/06

EXAMPLE 7:

Offense Date: 12/12/13-refused
DOB 12/07/60

PRIORS:

Administrative refusals without conviction on 8/5/10
DUI 1st-refusal- 9/12/12
DUI 1st- 9/12/12

ANSWERS:

Example 1: DUI-refusal 1st and DUI- 1st

Example 2: DUI-refusal 2nd (felony) and DUI-3rd (felony)

Example 3: DUI-refusal 2nd (felony) and DUI-2nd

Example 4: DUI-refusal 1st and DUI-2nd offense (it would appear these are out of date...but note Agg vehicular homicide in a person's LIFETIME counts as a prior for both refusal and DUI law. The admin refusal is out of time.

Example 5: DUI-refusal 2nd(felony) and DUI-2nd offense (only one administrative refusal after July 1st 2001 counts no matter how many they have)

Example 6: DUI-refusal 1st and DUI-2nd offense (person was not 18 at time of diversion so that can't count toward the priors for refusal-- but his admin refusal in 2006 can count because he was over 18)

Example 7: DUI-refusal 2nd felony and DUI-2nd offense

OTHER CHANGES TO THE DUI LAW:

1. DUI priors have expanded²⁰. Priors now include:

On or after July 1, 2001

- 1) Prior conviction/diversion

OR IN PERSON'S LIFETIME:

- 1) DUI-refusal
- 2) Commercial DUI
- 3) Boating DUI
- 4) DUI-Manslaughter
- 5) Agg vehicular Homicide
- 6) Vehicular Battery-DUI
- 7) Code of Military Justice-DUI

2. The provisions for Impoundment of vehicles and revocation of an offender's license plate has been repealed²¹.

3. Last legislative session (SB 6) the KBI was directed to craft rules and regulations concerning saliva testing for DUI. In this legislative session the legislature backed away from requiring this and stated they are *authorized* to do it.²²

4. The element of DUI suggesting if you were a habitual user of any narcotic, hypnotic, somnifacient or stimulating drug has been repealed.²³

5. All convictions in a person's lifetime can be considered during sentencing --within the limits provided for a 1st thru 4th conviction.²⁴ For example if a person is charged with a first offense but had 5 prior DUIs in the 90s, the judge could consider those 5 offenses when sentencing the defendant to his "first" offense.

6. A drug and alcohol evaluation is **NOT** required for the following convictions²⁵:

- Commercial DUI-3rd offense
- 3rd (misd or felony) DUI
- 4th DUI
- 2nd (misd or felony) DUI-refusal
- 3rd DUI-refusal

7. Drug and alcohol evaluations are required for anyone who may be eligible for DUI diversion or DUI-refusal diversion.²⁶

8. The cost for the Drug and Alcohol Evaluations can be made part of the judgment for either the DUI-refusal or DUI if the court determines the offender to be indigent. The cost cannot be less than \$150. See Sec. 13 subsection (d)(1).

9. The legislature gave SRS more time to craft rules and regulations as well as preparing standardized forms.²⁷

10. For a DUI-refusal, the State is not required to show intent i.e. guilt without culpable mental state.²⁸

11. Comparable provisions have been incorporated into the Commercial DUI statutes--the crime of refusal and expansion of priors.²⁹

12. K.S.A. 8-241 clarifies reinstatement fees for 4th or subsequent offenses i.e. \$400 and requires the follow reinstatement fees for DUI-refusal³⁰:

- 1st occurrence --\$400
- 2nd occurrence---\$600
- 3rd occurrence---\$800
- 4th or sub. --\$1000 

20 See 20 subsection (i)

21 Sec. 20 subsection (g) and (p)

22 See Section 38

23 Sec. 20 subsection (a)(6)

24 Sec. 20 subsection (i)(1)

25 Sec. 13(d)(2)

26 Sec. 13(e)

27 Sec. 13(f)

28 Sec. 27

29 See Sec. 10 and Sec. 11

30 Sec. 4 (b)



by District Attorney Nola Foulston, 18th Judicial District of Kansas
NDAA Board of Director from Kansas

Summer Meeting 2012 - Mystic, Connecticut



It was nice to have a respite from the Kansas heat by taking a short trip to Mystic, Connecticut for the National District Attorneys Board Meeting and Summer Conference. Surrounded by trees, lakes, mosquitoes, and the Long Island Sound, we had an excellent board meeting and conference that followed. Unfortunately, while you were sweltering, I am sorry to say that we experienced just a little rain and temperatures in the 70s!

Our work as prosecutors is never done, and as you will see from this report, we had a full agenda over several days of executive and full board meetings. There are many standing and *ad hoc* committees that work for the board. Here are the highlights:

Executive Board of Directors

This past year 2011-2012, I have been fortunate to serve on the NDAA Executive Board under President Jan Scully in addition to my responsibilities as Kansas Director. We have been working hard to keep the organization viable and fiscally sound. Our final joint executive committee meeting in Mystic with President Jan Scully of Sacramento, Calif. and President Elect Mike Wright of Mo. and his new executive board was a most productive session. We will continue our efforts to represent prosecutors with a strong voice on issues of state and national concern.

Finances

The NDAA has continued to work with the Office of Justice Programs to release pending grant funds earned from services performed by the association. This has turned out to be an exercise in futility that gives new meaning to “Federal red-tape”! We all know that in Washington DC everything moves very slowly without much regard for the progress that we would all like to see. For

the NDAA, there are six pending grants that we are anxious to receive so that the association can continue its educational programs and specialized prosecution units.

Elections and Awards

Michael Wright of Missouri was elected President of NDAA for 2012-2013. **Jan Scully**, immediate past-president, will remain on the Executive Board as its Chairman. **Henry Garza of Texas** was honored to be the 2013-2014 President Elect, and our own **Shawnee County District Attorney Chadwick Taylor** was appointed to a one year term as Member at Large. *Congratulations Chad!*

Each year, the outgoing president of the association gives special recognition to those members of the board who have demonstrated “leadership, dedication, and steadfast work on behalf of the National District Attorneys Association”. At the Mystic Conference, President Jan Scully honored the following individuals: **Josh Marquis-Oregon** for his outstanding national work on issues regarding prosecutorial misconduct and claims of wrongful conviction; **Kim Parker-Kansas** for her consistent dedication and hard work representing the NDAA as its official liaison with the American Bar Association; **William Fitzpatrick-New York** for his outstanding contributions to the organization and for his work with the ABA; and **Nola Foulston-Kansas** for her efforts on behalf of the association and as a member of the Executive Board. *A special award was given as well to the long-suffering and very dedicated accountant for NDAA who has worked tirelessly to keep us financially sound and operating!*

Legislation

As Congress continues to bicker, most of the pending legislative initiatives remain in

limbo. **Jason Baker, Director of Government Affairs for the National District Attorneys Association** has continued to make the rounds on the hill, keeping alive interest in the John R. Justice loan forgiveness funding; Byrne and JAG grants as well as other programs that fund prosecutor initiatives and training. There is little hope that any action will be taken before the November election. Check the NDAA website for further information on current issues: www.ndaa.org.

Fair & Truthful Administration of Justice Ethics, Media and Current Issues

Our organization has a myriad of opportunities to be “the Voice of America’s Prosecutors” in the Criminal Justice Section (CJS) of the American Bar Association. The ABA CJS is active in recommending and moving policy that involves prosecution efforts in the criminal justice system across the nation. Our NDAA members provide an experienced and meaningful prosecution presence at the ABA table. For a number of years, the ABA Criminal Justice Section had a disproportionate number of prosecutors vs. defense oriented representation. With the selection of **Brooklyn New York District Attorney Charles Hynes** as President, and his First Assistant **Deputy Anne Swern**, there was a change in leadership that led to this committee being more inclusive. Currently serving as your representative **Chief Deputy District Attorney Kim Parker** is the appointed NDAA representative to ABA-CJS Here are some of the highlights of their work:

- **Mandatory Reporting of Child Abuse by all:** Each state has different requirements on reporting allegations. Kansas has a statutory provision that identifies only certain professions as mandatory reporters. In other states, for example, Michigan, all persons are mandatory reporters *without a satisfactory definition of child abuse and neglect*. As a result, their system has been inundated with inappropriate reporting resulting in grid-lock for social service and law enforcement agencies. The NDAA believes that definitions need to be crafted that will streamline the process, and that

more education needs to be provided on how to define abuse and neglect. After the serious criminal acts involving Penn State University, states have jumped on this initiative to have *all mandatory reporting*. While prosecutors agree with reporting requirements, they need to be effective, efficient and viable.

- **Innocence ? Project:** In past reports and emails, you have been notified about the “National Registry of Exonerations” prepared by the University Of Michigan School Of Law along with Center on Wrongful Convictions at Northwestern University. Touting over 2000 “exonerations” the list actually reports only 927cases reviewed. These “exonerations” are located in a state by state searchable data base. [Kansas had three cases listed on this site, and information about those cases has been researched and reported to NDAA and the National Association of Prosecutor Coordinators who is working to gather the facts of each state and federal case reported.] The role of the NDAA in this process is to seek the truth on claims of wrongful conviction and to have a clearly defined statement as to what constitutes “exoneration.” In a project initiated by the Office of the Hennepin County Attorney [Minnesota], a study was undertaken by that office in conjunction with the Minnesota State Public Defender and the Minnesota Bureau of Criminal Apprehension, reviewing over 14,000 cases of homicide and sex crime convictions in Minnesota from 1981-1999. Preliminary conclusions find that of these cases, no defendants were “exonerated” under the three broad categories of (1) DNA testing not exculpatory in 93% of the cases (2) DNA could be exculpatory but the nature of physical evidence precluded DNA testing approx. 4% of cases and (3) DNA could conceivably be exculpatory and was available in just 1% of the cases. This project was not just to “free the innocent,” but to serve as a check on the entire criminal justice system. *You will be hearing more about*

NDAAs efforts to set the record straight and to do justice and seek justice as we progress in our important work.

Of great importance for all prosecutors is the continued work on the Resolution 100b:

The Criminal Justice Section of the ABA, Resolution 100B by the ABA House of Delegates: RESOLVED, that the American Bar Association urges trial and appellate courts when reviewing the conduct of prosecutors to differentiate between “error” and “prosecutorial misconduct.”

In an unprecedented move, NDAA President Jan Scully and ABA Section Chair Jack Hanna wrote a joint letter to be sent to all state court administrators to implement this necessary resolution that differentiates between “error” and “misconduct.” We will continue working to shift the scales back to equal treatment by the courts in all criminal cases, and this resolution is the first rally. The National Association of Prosecutor Coordinators will be working with state bar representatives to pass this resolution in every state to enable the judiciary, at all levels, to participate. In addition to the work of the NDAA, the National Association of Attorneys General [NAG] has adopted a similar resolution. The California justices have already passed this resolution. Many prosecution offices have developed policies and procedures on how to handle these allegations during the trial phase, where a special ethics prosecutor handles the hearings in court at this level to begin the process. Consider working in your jurisdiction to apply these methods. Information is available on the San Diego DA’s policy and procedure.

New York Prosecutors Training Institute

Just a reminder that there is a great prosecution website you can connect with through the NY prosecutors association. To sign in, go to the following link and create an account. This is only open to prosecutors! <http://www.MyProsecutor.com>

Science and Technology Update

Our board continues to monitor suggested

updates to the 1986 *Electronic Communications Privacy Act*. Congress is working to reauthorize different aspects of the law and this would certainly affect law enforcement’s day-to-day ability to access electronic information through wire taps and could place burdensome restrictions on law enforcement’s ability to access stored electronic communications in order to solve a crime, including emails, text messages and other electronic messaging methods. NDAA continues to work closely with both the House and Senate Judiciary Committees, along with its law enforcement advocacy partners, to preserve law enforcement’s lawfully authorized electronic surveillance capability while maintaining the privacy rights of individuals.

National Center for Prosecution of Animal Abuse

NDAA has consistently produced excellent assistance programs. The *Center for Prosecution of Animal Abuse* was launched in 2011 through support from the Animal Welfare Trust in partnership with the American Society for the Prevention of Cruelty to Animals. It is also funded by private grants from the Animal Legal Defense Fund and the ASPCA Kenneth Scott charitable trust.

NDAA has made a strong commitment to its mission to create an environment in the criminal justice community where animal protection laws are fully enforced and to create an understanding of the integral connection and links between animal abuse and domestic violence, child and elder abuse, and other crimes of violence against persons. Do you remember Dennis Rader also known as “BTK”? He not only killed and abused animals; he was a notorious Kansas serial killer. Point taken.

NOTE: At this national center, you can access technical assistance and support, a quarterly newsletter “*Tales of Justice*,” online resources, and training at the national, state, and local level. Allie Phillips, the Director of the *National Center for Prosecution of Animal Abuse* can be reached at aphillips@ndaa.org or by calling the Alexandria, Virginia headquarters at 703-519-1674. Set an example in your community by becoming a part of this necessary criminal justice program. The center is assisted by a team of law students in Vermont who research and report on significant legal issues. For

further information and to sign up for webinars that will be presented in partnership with the ASPCA and ALDF. The NDAA invites you to visit its website at www.ndaa.org/animal_abuse_training_webinars.html.

Training and Education Committee

NDAA's newest committee, constituted to provide support, guidance, and oversight to the training and education function of NDAA administers over \$10 million in training and technical assistance grants to America's prosecutors. The functions of the committee include helping NDAA set priorities in the type of training it offers, assisting NDAA in securing training grants from governmental and private sectors, promoting use of NDAA research and training resources among state and local prosecutors, and reporting to the board on all aspects of NDAA training and assistance.

We are continuing to work with the University Of Utah School Of Law in replicating the "Advocacy Center" in this new location. Plans are moving forward in this NDAA/Law School partnership.

Crime Victims Advocacy

The National District Attorneys Association has endorsed the proposed United States Constitutional Amendment on Victims Rights. We are working to find ways to support this initiative as we move forward in the process of enactment.

Drug Enforcement Committee

It is time for NDAA to reclaim its role as the key voice in combining enforcement, prosecution, treatment, and education and prevention efforts to attack illegal drug's corrosive impact on America. NDAA once again will provide a forum for sharing best practices, the development of model legislation to strengthen our hands, training, and advocacy to raise the level of effort needed to meet this threat. We recognize that "medical marijuana" is opening the back door of America's communities to expansion of drug use of cartel supplied marijuana and other drugs. The fight for control of U.S. markets by the Sinaloa and Zeta Cartels is taking lives on both sides of the Border while brave Mexican prosecutors and police, standing up for

the rule of law, are being systematically targeted and murdered along with their families. In the early 1980s, the American "attitude" was to fight the war on drugs. Since that time, we have all become victims of "mission fatigue." The NDAA, with new vigor, will continue to recommend best practices and exploring alternatives such as treatment and restorative programs that are legitimate and worthwhile to aid in the war on drugs. [Recently the Department of Justice developed a "handbook" on DNA for the defense bar... what side are they on?] We believe that it is incumbent upon the Department of Justice to support our nation's prosecutors and assist in resolving these issues that have been plaguing our communities and filling our jails.

Corrections and Reentry Committee

Criminals are being released by the thousands across the nation with the tidal wave starting in the fine State of California under the guise of prison overcrowding. We have experienced this same nagging issue in Kansas with unfunded mandates that place criminals in our local jails thereby taxing the resources of our communities. We are not alone in addressing the early throes of correctional realignment with career criminals doing hard time in "county jail prisons" instead of more secure prisons. This is a complex issue but the balance should be in favor of the rights of the victims, and due consideration given to violent vs. non-violent offenders. [See Drug Report]

Across the nation, states are exploring elimination of the death penalty for financial reasons and on claims of "wrongful conviction" that is constantly touted by the Innocent Project and its spawn. The proponents argue that the death penalty is just too expensive; a fact that is incorrect as evidenced by the Kansas Report a number of years ago that was inaccurate and poorly documented. For the states that do not have the death penalty now, concerns are expressed that there are efforts underway to eliminate "Life without possibility of Parole" as was accomplished in sentencing of juvenile offenders. The NDAA continues to support and apply "best practices" in dealing with criminal offenders, while ensuring that victims are considered equally and focused on within the context of re-entry and realignment.

Justice and Generosity Benevolent Fund Silent Auction

On Sunday evening, we welcomed the conferees with our annual reception and silent auction. The innovative ideas of our donors and planning committee provided another successful benefit! The donations included tickets to the races at Keeneland, Kentucky along with visits to horse farms and distilleries; several golf and vacation packages ranging from the Atlantic to the Pacific for whale

watching and sea tours; stays in Napa and lots of wine in addition to sports memorabilia galore! Again this year, I was the chair of this committee with excellent assistance from staff and prosecutors in making this event a success.

We appreciate your support in this endeavor. You are also able to donate to the fund, 501© 3 corporations that make your cash or credit card donation tax deductible. For more information, please contact Foulstson@sedgwick.gov.

Future National Meetings and Training Opportunities

Justice in Our Communities

Investigation and Prosecution of Child Abuse

September 4-6, 2012
Houghton, Michigan

Prosecuting Drug Cases

September 10-14, 2012
Las Vegas, Nevada

Digital Evidence

Investigation and Prosecution of

Technology-Facilitated Child Sexual Exploitation

September 18-19, 2012
Jackson, Mississippi

Forensic Evidence

September 18-21
Portland, Oregon

Justice in Our Communities

Investigation and Prosecution of Child Abuse

October 9-11, 2012
Casper, Wyoming

National Association for Justice Information Systems

2012 Conference
October 9-12, 2012
Portland, ME

Digital Evidence

Investigation and Prosecution of

Technology-Facilitated Child Sexual Exploitation

October 10-11, 2012
Livonia, Michigan

Justice in Our Communities

Investigation and Prosecution of Child Abuse

October 23-25, 2012
Yankton, South Dakota

Digital Evidence Post-Course follows Alaska 2012 Child Maltreatment Conference

"Respect & Protect"
October 25-26, 2012

22nd Annual National Multidisciplinary Conference on Domestic Violence

October 29-November 2, 2012
Miami, Florida

Justice in Our Communities

Investigation and Prosecution of Child Abuse

November 13-15, 2012
Defiance, Ohio

NDAAs Fall Board Meeting

November 15-17, 2012
Palm Springs, CA
Hyatt Regency Suites
285 North Palm Canyon Dr
Palm Springs, CA 92262

**Check www.ndaa.org
for complete details
and to register.**

Photos from the 2012 KCDA Spring Conference



1st Golf Tournament to Support the Kansas Prosecutors Foundation



Photos by Angela Wilson

MARK YOUR CALENDARS

2012 KCDA A Fall Conference



October 7-9, 2012

Sheraton Hotel

Overland Park, Kansas

Watch www.kcdaa.org for more details



**Kansas County and District
Attorneys Association**

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